



January 9, 2019

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Ms. Kirsten Wielobob
Deputy Commissioner for Services
and Enforcement
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Relief from Sections 6654 and 6655 Penalties for Specified Taxpayers

Dear Commissioner Rettig and Ms. Weilobob:

The American Institute of CPAs (AICPA) is writing to request that the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) issue guidance on the proper calculation of the “required annual payment” (a/k/a “safe harbor amount”) imposed under section 6654¹ and 6655 for any taxpayer subject to the provisions of section 965 as enacted by Public Law No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA).

BACKGROUND

Taxpayers are generally required to make prepayments of estimated federal income taxes. Individuals, with limited exceptions, are required to pay at least 90% of the tax due for the current year or 100% / 110% (based upon their individual adjusted gross income levels) of the amount of tax shown on their United States (U.S.) income tax return for the prior year, whichever is smaller.² Corporations, other than large corporations, are required to pay at least 100% of their income tax due for the current year or 100% of their tax amount shown on their U.S. income tax return for the prior year.³

RECOMMENDATION

The AICPA recommends that Treasury and the IRS issue guidance establishing that the additional amount of tax due as a result of section 965 is not included in the calculation of a taxpayer’s required annual payment for purposes of sections 6654 and 6655 for their 2018 and subsequent tax years.

¹ All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.

² Section 6654.

³ Section 6655.

ANALYSIS

The relevant statutes of the Internal Revenue Code (IRC) recognize that in order to make reasonable estimated tax payments, taxpayers require benchmarks to which they can refer. Taxpayers can choose between making payments based on accurately anticipating their current year taxable income or based on their prior year tax liability. Taxpayers faced substantial uncertainties relating to how to determine the amount of their actual tax liability for the 2018 taxable year as regulations addressing many of the statutory changes made by the TCJA were not yet available or were released late in the year as proposed regulations. In the absence of such guidance, taxpayers cannot estimate their tax liability for their 2018 taxable year with any degree of certainty.

Additionally, a taxpayer could rely on the alternative safe harbor amount to ensure avoidance of any penalty for underpayment of estimated tax. However, taxpayers who were subject to section 965 inclusions had their 2017 tax liability significantly inflated by a one-time amount. The calculation and inclusion of the separate tax liability under section 965 creates uncertainty among taxpayers as to what amount from their 2017 return represents the safe harbor amount. For example, a taxpayer must choose from the following possible safe harbor amounts:

- The non-section 965 tax liability (i.e.- their regular tax liability);
- The regular tax liability plus the first installment payment of their section 965 tax liability with a section 965(h) election; or
- The regular tax liability plus the entire amount of their section 965 tax liability.

The determination of the correct safe harbor amount to use is further complicated for S corporation shareholders who elected under section 965(i) to defer their entire section 965 tax liability until the occurrence of a triggering event. In subsequent tax years, a similar issue reoccurs if a taxpayer was required to make a section 965 installment payment in the prior year.

Due to the fact that underpayment penalties are not imposed for failure to make estimated tax payments of the section 965 tax itself⁴ (either in the inclusion year or subsequent installment payment years), we recommend that a taxpayer's safe harbor amount for purposes of sections 6654 and 6655 is determined without including any portion of tax reported or paid as a result of a section 965 inclusion. This method should apply for any taxable year beginning after December 31, 2017 to ensure that it applies in future tax years for a) taxpayers making installment payments in later years; b) taxpayers potentially subject to an acceleration of their installment liability; and c) S corporation shareholders who elected deferral under section 965(i).

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⁴ [Section 6 of Notice 2018-26.](#)

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interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please contact Philip Pasmanik, Chair, AICPA International Taxation Technical Resource Panel, at (212) 686-7160, ext. 156 or Philip.Pasmanik@hertzherson.com; Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204 or Jonathan.Horn@aicpa-cima.com; or me at (408) 924-3508 or Annette.Nellen@sjsu.edu.

Respectfully submitted,



Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

cc: Honorable David J. Kautter, Assistant Secretary for Tax Policy, Department of the Treasury
Mr. William Paul, Acting Chief Counsel, Internal Revenue Service