

Electronic Funds Transfer — Temporary Waiver of Failure-To- Deposit Penalty for Certain Tax- payers and Request for Com- ments on Future Guidance

Notice 97-43

This notice provides guidance relating to the waiver of penalties announced in News Release IR-97-32, issued June 2, 1997. In IR-97-32, the Internal Revenue Service announced that it will waive the failure to deposit penalty under § 6656 of the Internal Revenue Code for certain taxpayers first required to make federal tax deposits by electronic funds transfer on or after July 1, 1997. This notice also requests comments regarding possible alternatives for future amendments to § 31.6302-1(h) of the Employment Tax and Collection of Income Tax at Source Regulations with respect to the requirement to deposit by electronic funds transfer for periods beginning after 1999.

Background

Section 6302(h)(1)(A) provides that the Secretary will prescribe regulations necessary for the development and implementation of an electronic funds transfer system for the collection of depository taxes. Section 6302(h)(2) provides a phase-in schedule for the new system.

Section 31.6302-1(h) prescribes rules for implementing an electronic funds transfer system for the collection of depository taxes. Under the regulation, taxpayers are required to deposit taxes by electronic funds transfer if the amount of their depository taxes in a specified earlier year exceeds the applicable threshold amount. The regulation provides that taxpayers with more than \$50,000 of federal employment tax deposits in calendar year 1995 must use electronic funds transfer to make deposits that are due on or after July 1, 1997 and relate to return periods beginning on or after January 1, 1997. For example, a corporation to which this rule applies, and which files its income tax returns on a calendar year basis, must use electronic funds transfer to make corporate and estimated income tax deposits that are due on or after July 1, 1997. Therefore, the corporation's September

15, 1997, and subsequent estimated tax payments must be made by electronic funds transfer.

Section 6656(a) provides that in the case of any failure by any person to deposit taxes on the prescribed date in an authorized government depository, a penalty applies unless the failure is due to reasonable cause and not due to willful neglect. Rev. Rul. 95-68, 1995-2 C.B. 272, provides that, absent reasonable cause, a taxpayer that is required to deposit federal taxes by electronic funds transfer is subject to the 10 percent failure to deposit penalty if the taxpayer deposits the taxes by means other than electronic funds transfer.

Temporary Waiver of Penalty for Certain Taxpayers

Although taxpayers with more than \$50,000 of federal employment tax deposits in calendar year 1995 are required to make federal tax deposits electronically on and after July 1, 1997, the Service will not impose the 10 percent § 6656 penalty solely for the failure to make those deposits by electronic funds transfer. However, a taxpayer will remain liable for the failure to deposit penalty under § 6656 (absent reasonable cause) if the taxpayer fails to make a required deposit (using either electronic funds transfer or paper coupons) in a timely manner.

This waiver of the failure to deposit penalty applies only to deposit obligations incurred on or before December 31, 1997. The penalty waiver includes deposits made after December 31, 1997, so long as the deposit obligation was incurred on or before December 31, 1997.

This waiver of the failure to deposit penalty does not apply to taxpayers that were required to begin using electronic funds transfer in 1995 or 1996.

Request for Comments on Future Guidance

Under § 31.6302-1(h), taxpayers that are not currently required to use electronic funds transfer must begin making federal tax deposits electronically in 1999 if they exceed a \$50,000 threshold in 1997. Currently, § 31.6302-1(h) provides no requirement that a new or growing taxpayer that exceeds \$50,000 in annual deposits only after 1997 use electronic funds

transfer. In addition, a taxpayer that deposits employment taxes but never exceeds \$50,000 a year in employment tax deposits is not currently required to use electronic funds transfer even if its deposits of other taxes have exceeded \$50,000 per year. The Service and Treasury Department intend to develop regulations that will address these matters. At this time, two options are being considered.

The first option would be a two-pronged test. If during a calendar year determination period the taxpayer deposits more than \$50,000 of the employment taxes imposed by chapters 21, 22, and 24, or more than \$50,000 of other depository taxes, the taxpayer becomes subject to the requirement to deposit electronically in the second succeeding calendar year.

The second option would be an aggregate deposits test. If during a calendar year determination period the taxpayer's aggregate deposits of all depository taxes exceed \$50,000, the taxpayer becomes subject to the requirement to deposit electronically in the second succeeding calendar year.

The Service and Treasury Department invite public comment on these two options and also welcome any suggestions for a different future rule. Comments and suggestions are requested by October 10, 1997. An original and eight copies of written comments should be sent to:

Internal Revenue Service
Attn: CC:DOM:CORP:R
Room 5228 (IT&A:Br4)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044,
or hand delivered between the hours of
8:00 a.m. and 5:00 p.m. to:
Courier's Desk
Internal Revenue Service
Attn: CC:DOM:CORP:R
Room 5228 (IT&A:Br4)
1111 Constitution Ave., NW
Washington, DC

Alternatively, comments may be submitted electronically via the Service's Internet site at "http://www.irs.ustreas.gov/prod/tax_regs/comments.html". All comments will be available for public inspection and copying in their entirety.

For Further Information on Electronic Funds Transfer

For information on the Treasury's electronic funds transfer system — the Electronic Federal Tax Payment System (EFTPS) — or to get a form to enroll in EFTPS, call either of the two Treasury Financial Agents for EFTPS at (800) 945-8400 or (800) 555-4477. Taxpayers may also request enrollment forms by calling the Service Distribution Center at (800) 829-3676.

Drafting Information

The principal author of this notice is Robert J. Basso of the Office of Assistant Chief Counsel (Income Tax and Accounting). For further information regarding the penalty waiver, contact Mr. Basso. For further information regarding the comments on future guidance, contact Vincent G. Surabian. Both can be contacted at (202) 622-4940 (not a toll-free call).