

Section 6664.—Definitions and Special Rules

26 CFR 1.6664–1T: Accuracy-related and fraud penalties; definitions and special rules (temporary).

T.D. 9186

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

Qualified Amended Returns

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that modify the rules relating to qualified amended returns by providing additional circumstances that end the period within which a taxpayer may file an amended return that constitutes a qualified amended return. These regulations provide that the period for filing a qualified amended return is terminated once the IRS has served a John Doe summons on a third party with respect to the taxpayer's tax liability. In addition, for taxpayers who have claimed tax benefits from undisclosed listed transactions, the regulations provide that the period for filing a qualified amended return is terminated once the IRS contacts a promoter, organizer, seller, or material advisor concerning the listed transaction. The regulations also provide that the date on which published guidance is issued announcing a settlement initiative for a listed transaction in which penalties are compromised or waived is an additional date by which a taxpayer must file a qualified amended return. The text of these temporary regulations also serves as the text of the proposed regulations (REG–122847–04) set forth in the notice of proposed rulemaking on this subject published elsewhere in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective March 2, 2005.

Applicability Dates: For dates of applicability, see §1.6664–1T(b)(3).

FOR FURTHER INFORMATION CONTACT: Nancy M. Galib,

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations under 26 CFR part 1 relating to qualified amended returns. Section 1.6664-2(c) provides that the amount reported on a qualified amended return will be treated as an amount shown as tax on the taxpayer's return for purposes of determining whether there is an underpayment of tax subject to an accuracy-related penalty. Section 1.6664-2(c)(3) provides that an amended return, or request for administrative adjustment under section 6227 of the Internal Revenue Code, is a qualified amended return if it is filed before the earliest of: (1) the date on which the IRS first contacts the taxpayer concerning an examination of the return; (2) the date on which the IRS first contacts a person described in section 6700(a) concerning the examination of an activity described in section 6700(a) with respect to which the taxpayer claimed any tax benefit on the return directly or indirectly through the entity, plan or arrangement described in section 6700(a)(1)(A); or (3) for certain pass-through items, the date on which the IRS first contacts the pass-through entity in connection with an examination of the return to which the pass-through item relates. These provisions are intended to encourage voluntary compliance by permitting taxpayers to avoid accuracy-related penalties by filing an amended return before the IRS begins an investigation of the taxpayer or the promoter of a transaction in which the taxpayer participated.

The Treasury Department and the IRS have determined that additional rules providing for the termination of the period for filing a qualified amended return are necessary because existing rules may encourage taxpayers to delay filing amended returns until after the IRS has taken steps to identify taxpayers as participants in potentially abusive transactions. To discourage the wait-and-see approach of some taxpayers and to encourage voluntary compliance, the Treasury Department and the IRS announced in Notice 2004-38, 2004-21 I.R.B. 949, that regulations modifying the

definition of *qualified amended return* in §1.6664-2(c)(3) would be issued. Notice 2004-38 announced that the regulations would provide that the period for filing a qualified amended return is terminated when the IRS serves a John Doe summons under section 7609(f) with respect to the taxpayer's tax liability. Notice 2004-38 also announced that the regulations would provide that the period for filing a qualified amended return would terminate when the IRS contacts an organizer, seller, or material advisor concerning a listed transaction for which the taxpayer has claimed a tax benefit. Notice 2004-38 provided that the regulations would be effective for amended returns or requests for administrative adjustment filed on or after April 30, 2004.

Explanation of Provisions

These regulations provide the rules announced in Notice 2004-38 that identify additional circumstances that terminate the period within which a taxpayer may file a qualified amended return. Temporary regulation §1.6664-2T(c)(3)(i) provides that a qualified amended return must be filed before the IRS serves on a third party a John Doe summons relating to the tax liability of a person, group, or class that includes the taxpayer or pass-through entity of which the taxpayer is a partner, shareholder, beneficiary, or holder of a residual interest in a REMIC with respect to a return that reflects the activity that is the subject of the summons. Any taxpayer so identified also is precluded from filing a qualified amended return in a year not identified in the summons if the original return for that year reflected the taxpayer's participation in the transaction or activity to which the summons relates.

