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TaxNewsFlash

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Notice 2017-09: De minimis error safe harbor, information reporting penalties

The IRS today released an advance version of Notice 2017-09 concerning a "de minimis error" safe harbor that is available with respect to the information reporting penalties imposed under sections 6721 and 6722, and the payee election to have the safe harbor not apply. These provisions are effective for information returns required to be filed and payee statements required to be furnished after December 31, 2016.

Notice 2017-09 [PDF 29 KB] explains that the Treasury Department and IRS intend to issue regulations under sections 6721 and 6722 with respect to the de minimis error safe harbor and the payee election to have the safe harbor not apply. The regulations (to the extent they incorporate the rules contained in today's notice) will be effective for returns required to be filed, and payee statements required to be furnished, after December 31, 2016.

Today's notice solicits comments regarding the rules contained in this notice; any potential abuses of the de minimis error safe harbor; and any information returns or payee statements to be excepted from the de minimis error safe harbor provisions. Comments are due by April 24, 2017.

Background

The *Protecting Americans from Tax Hikes Act of 2015* (the "PATH Act") provides a safe harbor for certain penalties for de minimis errors on information returns and payee statements. The PATH Act relief applies for information return filers that discover errors of $100 or less (or withholding tax errors of $25 or less), thereby removing the administrative burden of filing corrected information returns without exposure to information reporting penalties. This relief applies to information returns and statements required to be filed after December 31, 2016 (i.e., calendar year 2016 information returns filed in 2017).

There is an exception to application of the safe harbor. It does not apply to any payee statement if the payee makes an election that the safe harbor is not to apply. Also, the safe harbor does not apply with respect to any incorrect dollar amount on an information return to the extent the error relates to an amount with respect to which a safe harbor election has been made by a payee under section 6722(c)(3)(B). Accordingly, if an election is in effect, a payor may be subject to penalties for an incorrect dollar amount appearing on an information return or payee statement even if the incorrect amount is a de minimis error.

Notice 2017-09

Today's notice sets out requirements for the election under section 6722(c)(3)(B, including the time and manner for making the election. The notice also requires payors to retain certain records.

How does a payor make the election? Notice 2017-09 states that a payor may prescribe any reasonable manner for making the election—e.g., in writing, on-line (electronic), or by telephone—as long as the payor furnishes the payee written notification of the reasonable manner before the date the payee makes the election. If the payor provides an on-line (electronic) option to make the election, it cannot be the exclusive manner to make the election.

If a payor has prescribed a reasonable manner for making the election, the payee must adhere to that prescribed manner to make a valid election. If the payor has not prescribed a manner to make the election, a payee may make the election under section 6722(c)(3)(B) in writing to the payor's address appearing on a payee statement furnished by the payor to the payee, or as directed by the payor after making an appropriate inquiry. A payor may not impose any prerequisite, condition or time limitation on the payee's ability to request a corrected payee statement, other than prescribing a reasonable manner for making the election.

If a payee has made the election under section 6722(c)(3)(B), and the payor both furnishes a corrected payee statement to the payee and files a corrected information return with the IRS within 30 days of the date of the election (or within a longer timeframe prescribed by a reporting provision's specific rules), the error will be treated as due to reasonable cause and not willful neglect, and the section 6721 and 6722 penalties will not apply to the error.

Notice 2017-09 clarifies that the de minimis error safe harbor does not apply in the case of an intentional error or if a payor fails to file an information return or furnish a payee statement (even if the payee statement or information return would report dollar amounts of $100 or less, or $25 or less with respect to any amount of tax withheld).

For more information, contact a tax professional with KPMG's Washington National Tax practice:

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