

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8798]

RIN 1545-AW74

Preparer Due Diligence Requirements for Determining Earned Income Credit Eligibility

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the due diligence requirements for paid preparers of federal income tax returns or claims for refund involving the earned income credit. The temporary regulations reflect changes to the law made by the Taxpayer Relief Act of 1997. The temporary regulations provide guidance to paid preparers who prepare federal income tax returns or claims for refund claiming the earned income credit. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: These regulations are effective December 21, 1998.

FOR FURTHER INFORMATION CONTACT: Marc C. Porter (202) 622-4940 (not a toll free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and

public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1570. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books and records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the Income Tax Regulations (26 CFR parts 1 and 602) under section 6695(g) relating to the penalty for failure of a preparer to be diligent in determining a taxpayer's eligibility for the earned income

credit (EIC). Section 6695(g) was added by section 1085(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105-34 (11 Stat. 788, 955 (1997)) (the Act), effective for taxable years beginning after December 31, 1996.

Section 6695(g) imposes a \$100 penalty for each failure by an income tax return preparer to meet the due diligence requirements set forth in this regulation. The IRS may impose the section 6695(g) penalty in addition to any other applicable penalty provided by law.

In Notice 97-65 (1997-51 I.R.B. 14 (December 22, 1997)), the IRS set forth the preparer due diligence requirements for 1997 returns and claims for refund involving the EIC. To avoid the imposition of the section 6695(g) penalty for 1997 returns and claims for refund, Notice 97-65 requires preparers to meet four requirements: (1) complete the Earned Income Credit Eligibility Checklist attached to Notice 97-65 (Eligibility Checklist), or otherwise record the information necessary to complete the Eligibility Checklist; (2) complete the Earned Income Credit Worksheet (Computation Worksheet), as contained in the 1997 Form 1040 instructions, or otherwise record the computation and information necessary to complete the Computation Worksheet; (3) have no knowledge that any information used by the preparer in determining eligibility for, and amount of, the EIC is incorrect; and (4) retain for three years the Eligibility Checklist and Computation Worksheet (or alternative records), and a record of how and when the information used to determine eligibility for,

and amount of, the EIC was obtained by the preparer. This information may be retained either as a paper record or in magnetic media format consistent with Rev. Proc. 81-46 (1981-2 C.B. 621).

Notice 97-65 also requested comments on preparer due diligence requirements for tax years after 1997. Two comments were received. The commentators did not suggest alternative due diligence requirements. One commentator suggested, however, increased education for the public. The IRS and Treasury Department adhere to the principle that education is an integral part of good tax administration. Therefore, as part of its overall EIC strategy, the IRS has established various educational tools and outreach programs for taxpayers and preparers. These efforts are intended to provide the public with the tools necessary to receive the full amount of the EIC allowed by law.

The second commentator suggested that preparers should be able to meet the due diligence requirements by using software reviewed and approved by the IRS. The IRS does not approve commercial software. The IRS is currently exploring, however, new opportunities for partnership with outside stakeholders to reduce burden, enhance customer service, and increase compliance. As part of this effort, the IRS will continue to review this comment and evaluate options.

Explanation of Provisions

The temporary and proposed regulations impose due diligence standards on persons who are income tax return preparers with

respect to determining eligibility for, or the amount of, the EIC. Consistent with existing regulations under section 6695, these temporary regulations apply a modified definition of income tax return preparer. Section 7701(a)(36) provides that, in general, the term income tax return preparer means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return or claim for refund of tax imposed by subtitle A. The preparation of a substantial portion of a return or claim for refund is treated as if it were the preparation of such return or claim for refund. Persons are considered preparers if they give legal advice concerning a return or claim for refund or if they prepare another return which affects the return or claim for refund (§301.7701-15(a)(2) and (b) and §301.7701-15(b)(3), respectively). The regulations retain this definition of an income tax return preparer, except that preparers who merely give advice or prepare another return that affects the EIC return or claim for refund are not preparers for purposes of the section 6695(g) penalty. Rather, the due diligence standards are imposed only on paid preparers who prepare the return claiming the EIC.