Temporary regulation §1.6664-2T(c)(3)(ii) provides special rules with respect to undisclosed listed transactions. An *undisclosed listed transaction* is a transaction that: (1) is the same or substantially similar to a listed transaction as defined in §1.6011-4(b)(2) (regardless of whether §1.6011-4 requires the taxpayer to disclose the transaction); and (2) was not previously disclosed by the taxpayer within the meaning of §1.6011-4 or §1.6011-4T, or had not been disclosed under Announcement 2002-2 by the deadline therein. In the case of an undisclosed

listed transaction for which a taxpayer claims any direct or indirect tax benefits on its return, a taxpayer may not file a qualified amended return on or after the earlier of: (1) the date on which the IRS first contacts any person regarding an examination of that person's liability under section 6707(a) with respect to the undisclosed listed transaction of the taxpayer; or (2) the date on which the IRS issues to any person a request for information required to be included on a list under section 6112 relating to a type of listed transaction regarding which that person made a tax statement to or for the benefit of the taxpayer (regardless of whether the taxpayer's information is required to be included on the list requested by the IRS). For purposes of this section, an examination of a person's liability under section 6707(a) includes examinations under section 6707, in effect prior to and after the amendments made by section 816 of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418).

An amended return that is filed to disclose a transaction, but that does not show an additional amount due, is treated as a qualified amended return for purposes of §1.6662-3(c) or §1.6662-4(e) and (f). These temporary regulations also provide that a qualified amended return includes an amended return filed solely to disclose information pursuant to §1.6011-4, provided that the taxpayer also makes the required disclosure to the Office of Tax Shelter Analysis.

In addition to these rules, temporary regulation §1.6664-2T(c)(3)(i) also provides that the date on which published guidance is issued providing for a settlement initiative for a listed transaction is an additional date by which a taxpayer who participated in the listed transaction must file a qualified amended return for the taxable years in which the taxpayer claimed any direct or indirect tax benefits from the listed transaction. The Commissioner may waive the requirements of this provision or identify a later date by which a taxpayer who participated in the listed transaction must file a qualified amended return in the published guidance announcing the listed transaction settlement initiative.

These temporary regulations also clarify the existing rules applicable to qualified amended returns. Temporary regulation §1.6664-2T(c)(3)(i)(B) clarifies that

the period for filing a qualified amended return terminates on the date the IRS first contacts a person concerning an examination under section 6700, regardless of whether the IRS ultimately establishes that such person violated section 6700. Temporary regulation §1.6664-2T(c)(3)(i) also clarifies that a taxpayer must file a qualified amended return before the IRS first contacts the taxpayer concerning a criminal investigation of the taxpayer that includes the tax period covered by the return.

Effective Date

Paragraphs (c)(1), (c)(2), (c)(3)(i)(A), (c)(3)(i)(B), (c)(3)(i)(C), (c)(3)(i)(D) (second sentence), (c)(3)(i)(E), and (c)(4) of §1.6664-2T are applicable for amended returns and requests for administrative adjustment filed on or after March 2, 2005. Paragraphs (c)(3)(i)(D) (first sentence) and (c)(3)(ii) of §1.6664-2T are applicable for amended returns and requests for administrative adjustment filed on or after April 30, 2004.

Effect on Other Documents

Notice 2004-38, 2004-21 I.R.B. 949, is obsolete as of March 2, 2005.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), this Treasury decision will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of this regulation is Nancy M. Galib, Office of Associate Chief Counsel (Procedure & Administration), Administrative Provisions and Judicial Practice Division.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1 — INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:
Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.6664-1T is added to read as follows:

§1.6664-1T Accuracy-related and fraud penalties; definitions and special rules (temporary).

(a) through (b)(2) [Reserved]. For further guidance, see §1.6664-1.

