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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

TD 9109

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Establishing Defenses to the Imposition of the Accuracy-Related Penalty

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that affect the defenses available to the imposition of the accuracy-related penalty when taxpayers fail to disclose reportable transactions or fail to disclose that they have taken a return position based on the conclusion that a regulation is invalid. The final regulations are intended to promote disclosure of reportable transactions and positions based on the conclusion that a regulation is invalid by narrowing a taxpayer's ability to establish good faith and reasonable cause as a defense. The final regulations also clarify the existing regulations with respect to the facts and circumstances to be considered in determining whether a taxpayer acted with reasonable cause and in good faith.

DATES: Effective Dates: These regulations are effective December 30, 2003.

Applicability Dates: These regulations apply to returns filed after December 31, 2002, with respect to transactions entered into on or after January 1, 2003.

FOR FURTHER INFORMATION CONTACT: Jamie G. Bernstein at (202) 622-4940 (not a toll-free number).

## SUPPLEMENTARY INFORMATION:

### **Background**

This document contains amendments to 26 CFR part 1. On December 31, 2002, the IRS and the Treasury Department published in the **Federal Register** (67 FR 79894) proposed amendments to the regulations (REG-126016-01) under sections 6662 and 6664 of the Internal Revenue Code (Code). No public hearing was requested or held. Written and electronic comments responding to the notice of proposed rulemaking were received. After consideration of all the comments, the proposed regulations under section 6662 and 6664 are adopted as amended by this Treasury decision. The revisions are discussed below.

### **Explanation of Revisions and Summary of Comments**

These final regulations generally adopt the provisions of the proposed regulations. The changes to the proposed regulations reflected in these final regulations, as well as comments received, are discussed below.

#### 1. Applicability of Disclosure Regulations Under Section 6011 and Effective Date

These final regulations were proposed to apply to returns filed after December 30, 2002, with respect to transactions entered into on or after January 1, 2003, to coincide with temporary regulations relating to disclosure, promulgated under section 6011 and applicable for transactions entered into on or after January 1, 2003 (the Temporary Disclosure Regulations). The Temporary Disclosure Regulations were published in the **Federal Register** on October 22, 2002. See 67 FR 64799 and 67 FR 64840 (October 22, 2002). Final regulations under section 6011 were published on March 4, 2003, and apply to transactions entered into on or after February 28, 2003.

See 68 FR 10161, 10163 (March 4, 2003) (the Final Disclosure Regulations). The Final Disclosure Regulations define reportable transactions more narrowly than the Temporary Disclosure Regulations. For transactions entered into on or after January 1, 2003, and before February 28, 2003, the taxpayer may apply the Final Disclosure Regulations instead of the Temporary Disclosure Regulations. Revisions throughout these final regulations refer to the definition of reportable transaction in §1.6011-4(b) or 1.6011-4T(b), as applicable, to accommodate situations in which the Temporary Disclosure Regulations apply to a transaction.

One commentator suggested that the final regulations under sections 6662 and 6664 apply to transactions entered into on or after February 28, 2003, because that date is the effective date for the Final Disclosure Regulations. See 68 FR 10161, 10163 (March 4, 2003). The final regulations do not adopt this recommendation. The proposed regulations under sections 6662 and 6664 provided adequate notice that failure to comply with the Temporary or Final Disclosure Regulations could limit the penalty defenses available under sections 6662 and 6664.

## 2. Applicability of the Reasonable Cause and Good Faith Defense

The proposed regulations prohibited reliance on tax advice to establish a reasonable cause and good faith defense to the accuracy-related penalties if a taxpayer failed to disclose a reportable transaction pursuant to the Final or Temporary Disclosure Regulations, as applicable. Three commentators suggested that it is inappropriate to preclude a taxpayer from relying on the advice of a tax advisor in circumstances in which the taxpayer does not lack good faith in failing to disclose a reportable transaction. The Treasury Department and the IRS believe that good faith requires

taxpayers to be forthcoming and that taxpayers should construe the Final and Temporary Disclosure Regulations broadly in favor of disclosure. Nonetheless, there may be circumstances in which a taxpayer does not lack good faith in failing to disclose a reportable transaction. Accordingly, the final regulations revise the proposed regulations to provide that a taxpayer's failure to disclose a reportable transaction is a strong indication that the taxpayer failed to act in good faith, which would bar relief under section 6664(c).

These final regulations also adopt the requirement in the proposed regulations that a taxpayer may not rely on an opinion or advice that a regulation is invalid to establish that the taxpayer acted with reasonable cause and in good faith unless the taxpayer adequately disclosed its position that the regulation is invalid. One commentator suggested that this provision is inappropriate because it would be difficult for a taxpayer to discern whether its position is contrary to a regulation without consulting with a tax advisor. This suggestion was rejected because the requirement of revised §1.6664-4(c)(2)(iii) does not apply to situations in which a taxpayer has taken a position that is merely contrary to a regulation, but instead applies to situations in which a taxpayer has taken a return position based on advice or an opinion that a regulation is invalid.