The temporary regulations essentially adopt the four due diligence requirements in Notice 97-65. Thus, to avoid the penalty under section 6695(g), a preparer must: (1) complete the Eligibility Checklist (Form 8867, Paid Preparer's Earned Income Credit Checklist, or such other form as may be prescribed by the IRS), or otherwise record in the preparer's files the information

necessary to complete the Eligibility Checklist; (2) complete the Computation Worksheet (Earned Income Credit Worksheet contained in the Form 1040 instructions), or otherwise record in the preparer's files the computation and information necessary to complete the Computation Worksheet; (3) have no knowledge, and have no reason to know, that any information used by the preparer in determining eligibility for, and amount of, the EIC is incorrect; and (4) retain for three years the Eligibility Checklist and the Computation Worksheet (or alternative records), and a record of how and when the information used to determine eligibility for, and the amount of, the EIC was obtained by the preparer.

The temporary regulations also provide that the income tax return preparer may avoid the section 6695(g) penalty with respect to a particular income tax return or claim for refund if the preparer can demonstrate to the satisfaction of the IRS that, considering all the facts and circumstances, the preparer's normal office procedures are reasonably designed and routinely followed to ensure compliance with the due diligence requirements of the regulations, and that the particular failure was isolated and inadvertent.

The temporary regulations will be effective for taxable years beginning after December 31, 1996. However, the Eligibility Checklist contained in Notice 97-65 has been expanded in Form 8867. Therefore, for taxable year 1997, the applicable Eligibility Checklist is the Eligibility Checklist contained in

Notice 97-65. For taxable year 1998, a preparer may choose as the applicable Eligibility Checklist either the Eligibility Checklist published in Notice 97-65 modified however, by replacing, \$9,770, \$25,760, \$29,290, and \$2,250 each time these figures appear on the 1997 Eligibility Checklist with \$10,030, \$26,473, \$30,095, and \$2,300, respectively, or Form 8867. For taxable years beginning after December 31, 1998, the applicable Eligibility Checklist will be the Form 8867.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 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. Further, it is hereby certified, pursuant to sections 603(a) and 605(b) of the Regulatory Flexibility Act, that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the amount of time necessary to record and retain the required information will be nominal for those income tax return preparers that choose to use the Alternative Eligibility Record and Alternative Computation Record. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for

Advocacy of the Small Business Administration for comment on their impact.

Drafting Information

The principal author of these regulations is Marc C. Porter, Office of Assistant Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1 -- INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

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

Section 1.6695-2T also issued under 26 U.S.C. 6695(g). * * *

Par. 2. Section 1.6695-2T is added to read as follows:

§1.6695-2T Preparer due diligence requirements for determining earned income credit eligibility (temporary).

(a) Penalty for failure to meet due diligence requirements.

A person who is an income tax return preparer (preparer) of an income tax return or claim for refund under subtitle A of the

Internal Revenue Code (Code) with respect to determining the eligibility for, or the amount of, the earned income credit (EIC) under section 32 and who fails to satisfy the due diligence requirements of paragraph (b) of this section will be subject to a penalty of \$100 for each such failure. However, no penalty will be imposed under section 6695(g) on a person who is an income tax return preparer solely by reason of --

(1) Section 301.7701-15(a)(2) and (b) of this chapter, on account of having given advice on specific issues of law; or

(2) Section 301.7701-15(b)(3) of this chapter, on account of having prepared the return solely because of having prepared another return that affects amounts reported on the return.

(b) Due diligence requirements. A preparer must satisfy the following due diligence requirements:

(1) Completion of eligibility checklist. (i) The preparer must either --

(A) Complete Form 8867, Paid Preparer's Earned Income Credit Checklist, or such other form as may be prescribed by the IRS (Eligibility Checklist); or

(B) Otherwise record in the preparer's paper or electronic files the information necessary to complete the Eligibility Checklist (Alternative Eligibility Record). The Alternative Eligibility Record may consist of one or more documents containing the required information.