(b)(3) *Qualified amended returns.* Sections 1.6664-2T(c)(1), (c)(2), (c)(3)(i)(A), (c)(3)(i)(B), (c)(3)(i)(C), (c)(3)(i)(D) (second sentence), (c)(3)(i)(E), and (c)(4) are applicable for amended returns and requests for administrative adjustment filed on or after March 2, 2005. Sections 1.6664-2T(c)(3)(i)(D) (first sentence) and (c)(3)(ii) are applicable for amended returns and requests for administrative adjustment filed on or after April 30, 2004.

Par. 3. Section 1.6664-2 is amended to read as follows:

§1.6664-2 Underpayment.

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(c) [Reserved]. For further guidance, see §1.6664-2T.

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Par. 4. Section 1.6664-2T is added to read as follows:

§1.6664-2T Underpayment (temporary).

(a) through (b) [Reserved]. For further guidance, see §1.6664-2.

(c) *Amount shown as the tax by the taxpayer on his return — (1) Defined.* For purposes of paragraph (a) of this section, the “amount shown as the tax by the taxpayer on his return” is the tax liability shown by the taxpayer on his return, determined without regard to the items listed in §1.6664-2(b)(1), (2), and (3), except that it is reduced by the excess of —

(i) The amounts shown by the taxpayer on his return as credits for tax withheld under section 31 (relating to tax withheld on

wages) and section 33 (relating to tax withheld at source on nonresident aliens and foreign corporations), as payments of estimated tax, or as any other payments made by the taxpayer with respect to a taxable year before filing the return for such taxable year; over

(ii) The amounts actually withheld, actually paid as estimated tax, or actually paid with respect to a taxable year before the return is filed for such taxable year.

(2) *Effect of qualified amended return.* The “amount shown as the tax by the taxpayer on his return” includes an amount shown as additional tax on a qualified amended return (as defined in paragraph (c)(3) of this section), except that such amount is not included if it relates to a fraudulent position on the original return.

(3) *Qualified amended return defined.*
(i) *General rule.* A qualified amended return is an amended return, or a timely request for an administrative adjustment under section 6227, filed after the due date of the return for the taxable year (determined with regard to extensions of time to file) and before the earliest of —

(A) The date the taxpayer is first contacted by the Internal Revenue Service concerning any examination (including a criminal investigation) with respect to the return;

(B) The date any person is first contacted by the Internal Revenue Service concerning an examination of that person under section 6700 (relating to the penalty for promoting abusive tax shelters) of an activity with respect to which the taxpayer claimed any tax benefit on the return directly or indirectly through the entity, plan or arrangement described in section 6700(a)(1)(A);

(C) In the case of a pass-through item (as defined in §1.6662-4(f)(5)), the date the pass-through entity (as defined in §1.6662-4(f)(5)) is first contacted by the Internal Revenue Service in connection with an examination of the return to which the pass-through item relates;

(D) The date on which the Internal Revenue Service serves a summons described in section 7609(f) relating to the tax liability of a person, group, or class that includes the taxpayer (or pass-through entity of which the taxpayer is a partner, shareholder, beneficiary, or holder of a residual interest in a REMIC) with respect to an activity for which the taxpayer claimed any

tax benefit on the return directly or indirectly. This rule applies to any return on which the taxpayer claimed a direct or indirect tax benefit from the type of activity that is the subject of the summons, regardless of whether the summons seeks the production of information for the taxable period covered by such return; and

(E) The date on which the Commissioner announces by revenue ruling, revenue procedure, notice, or announcement, to be published in the Internal Revenue Bulletin (see §601.601(d)(2)), a settlement initiative to compromise or waive penalties with respect to a listed transaction. This rule applies only to a taxpayer who participated in the listed transaction and for the taxable year(s) in which the taxpayer claimed any direct or indirect tax benefits from the listed transaction. The Commissioner may waive the requirements of this paragraph or identify a later date by which a taxpayer who participated in the listed transaction must file a qualified amended return in the published guidance announcing the listed transaction settlement initiative.

