

May 18, 2020

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

David Kautter
Assistant Secretary, Tax Policy
Department of the Treasury
1500 Pennsylvania Ave NW
Washington, DC 20220

RE: Changes to IRM 20.1.12.7 and Review Process for Potential IRC 6695A Violations – Penalty on Appraisers

Messrs. Rettig and Kautter,

The undersigned valuation professional organizations are writing in response to a recent change to the Internal Revenue Manual; specifically relating to changes in the process by which the Internal Revenue Service considers whether or not a valuation professional has violated the valuation misstatement provisions of Section 6695A of the Internal Revenue Code.

We believe this recent change replaces a meaningful and robust process that worked to equitably ensure the legitimacy of claims brought by the IRS under 6695A with a truncated and more arbitrary process where a valuation misstatement penalty or referral to the Office of Professional Responsibility can be acted upon without regard to essential due process protections for valuation professionals.

Not only does this new process run counter to the notion of due process and administrative restraint (as was established under the original regime after the passage of the Pension Protection Act and the adoption of IRC 6695A in 2006), it places outsized control and responsibility in the hands of examiners or attorneys who may lack any formal valuation training or specialized knowledge as to the subjects of the underlying valuation without a clear process for introducing relevant expertise into the review.

We believe this new process creates several likely outcomes.

First, without the checks and balances of the original process – where more than one valuation professional and a review panel would review the appraisal in question and concur that a violation of 6695A had occurred – the number of non-meritorious cases likely to be brought will increase, especially where no referral came from an examining appraiser.

Even if the matter is ultimately resolved in the favor of the valuation professional, there is a significant investment of time, money, and emotional capital that is required when a practitioner

defends themselves against an allegation. An adverse finding by the IRS can significantly impair, if not outright end, an individual's career, so every allegation must be taken seriously even where the valuation professional can demonstrate their conclusion was "more likely than not" correct.

Second, in instances where the examiner or attorney cannot be convinced that the conclusion reached by the valuation professional was "more likely than not" supported, individuals will be faced with the difficult question of whether to lodge an appeal – and all of the added costs included, as stated previously – or to accept the finding and the likelihood that their ability to practice before the Service will be severely hindered if not outright ended. Such an outcome will also severely limit the appraiser's ability to prepare non-tax valuations.

Neither of these outcomes should be reached without the Service having consulted more than one valuation professional. This is important because appraisals are not facts to be uncovered but matters of opinion. It is possible for two appraisers to have differences of opinion that are both well supported. Yet the language of the January 22 memo announcing the change makes it possible – if not probable – that this will happen in a significant number of instances. The Service would not allow a taxpayer to assert something that was not supported by the opinion of a professional, however, the new review process lowers the standard for the Service by letting examiners and attorneys at the IRS impose a 6695A penalty with only one valuation professional involved and absent a review panel.

Third, when IRS officials were tasked with implementing provisions of Section 1219 of the Pension Protection Act (which created the 6695A penalty), they saw a need to have five individuals review the potential of the case before contacting the appraiser. These included: A revenue agent or attorney, his or her manager, the engineering valuation penalty manager, and two independent IRS appraisers. Only after all five individuals concurred that a potential penalty was warranted was the appraiser contacted by the IRS with Letter 4477 to inform the appraiser that an investigation was commencing on his or her appraisal.

There were several reasons for this. This process was implemented to prevent frivolous allegations by agents or attorneys that may have personal issues with the taxpayer or taxpayer's appraiser stemming from prior interactions, or when an IRS employee had taken ownership of the issue. It set a bar and process in place to truly review the facts of the case with unbiased, trained professionals that understood the valuation theory and had the experience to understand the valuation issues involved¹. The panel allowed a determination of which cases truly were egregious and to focus on those practitioners to improve voluntary compliance.

Finally, we take issue with the way this process change occurred – without any stakeholder notice or engagement, announced only to relevant IRS staff. At its genesis, the 6695A penalty procedure was developed with significant stakeholder input, both into the wording of Letter 4477, the process by which the IRS would engage with a valuation professional it believed had performed a valuation

¹ There are numerous assets which are subject to significant valuation uncertainty. Because of this, it is imperative that a trained valuation professional with expertise in the underlying asset be consulted, as the reasonable range of fair market value for the asset could be broad. Understanding this dynamic is another important reason why consultation with one – or several – valuation professionals is important.

misstatement and the rigor of review that IRS would undertake prior to initiating the penalty process. This was done intentionally, with the understanding of how professionally damaging an adverse IRS ruling or professional practice action can be to an individual's career, and to ensure that any penalty pursued under 6695A was significant.

We are sensitive to the demands that are placed on the IRS currently, and the resource limitations that may have motivated a shift to a less intensive review process. We also believe, in most instances, the guiding ethos of the IRS is to reach the right conclusion for taxpayers and the professionals who they rely upon when taking a tax position. Had the Service engaged with the valuation professional organization community at the outset, it is entirely possible that an alternative could have been (and still could be) developed that continues to balance the interests of each party.

In sum, we write not to simply critique the new review process, but to encourage the Service to work collaboratively with the valuation profession to find a way forward that maintains the rigor that existed under the previous review program while addressing resource constraints and other issues that led to the recent change. It is our belief that, together, we can find a solution that is fair and works for everyone.

We appreciate your attention to our concerns; if you have any questions or wish to discuss our views further, please contact John D. Russell, JD, Senior Director of Government Relations and Business Development for the American Society of Appraisers at 703-733-2103 or by email at jrussell@appraisers.org, or Bill Garber, Director of Government and External Relations for the Appraisal Institute at 202-298-5586 or by email at bgarber@appraisalinstitute.org.

Sincerely,
American Society of Appraisers
American Society of Farm Managers and Rural Appraisers
Appraisal Institute
Appraisers Association of America
Association of Machinery and Equipment Appraisers
Equipment Appraisers Association of North America
International Society of Appraisers
MBREA | The Association for Valuation Professionals
National Association of Certified Valuators and Analysts
National Association of Jewelry Appraisers
RICS

CC: Krishna Vallabhaneni, Treasury Department
Hannah Hawkins, Treasury Department
Terry Lemons, Internal Revenue Service