



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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SMALL BUSINESS/SELF-EMPLOYED DIVISION

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MEMORANDUM FOR EXCISE TERRITORY MANAGERS and PROGRAM
MANAGERS

FROM: W. Ricky Stiff /S/ **W. Ricky Stiff**
Chief, Excise Tax Program

SUBJECT: Interim Guidance Return Preparer Procedures for Excise Tax

This memorandum provides interim guidance procedures for excise tax examiners. These procedures should be used to review, determine, control, and propose return preparer penalties for excise taxes, credits for excise taxes, and claims for refund of excise taxes reported on Forms 720, 720X, 730, 11-C, 2290, 8849 and others, which have been prepared by a paid preparer after May 25, 2007. Please ensure that this information is disseminated to all affected employees.

Section 8246 of The Small Business and Work Opportunity Act of 2007 extended the application of return preparer penalties under IRC Sections 6694 and 6695 from only income tax returns to all tax returns. Procedures found in IRM 20.1.6 *Preparer/Promoter Penalties* now apply to excise tax preparer cases. The following interim guidance procedures are implemented for excise tax examiners' use in determining whether return preparer penalties should be applied during the course of an examination. The procedural guidance information herein will be incorporated into IRM 4.24.9.6 by December 31, 2009.

- For each excise examination involving a return that was prepared by a paid return preparer, the examiner must enter comments in the work papers, preferably Form 4318 *Examination Work papers Index*, regarding the appropriateness of a return preparer penalty.
- If a penalty is not appropriate, no further action is required.

- If the results of an examination give rise to a potential return preparer penalty, the examiner should document the facts and proceed with a potential penalty case.
- The examiner should interview the return preparer and the taxpayer separately, document the facts, and determine if a penalty is warranted. The examiner should be certain to ask appropriate follow-up questions.
- Examples of the type of questions to ask the taxpayer or preparer are found below:
 - **Taxpayer:**
 - Did you meet with the preparer?
 - Did you complete a questionnaire and/or have a face to face meeting with the preparer?
 - What documentation did you provide the preparer?
 - Did you receive a copy of the return?
 - Did you compensate the preparer?
 - **Preparer:**
 - Ask about the interview conducted with the taxpayer.
 - What documentation did the taxpayer provide to prepare the return?
 - Was a copy of the return provided to the taxpayer?
 - Is the preparer aware of any errors, omissions, or mistakes on the return under examination?
 - Was the preparer compensated by the taxpayer?
- Separate all information about the return preparer's activities and the applicability of any penalties to the return preparer from the taxpayer's case file.
- If the examiner thinks a return preparer penalty is warranted, he or she must discuss this with the group manager.
- If the group manager does not agree with the examiner, document work papers to show that a return preparer penalty was considered and determined not warranted. No other action is required.
- If the group manager agrees with the examiner, the examiner should prepare Form 6459, *Return Preparer's Checklist*, and have it approved by the group manager.
- The examiner should establish a penalty case. See IRM 20.1.6.1.3 Penalty Examination Guidelines.
- The examiner should prepare Form 5809, *Preparer Penalty Case Control Card*, to establish the penalty case on ERCS. See IRM 20.1.6.3.3.4.
- Preparer penalties will not be proposed until the taxpayer's case is completed at the group level.
- IRM 20.1.6.1.8 Statute of Limitations applies to excise examinations.
- Once the preparer penalty case has been established, contact the preparer and discuss why the penalty is being proposed.

- If it is subsequently determined that the preparer penalty is not warranted, the examiner should conclude the case as “no change” and send Letter 1120, *Preparer Penalty No-Change Case Letter*, to the preparer. Update Form 5809 to show termination of the penalty.
- If the return preparer penalty is warranted, the examiner should provide Form 5816, *Report of Tax Return Preparer Penalty*, to the return preparer.
- If the preparer agrees with the penalty, the preparer should sign Form 5816 and the examiner should solicit payment. If payment is received, prepare Form 3244-A, *Payment Posting Voucher – Examination*. Secure Form 5838, *Waiver of Restrictions on Assessment and Collection of Tax Return Preparer Penalty*, from the preparer. Complete Form 8278, *Computation and Assessment of Miscellaneous Penalties*. Complete Letter 1195, *Acceptance Letter – Agreed Preparer Penalty Case*, an addressed envelope and included these in the case file. Attach Form 3198, *Special Handling Notice for Examination Case Processing*, to the front of the case file with an annotation identifying the case as a preparer penalty case.
- If the penalty is agreed and all of the above steps are completed, ERCS will be updated to Status 41, and the case file will be sent to the Excise Return Preparer Coordinator (RPC) for review via Form 3210 *Document Transmittal*.
- If the preparer penalty is unagreed, the examiner will provide the preparer with Letter 1125, *Preparer Penalty 30-Day Letter*, a Form 5816 with the bottom part of the form removed, a Form 886A explaining the reason why the penalty is warranted, and Form 5838. Letter 1125 should include publications required to be provided to the taxpayer.
- Refer to IRM 20.1.6.1.4 *Appeal Rights* for procedural information. Preparer and Promoter penalties have been designated as Appeals Coordinated Issues.
- Form 4665 (T-Letter) and Form 3198 should include the following information:
 - Special action requirement for receiving Appeals Officer
 - Instruction that provisions of IRM 8.7.3.11 require the Appeals Officer to contact/make a referral to Technical Guidance.
- If the preparer agrees with the penalty after the 30-Day Letter is sent, follow the procedures for an agreed case.
- If the preparer submits a protest, review it for adequacy, development of the issue, and managerial involvement. The examiner should prepare Form 8278 and Form 3198, consistent with the agreed procedures. ERCS will be updated to Status 41 and the case file will be sent to the RPC for review via Form 3210.
- The RPC will review the case, update ERCS to Status 21 and forward the case to Tech Services for routing to Appeals.
- **NOTE:** If the taxpayer’s case is unagreed, the unagreed preparer penalty case file cannot be submitted before the taxpayer’s case.
- The procedures found in IRM 20.1.6 .2.1 *Referral to the Office of Professional Responsibility* apply to excise examinations.

If you have additional questions, please feel free to contact Nicholas J. Tranto, Excise Tax Policy Manager or Gregory Carlin, HQ RPC Analyst.

CC: www.IRS.gov