(ii) The preparer's completion of the Eligibility Checklist or Alternative Eligibility Record must be based on information

provided by the taxpayer to the preparer or otherwise reasonably obtained by the preparer.

(2) Computation of credit. (i) The preparer must either --

(A) Complete the Earned Income Credit Worksheet in the Form 1040 instructions or such other form as may be prescribed by the IRS (Computation Worksheet); or

(B) Otherwise record in the preparer's paper or electronic files the preparer's EIC computation, including the method and information used to make the computation (Alternative Computation Record). The Alternative Computation Record may consist of one or more documents containing the required information.

(ii) The preparer's completion of the Computation Worksheet or Alternative Computation Record must be based on information provided by the taxpayer to the preparer or otherwise reasonably obtained by the preparer.

(3) Knowledge. The preparer must not know, or have reason to know, that any information used by the preparer in determining the taxpayer's eligibility for, or the amount of, the EIC is incorrect. The preparer may not ignore the implications of information furnished to, or known by, the preparer, and must make reasonable inquiries if the information furnished to, or known by, the preparer appears to be incorrect, inconsistent, or incomplete.

(4) Retention of records. (i) The preparer must retain --

(A) A copy of the completed Eligibility Checklist or Alternative Eligibility Record;

(B) A copy of the Computation Worksheet or Alternative Computation Record; and

(C) A record of how and when the information used to complete the Eligibility Checklist or Alternative Eligibility Record and the Computation Worksheet or Alternative Computation Record was obtained by the preparer, including the identity of any person furnishing the information.

(ii) These items must be retained for three years after the June 30th following the date the return or claim for refund was presented to the taxpayer for signature, and may be retained on paper or electronically in the manner prescribed in applicable regulations, revenue rulings, revenue procedures, or other appropriate guidance.

(c) Exception to penalty. The section 6695(g) penalty will not be applied with respect to a particular income tax return or claim for refund if the preparer can demonstrate to the satisfaction of the IRS that, considering all the facts and circumstances, the preparer's normal office procedures are reasonably designed and routinely followed to ensure compliance with the due diligence requirements of paragraph (b) of this section, and the failure to meet the due diligence requirements of paragraph (b) of this section with respect to the particular return or claim for refund was isolated and inadvertent.

(d) Effective date. (1) In general. This section applies to income tax returns and claims for refund for taxable years beginning after December 31, 1996. This section expires on,

December 21, 2001. For the applicable Eligibility Checklist see paragraph (d)(2) of this section.

(2) Eligibility Checklist--(i) For the 1997 taxable year. For taxable year 1997, the applicable Eligibility Checklist is the Eligibility Checklist published in Notice 97-65 (1997-51 I.R.B.14) December 22, 1997. (See §601.601(d)(2)(ii)(b) of this chapter.)

(ii) For the 1998 taxable year. For taxable year 1998 the applicable Checklist is either--

(A) The Checklist published in Notice 97-65 (1997-51 I.R.B.14) December 22, 1997, modified however, by applying the figures \$10,030, \$26,473, \$30,095, and \$2,300 in place of \$9,770, \$25,760, \$29,290, and \$2,250, respectively, each time these figures appear on the 1997 Checklist; or

(B) Form 8867, Paid Preparer's Earned Income Credit Checklist.

(iii) For taxable years after 1998. For taxable years beginning after December 31, 1998, the applicable Eligibility Checklist is the Eligibility Checklist contained in Form 8867, Paid Preparer's Earned Income Credit Checklist, or such other form as may be prescribed by the IRS.

PART 602 -- OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 3. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 4. In §602.101, paragraph (c) is amended by adding the following entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

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(c) * * *

CFR part or section where identified and described	Current OMB control No.
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1.6695-2T	1545-1570
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Acting Deputy Commissioner of Internal Revenue
David S. Mader

Approved: December 9, 1998

Assistant Secretary of the Treasury
Donald C. Lubick