(ii) *Undisclosed listed transactions.* An *undisclosed listed transaction* is a transaction that is the same as, or substantially similar to, a listed transaction within the meaning of §1.6011-4(b)(2) (regardless of whether §1.6011-4 requires the taxpayer to disclose the transaction) and was not previously disclosed by the taxpayer within the meaning of §1.6011-4 or §1.6011-4T, or had not been disclosed under Announcement 2002-2, 2002-1 C.B. 304, by the deadline therein. In the case of an undisclosed listed transaction for which a taxpayer claims any direct or indirect tax benefits on its return (regardless of whether the transaction was a listed transaction at the time the return was filed), an amended return or request for administrative adjustment under section 6227 will not be a qualified amended return if filed on or after the earliest of —

(A) The dates described in §1.6664-2(c)(3)(i);

(B) The date on which the Internal Revenue Service first contacts any person regarding an examination of that person's liability under section 6707(a) with respect to the undisclosed listed transaction of the taxpayer; or

(C) The date on which the Internal Revenue Service requests, from any person

who made a tax statement to or for the benefit of the taxpayer, or who is a material advisor (within the meaning of section 6111) with respect to the taxpayer, the information required to be included on a list under section 6112 relating to a transaction that is the same as, or substantially similar to, the undisclosed listed transaction, regardless of whether the taxpayer's information is required to be included on that list.

(4) *Special rules.* (i) A qualified amended return includes an amended return that is filed to disclose information pursuant to §1.6662-3(c) or §1.6662-4(e) and (f) and that does not report any additional tax liability. A qualified amended return also includes an amended return filed solely to disclose information pursuant to §1.6011-4, if the taxpayer also makes the required disclosure to the Office of Tax Shelter Analysis under §1.6011-4(e). See §1.6662-3(c), §1.6662-4(f), and §1.6664-4(c) for rules relating to adequate disclosure.

(ii) The Commissioner may by revenue procedure prescribe the manner in which the rules of paragraph (c) of this section regarding qualified amended returns apply to particular classes of taxpayers.

(5) *Examples.* The following examples illustrate the provisions of paragraphs (c)(3) and (c)(4) of this section:

Example 1. T, an individual taxpayer, claimed tax benefits on its 2002 Federal income tax return from a transaction that is substantially similar to the transaction identified as a listed transaction in Notice 2002-65, 2002-2 C.B. 690 (Partnership Entity Straddle Tax Shelter). T did not disclose his participation in this transaction on a Form 8886, *Reportable Transaction Disclosure Statement*, as required by §1.6011-4. On June 30, 2004, the IRS requested from P, T's material advisor, an investor list required to be maintained under section 6112. The section 6112 request, however, related to the type of transaction described in Notice 2003-81, 2003-2 C.B. 1223 (Tax Avoidance Using Offsetting Foreign Currency Option Contracts). T did not participate in (within the meaning of §1.6011-4(c)), and claimed no tax benefits from, a transaction described in Notice 2003-81. T may file a qualified amended return relating to the transaction described in Notice 2002-65 because T did not claim a tax benefit with respect to the listed transaction that is the subject of the section 6112 request.

Example 2. The facts are the same as in Example 1, except that T's 2002 Federal income tax return reflected T's participation in the transaction described in Notice 2003-81. As of June 30, 2004, T may not file a qualified amended return for the 2002 tax year.

Example 3. Corporation X claimed tax benefits from a transaction on its 2002 Federal income tax return. In October 2004, the IRS and Treasury identified the transaction as a listed transaction. In De-

cember 2004, the IRS contacted P concerning an examination of P's liability under section 6707(a) (as in effect prior to the amendment to section 6707 by section 816 of the American Jobs Creation Act of 2004, P.L. 108-357, 118 Stat. 1418). P is the organizer of a section 6111 tax shelter who provided representations to X regarding tax benefits from the transaction, and the IRS has contacted P about the failure to register that transaction. Three days later, X filed an amended return.