### 3. Definition of Advice

One commentator suggested that the proposed regulations more clearly define what constitutes professional advice or opinion. Section 1.6664-4(c)(2) defines the term

advice. Neither the proposed nor the final regulations change the definition of the term advice.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Drafting Information**

The principal author of these regulations is Jamie Bernstein, Office of the Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice Division.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

### **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

#### **PART 1--INCOME TAXES**

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 1.6662-0 is amended by adding an entry for §1.6662-2(d)(5) to read as follows:

§1.6662-0 Table of Contents.

\* \* \* \* \*

§1.6662-2 Accuracy-related penalty.

\* \* \* \* \*

(d) \* \* \*

(5) Returns filed after December 31, 2002.

\* \* \* \* \*

Par. 3. Section 1.6662-2 is amended by:

1. Revising the first sentence of paragraph (d)(2).
2. Adding new paragraph (d)(5).

The revision and addition read as follows:

§1.6662-2 Accuracy-related penalty.

\* \* \* \* \*

(d) \* \* \* (1) \* \* \*

(2) \* \* \* Except as provided in paragraphs (d)(3), (4) and (5) of this section and the last sentence of this paragraph (d)(2), the provisions of §§1.6662-1 through 1.6662-4 and §1.6662-7 (as revised to reflect the changes made to the accuracy-related penalty by the Omnibus Budget Reconciliation Act of 1993) and of §1.6662-5 apply to returns the due date of which (determined without regard to extensions of time for filing) is after December 31, 1993. \* \* \*

\* \* \* \* \*

(5) For returns filed after December 31, 2002. Sections 1.6662-3(a), 1.6662-3(b)(2) and 1.6662-3(c)(1) (relating to adequate disclosure) apply to returns filed after December 31, 2002, with respect to transactions entered into on or after January 1,

2003. Except as provided in paragraph (d)(1) of this section, §§1.6662-3(a), 1.6662-3(b)(2) and 1.6662-3(c)(1) (as contained in 26 CFR part 1 revised April 1, 2003) apply to returns filed with respect to transactions entered into prior to January 1, 2003.

Par. 4. Section 1.6662-3 is amended by revising paragraph (a), the last sentence of paragraph (b)(2), and the first sentence of paragraph (c)(1) to read as follows:

§1.6662-3 Negligence or disregard of rules or regulations.

(a) In general. If any portion of an underpayment, as defined in section 6664(a) and §1.6664-2, of any income tax imposed under subtitle A of the Internal Revenue Code that is required to be shown on a return is attributable to negligence or disregard of rules or regulations, there is added to the tax an amount equal to 20 percent of such portion. The penalty for disregarding rules or regulations does not apply, however, if the requirements of paragraph (c)(1) of this section are satisfied and the position in question is adequately disclosed as provided in paragraph (c)(2) of this section (and, if the position relates to a reportable transaction as defined in §1.6011-4(b) (or §1.6011-4T(b), as applicable), the transaction is disclosed in accordance with §1.6011-4 (or §1.6011-4T, as applicable)), or to the extent that the reasonable cause and good faith exception to this penalty set forth in §1.6664-4 applies. In addition, if a position with respect to an item (other than with respect to a reportable transaction, as defined in §1.6011-4(b) or §1.6011-4T(b), as applicable) is contrary to a revenue ruling or notice (other than a notice of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter), this penalty does not apply if the position has a realistic possibility of being sustained on its merits. See

§1.6694-2(b) of the income tax return preparer penalty regulations for a description of the realistic possibility standard.

(b) \* \* \* \* \*

(2) \* \* \* Nevertheless, a taxpayer who takes a position (other than with respect to a reportable transaction, as defined in §1.6011-4(b) or §1.6011-4T(b), as applicable) contrary to a revenue ruling or notice has not disregarded the ruling or notice if the contrary position has a realistic possibility of being sustained on its merits.

\* \* \* \* \*

(c) \* \* \*(1) \* \* \* No penalty under section 6662(b)(1) may be imposed on any portion of an underpayment that is attributable to a position contrary to a rule or regulation if the position is disclosed in accordance with the rules of paragraph (c)(2) of this section (and, if the position relates to a reportable transaction as defined in §1.6011-4(b) (or §1.6011-4T(b), as applicable), the transaction is disclosed in accordance with §1.6011-4 (or §1.6011-4T, as applicable)) and, in case of a position contrary to a regulation, the position represents a good faith challenge to the validity of the regulation. \* \* \*

\* \* \* \* \*

#### **§1.6662-4 [Amended]**

Par. 5. Section 1.6662-4(g)(1)(iv) is amended by removing the reference to “§1.6664-4(e)” and adding the reference “§1.6664-4(f)” in its place.

