

AMERICAN PAYROLL ASSOCIATION

July 17, 2020

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Dear Mr. Desmond and Ms. Lough:

In a July 7 blog post by the National Taxpayer Advocate (NTA), Erin Collins describes a problem with the Internal Revenue Service's (IRS) use of online Frequently Asked Questions (FAQs) (see attached post, *Protecting the Rights of Taxpayers Who Rely on IRS "Frequently Asked Questions" (FAQs)*). The American Payroll Association (APA) supports the NTA's recommendations and requests that the IRS reconsider its position on the value of FAQs for purposes of compliance.

The Problem

When payroll professionals rely on the information found on the IRS's Internet site and that information is later changed, they may find themselves in a noncompliant situation due to no fault of their own.

When payroll professionals have questions regarding federal employment taxes, the first step taken is a review of available official IRS publications. However, if they cannot find the answer or the question is in regard to information in an IRS form, instruction, or publication, they will seek an answer through the IRS's Internet site before contacting the IRS, in particular the FAQs.

Payroll professionals prefer to rely upon an official IRS publication and will do so if an FAQ offers one. However, many answers are not found in an official publication. In addition, online information from the IRS has greater compliance value than speaking to an IRS employee who provides an answer. The online information can be more easily documented than an oral or email answer.

The Solution

While APA understands that an FAQ may be changed or removed because of new laws, court decisions, and IRS interpretations, reliance on the original information must protect payroll professionals and their employers from liability and penalties.

As recommended by the NTA, APA agrees that the IRS should continue to provide FAQs. We also agree that the IRS should change and remove FAQs when necessary and that agents should rely on the most current answers.

APA offers the following recommendations for your consideration:

1. Create an archive of FAQs changed or removed from the IRS's Internet site;
2. Provide a list of the FAQs changed or removed with a date of when the change was made and, if possible, include an explanation of the change;
3. Relieve employers of penalties when they prove reliance on a changed or removed FAQ; and
4. Provide employers with sufficient time to adjust processes and procedures to accommodate a change in requirements either identified on the changed/removed FAQ list or by an IRS agent.

About APA

APA is a nonprofit organization serving the interests of more than 20,000 payroll professionals across the United States, who are responsible for the administrative task of properly withholding and remitting federal and state taxes. APA's primary mission is to educate its members and the payroll industry about the best practices associated with paying America's workers while complying with applicable federal, state, and local laws and regulations. APA members are directly responsible for calculating wages and tax withholding for their employers.

Thank you for your consideration of APA's recommendations. To discuss this further, please contact Alice Jacobsohn at 202-669-4001 or ajacobsohn@americanpayroll.org.

Sincerely,

A handwritten signature in cursive script that reads "Alice P. Jacobsohn".

Alice P. Jacobsohn, Esq.
Senior Manager, Government Relations

Cc: APA IRS Issues Subcommittee Cochairs:
Rebecca Harshberger, CPP
Jon Schausten, CPP

NTA Blog: Protecting the Rights of Taxpayers Who Rely on IRS “Frequently Asked Questions” (FAQs)

July 7, 2020

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Consider this: In the course of preparing your federal income tax return, you are wondering whether a particular expense is deductible. You go to the IRS website and find a “Frequently Asked Question” (FAQ) that’s directly on point. Good news: The IRS says the expense is deductible. So you deduct it. The next year, the IRS audits your return. The examining agent informs you the IRS changed its position after you filed your return. The examining agent not only denies the deduction, but he imposes a 20 percent accuracy-related penalty as well. You go back to *IRS.gov* to try to find the FAQ you relied on, but it’s gone.

If the Taxpayer Bill of Rights is to be given meaning, this scenario violates “The Right to Informed” and “The Right to a Fair and Just Tax System.” It is neither fair nor reasonable for the government to impose a penalty against a taxpayer who follows information the government provides on its website.

As tax professionals know well, some forms of administrative guidance are more authoritative than others. Regulations are at the top of the hierarchy, because they go through a notice-and-comment process and are considered binding on the government and taxpayers alike. Other forms of guidance that are published in the [Internal Revenue Bulletin](#) (IRB) like revenue rulings, revenue procedures, and notices generally go through an extensive Treasury and IRS review process and are considered binding on the government (but not on taxpayers). According to a statement included in each [IRB](#), “Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents.” Below IRB guidance are IRS press releases, FAQs, and well-reasoned arguments, which may be found in Chief Counsel Advice and Private Letter Rulings that have been disclosed to the public.