X's amended return is not a qualified amended return, because X did not disclose the transaction before the IRS contacted P. X's amended return would have been a qualified amended return if it was submitted prior to the date on which the IRS contacted P.

Example 4. The facts are the same as in Example 3 except that, instead of contacting P concerning an examination under section 6707(a), in December 2004, the IRS served P a summons described in section 7609(f). X cannot file a qualified amended return after the summons has been served regardless of when, or whether, the transaction becomes a listed transaction.

Example 5. On November 30, 2003, the Internal Revenue Service served Corporation Y, a credit card company, a summons described in section 7609(f). The summons requested the identity of, and information concerning, United States taxpayers who, during the taxable years 2001 and 2002, had signature authority over Corporation Y's credit cards issued by, through, or on behalf of certain offshore financial institutions. In obtaining court approval for the summons, the IRS provided reports and declarations that established a reasonable basis for believing that this ascertainable group of taxpayers may have been using these offshore credit card accounts to avoid complying with the internal revenue laws of the United States. Corporation Y complied with the summons, and identified, among others, Taxpayer B. On May 31, 2004, before the IRS first contacted Taxpayer B concerning an examination of Taxpayer B's federal income tax return for the taxable year 2002, Taxpayer B filed an amended return for that taxable year, that showed an increase in Taxpayer B's federal income tax liability. Under paragraph (c)(3)(i)(D) of this section, the amended return is not a qualified amended return because it was not filed before the summons was served on Corporation Y.

Example 6. The facts are the same as in Example 5. Taxpayer B continued to maintain the offshore credit card account through 2003 to avoid compliance with the internal revenue laws. On March 21, 2005, Taxpayer B filed an amended return for the taxable year 2003, that showed an increase in Taxpayer B's federal income tax liability. Under paragraph (c)(3)(i)(D) of this section, the amended return is not a qualified amended return because it was not filed before the summons for 2001 and 2002 was served on Corporation Y, and the return reflects an activity that is the subject of the same summons.

Example 7. On November 30, 2003, the Internal Revenue Service served Corporation Y, a credit card company, a summons described in section 7609(f). The summons requested the identity of, and information concerning, United States taxpayers who, during the taxable years 2001 and 2002, had signature authority over Corporation Y's credit cards issued by, through, or on behalf of certain offshore financial institutions. In obtaining court approval for the sum-

mons, the IRS established a reasonable basis for believing that this ascertainable group of taxpayers may have been using these offshore credit card accounts to avoid complying with the internal revenue laws of the United States. Taxpayer C did not have signature authority over any of Corporation Y's credit cards during either 2001 or 2002 and, therefore, was not a person described in the summons.

In 2003, Taxpayer C first acquired signature authority over a Corporation Y credit card issued by an offshore financial institution. Taxpayer C's ability to file a qualified amended return for 2003 is not limited by paragraph (c)(3)(i)(D) because Taxpayer C's return does not reflect an activity that was the subject of the summons that was served on Corporation Y for 2001 and 2002.

Example 8. On April 15, 2004, Taxpayer D timely filed his 2003 federal income tax return. The return reported tax benefits from a transaction that had previously been identified as a listed transaction. The tax treatment of the transaction also reflected a position that was contrary to a revenue ruling. D did not include with his return a Form 8275, *Disclosure Statement*, as required by §1.6662-3(c), or a Form 8886, *Reportable Transaction Disclosure Statement*, as required by §1.6011-4. On March 21, 2005, D filed a qualified amended return that disclosed the listed transaction on an attached Form 8886, but that did not report any additional tax. D also filed the Form 8886 with the Office of Tax Shelter Analysis as required by §1.6011-4. D has not adequately disclosed the transaction under §1.6662-3(c) because D failed to file a Form 8275.

(d) through (g) [Reserved]. For further guidance, see §1.6664-2.

Mark E. Matthews,
*Deputy Commissioner for
Services and Enforcement.*

Approved February 23, 2005.

Eric Solomon,
*Acting Deputy Assistant Secretary
of the Treasury.*

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