Par. 6. Section 1.6664-0 is amended by:

1. Adding entries for §§1.6664-1 (b)(2)(i), (b)(2)(ii) and 1.6664-4(c)(1)(iii).



2. Redesignating the entries for §1.6664-4(d), (e), (f), and (g), as §1.6664-4(e), (f), (g), and (h), respectively.

3. Adding a new entry for §1.6664-4(d).

The additions read as follows:

§1.6664-0 Table of contents.

\* \* \* \* \*

§1.6664-1 Accuracy-related and fraud penalties, definitions and special rules.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) For returns due after September 1, 1995.

(ii) For returns filed after December 31, 2002.

\* \* \* \* \*

§1.6664-4 Reasonable cause and good faith exception to section 6662 penalties.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iii) Reliance on the invalidity of a regulation.

(d) Underpayments attributable to reportable transactions.

\* \* \* \* \*

Par. 7. Section 1.6664-1 is amended by:

1. Redesignating the text of paragraph (b)(2) as (b)(2)(i)
2. Adding a new paragraph heading for newly designated paragraph (b)(2)(i).
3. Adding paragraph (b)(2)(ii).

The revisions and additions are as follows:

§1.6664-1 Accuracy-related and fraud penalties; definitions and special rules.

\* \* \* \* \*

(b) \* \* \* (1) \* \* \*

(2) \* \* \*(i) For returns due after September 1, 1995. \* \* \*

(ii) For returns filed after December 31, 2002. Sections 1.6664-4(c) (relating to relying on opinion or advice) and (d) (relating to underpayments attributable to

reportable transactions) apply to returns filed after December 31, 2002, with respect to transactions entered into on or after January 1, 2003. Except as provided in paragraph (b)(2)(i) of this section, §1.6664-4 (as contained in 26 CFR part 1 revised April 1, 2003) applies to returns filed with respect to transactions entered into before January 1, 2003.

Par. 8. Section 1.6664-4 is amended by:

1. Removing the language “(g) of this section” from the last sentence of paragraph (a) and adding the language “(h) of this section” in its place.
2. Revising paragraph (c)(1) introductory text and the last sentence of paragraph (c)(1)(i).
3. Adding paragraph (c)(1)(iii).
4. Redesignating paragraphs (d), (e), (f) and (g) as paragraphs (e), (f), (g) and (h), respectively.
5. Adding a new paragraph (d).
6. Removing the language “(e)” wherever it appears in newly designated paragraphs (f)(1), (f)(2)(i), (f)(2)(ii), (f)(3), and (f)(4) and adding the language “(f)” in its place.
7. Removing the language “(g)” wherever it appears in newly designated paragraphs (h)(1), (h)(1)(i), (h)(2), and (h)(3) and adding the language “(h)” in its place.

The revisions and additions read as follows:

§1.6664-4 Reasonable cause and good faith exception to section 6662 penalties.

\* \* \* \* \*

(c) Reliance on opinion or advice--(1) Facts and circumstances; minimum requirements. All facts and circumstances must be taken into account in determining whether a taxpayer has reasonably relied in good faith on advice (including the opinion of a professional tax advisor) as to the treatment of the taxpayer (or any entity, plan, or arrangement) under Federal tax law. For example, the taxpayer's education, sophistication and business experience will be relevant in determining whether the taxpayer's reliance on tax advice was reasonable and made in good faith. In no event will a taxpayer be considered to have reasonably relied in good faith on advice (including an opinion) unless the requirements of this paragraph (c)(1) are satisfied. The fact that these requirements are satisfied, however, will not necessarily establish that the taxpayer reasonably relied on the advice (including the opinion of a tax advisor) in good faith. For example, reliance may not be reasonable or in good faith if the taxpayer knew, or reasonably should have known, that the advisor lacked knowledge in the relevant aspects of Federal tax law.

(i) \* \* \* In addition, the requirements of this paragraph (c)(1) are not satisfied if the taxpayer fails to disclose a fact that it knows, or reasonably should know, to be relevant to the proper tax treatment of an item.

\* \* \* \* \*

(iii) Reliance on the invalidity of a regulation. A taxpayer may not rely on an opinion or advice that a regulation is invalid to establish that the taxpayer acted with

reasonable cause and good faith unless the taxpayer adequately disclosed, in accordance with §1.6662-3(c)(2), the position that the regulation in question is invalid.

(d) Underpayments attributable to reportable transactions. If any portion of an underpayment is attributable to a reportable transaction, as defined in §1.6011-4(b) (or §1.6011-4T(b), as applicable), then failure by the taxpayer to disclose the transaction in accordance with §1.6011-4 (or §1.6011-4T, as applicable) is a strong indication that the

taxpayer did not act in good faith with respect to the portion of the underpayment attributable to the reportable transaction.

\* \* \* \* \*

/s/ Mark E. Matthews

Deputy Commissioner for Services and Enforcement.

Approved: December 18, 2003

/s/ Pamela F. Olson

Assistant Secretary of the Treasury.