

Penalty Assessed for Failure to File Forms W-2 With SSA

This is actually a collection due process (CDP) case, but our focus is on the underlying issue of the assessment of penalties for not filing Forms W-2.

When we are teaching seminars and discussing the penalties for not filing Forms W-2 and 1099, we are often asked “Does IRS ever assess these?” This case shows the penalties do occasionally get assessed.

The penalty for failure to issue Forms W-2 in 2010 & 2011 was \$100 per failure under IRC Section 6721(a)(1). If the failure was due to intentional disregard the penalty increases to the greater of: 1) \$250 per failure, or 2) 10% of the aggregate amount of the items required to be reported correctly under IRC Section 6721(e)(2). (A few years ago the penalty was increased by a tax law change so the \$100 and \$250 amounts are now \$250 and \$500 respectively, plus indexing.)

Pentano Baptist Church is located in Tucson, Arizona. During 2010 and 2011 it had a number of part-time and full-time employees during the years 2010 & 2011. The case does not mention the exact number of Forms W-2 not filed, nor the total amount of wages on the Forms.

IRS determined that the church did not provide the Social Security Administration (SSA) with Forms W-2 for these workers. IRS notified the Church of its failure to file the Forms W-2. IRS did not receive a reply. In December 2013, IRS assessed the intentional disregard penalty for a total of \$5,942 for the missing Forms W-2 for calendar year 2010. In November 2014, IRS assessed the intentional disregard penalty for a total of \$6,354 for the missing Forms W-2 for the calendar year 2011. This comes to \$12,296 combined penalties for the two years. Since these amounts are not multiples of \$250, they must be based on the 10% test, which means the Church's Forms W-2 must have had aggregate amounts of roughly \$122,960.

This case did not detail how IRS found out about the missing Forms W-2. We assume it is because one or more employees filed a Form W-2 from the Church with their personal income tax return.

There is also another penalty of identical amounts for failing to provide the Forms to the recipients. This was not mentioned in this case, so it appears either the Forms had been provided to the recipients OR IRS did not assess that penalty. We've heard informally that IRS usually doesn't assess both penalties.

Regarding the collection due process case – the Church had received notices regarding the penalties and not replied to IRS. At Court the Church requested abatement of the penalties stating it had filed the forms, but Tax Court determined the Church did not exercise its opportunity to dispute the penalties

before the IRS Appeals Officer, therefore the Church was barred from challenging its liability for the penalties in Court. For more information, check out the case itself at www.ustaxcourt.gov by clicking on the OPINION SEARCH tab and entering "Pantano" in the Case Name box.

Pantano Baptist Church, TC Summary 2018-3

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