Treasury Regulation § 1.6662-4 says that taxpayers may avoid the accuracy-related penalty for substantial understatements of income tax if there is “substantial authority” for a return position, and reliance on “Internal Revenue Service information or press releases” is considered to meet that standard. With some exceptions, FAQs are not published in the IRB, and the scope of the term “Internal Revenue Service information” is not defined in regulations. It may seem obvious that FAQs posted on the IRS website constitute “Internal Revenue Service information,” but the IRS has declined to concede that point. (See [Internal Revenue Manual 4.10.7.2.4](#) (Jan. 10, 2018) (“FAQs that appear on IRS.gov but that have not been published in the Bulletin are not legal authority and should not be used to sustain a position unless the items (e.g., FAQs) explicitly indicate otherwise or the IRS indicates otherwise.”))

There is a legitimate reason why the IRS uses FAQs and doesn’t want them to be accorded the same level of authority as published IRB guidance. The agency seeks to strike a balance between precision and timeliness. The published guidance process is thorough and time-consuming. Treasury and the IRS don’t have the bandwidth to address all legal issues that arise through the published guidance process, and that process is not well-suited to providing guidance quickly. FAQs fill the timeliness gap.

The Coronavirus relief provisions provide a good example of the useful role of FAQs. There is no end to the questions that have arisen under the Families First Coronavirus Response Act, the Coronavirus Aid, Relief, and Economic Security Act, and the IRS's [People First Initiative](#). It would not have been feasible for the IRS to address most of those questions through published guidance, at least not quickly. By our count, the IRS has posted nearly 500 COVID-19-related FAQs on its website, including 94 on the employee retention credit, 93 on the Families First Coronavirus Response Act (via a link to the Department of Labor website), 69 on Economic Impact Payments, 67 on COVID 19-related tax credits, and 40 on filing and payment deadlines.

Because FAQs aren't subject to thorough review, Treasury and the IRS may later decide some of them are wrong and change them. That is reasonable.

But what about taxpayers who followed an FAQ and now find that: (i) the IRS is taking the opposite position on audit; (ii) the IRS is imposing a penalty on the taxpayer for taking the position the FAQ had advised; and (iii) the taxpayer can't locate the original FAQ because the IRS has changed it and removed the initial FAQ from its website?

On some FAQ pages, the IRS provides this or a similar disclaimer: "This FAQ is not included in the Internal Revenue Bulletin, and therefore may not be relied upon as legal authority. This means that the information cannot be used to support a legal argument in a court case." On other FAQ pages, there is no such disclaimer. Either way, it is unreasonable to say taxpayers may not "rely" on FAQs. The sole purpose for posting FAQs and similar information on *IRS.gov* is to help taxpayers file accurate returns. Why should taxpayers even bother reading and following FAQs if they can't rely on them and if the IRS can change its position at any time and assess both tax and penalties? At a minimum, the IRS should treat FAQs as "Internal Revenue Service information" for purposes of determining whether a taxpayer had "substantial authority" for taking a return position. The fact that the disclaimer itself refers to FAQs as providing "information" is revealing. When the "Internal Revenue Service" posts "information" on its website, it is hard to see why the information should be characterized as anything other than "Internal Revenue Service information."

To protect the rights of taxpayers who follow FAQs, we make the following recommendations:

1. The IRS should continue to use FAQs to provide timely guidance to taxpayers where appropriate. We acknowledge that quick answers will sometimes be changed upon more thorough review. Therefore, it is reasonable for examining agents to retain the authority *in limited cases* to challenge taxpayer return positions if an FAQ has been changed, but when that situation arises, examining agents should be required to consider the previously issued FAQ.
2. For penalty relief purposes, the Treasury Department and the IRS should clarify that the information presented in FAQs constitutes "Internal Revenue Service information" under Treasury Regulation § 1.6662-4(d)(3)(iii). Further, the IRS should never assess a penalty against a taxpayer for taking a position consistent with an FAQ posted on the IRS website at the end of a taxpayer's taxable year or at the time of return filing unless the IRS has convincing evidence the taxpayer knew the FAQ had been changed.
3. The IRS should include the versions and dates of each FAQ on its website or create an archive of obsolete or modified FAQs, including applicable dates, so that taxpayers can locate an FAQ that was in effect at the time they filed their returns. Regardless of the level of deference a taxpayer's reliance on an FAQ ultimately receives, it is a basic requirement of government transparency that a taxpayer be able to locate and cite the FAQ that appeared on *IRS.gov* at the time the taxpayer filed a return. An FAQ should not just "disappear" if the IRS decides to change it or remove it as current guidance.

In sum, FAQs play a useful role in providing timely guidance to taxpayers and tax professionals, and this has been particularly true in connection with COVID-19 relief provisions. Because of the haste with which FAQs are sometimes posted, it is understandable that the IRS would want to ensure it can change FAQs without being permanently bound to the position it initially expressed. But taxpayers have the right to expect transparency and fair dealing from their government. If a taxpayer takes the time to visit a government website to locate information to help comply with tax obligations, the taxpayer should be rewarded for trying to do the right thing – not penalized.