

## Late-Filed Form 5471 Penalty

Any US citizen or resident (corporate or non-corporate) whose shareholdings in certain foreign corporations exceed specified thresholds must file with the IRS an annual form 5471 disclosing certain information. In some cases, US officers and directors must also file. The IRS has indicated that after 2008 it will automatically impose penalties on any corporation that late-files the form. This signals a change from the current IRS policy, which generally imposes penalties only on a discretionary basis and at the audit level. The change is also another step toward the IRS's goal of increased review and scrutiny of outbound reporting by US residents and citizens of their interests in foreign entities, including corporations, partnerships, disregarded entities, and trusts. It is not clear whether the automatic penalty procedure also applies to non-corporate US residents, and whether the penalty applies not only to late-filed returns but also to timely filed returns that are incomplete or inaccurate. As a practical matter, the assessment of a penalty in the latter case may require an examining agent's input to determine incompleteness or inaccuracy.

Failure to timely file a form 5471 can result in significant potential penalties: (1) a \$10,000 penalty for each form 5471 that is filed after the due date (including extensions) or that does not contain complete and accurate information (Code section 6038(b)(1)); (2) a potential failure-to-file or failure-to-pay penalty equal to 5 percent of the tax required to be shown on the return for each month during which it is delinquent (up to 25 percent of the tax due) (section 6651(a)(1)); and (3) a potential 10 percent reduction in available foreign taxes otherwise creditable under sections 901, 902, and 960 (section 6038(c)). A taxpayer that establishes reasonable cause for its failure to file on time can generally avoid penalties.

The change to automatic penalties was set out in letters recently sent to taxpayers by the IRS Large and Mid-Size Business Division. Similar filing obligations and IRS forms are required for disclosure of information with respect to ownership interests and transfers of property by US persons to certain foreign partnerships (form 8865), foreign disregarded entities (form 8858), and foreign trusts (form 3520); it seems likely that the IRS will adopt a similarly strict approach if those forms are late-filed. In light of the IRS's increased scrutiny and aggressive approach, taxpayers are well advised to ensure that they comply with filing obligations for all these forms.

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