CAWR & “Intentional Disregard”

# 26 CFR 301.6721-1 - Failure to file correct information returns.

**(f)(3)** Facts and circumstances considered. The facts and circumstances that are considered in determining whether a failure is due to intentional disregard include, but are not limited to -

(i) Whether the failure to file timely or the failure to include correct information is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely or repeatedly failing to include correct information;

(ii) Whether correction was promptly made upon discovery of the failure;

(iii) Whether the filer corrects a failure to file or a failure to include correct information within 30 days after the date of any written request from the Internal Revenue Service to file or to correct; and

(iv) Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely or to include correct information on an information return. [[1]](#footnote-1)

## Not intentional when prepared but messy desk:

In *American Vending Group, Inc. v. United States,* 103 A.F.T.R.2d (RIA) 20092181(D.Md.2009), the District Court concluded that the taxpayer did not act with intentional disregard and the failure to file was accidental where the Forms W–2 and W–3 were prepared but were likely misplaced on a messy desk and not filed.[[2]](#footnote-2)

## Taxpayer’s testimony pertinent when ascertaining willful disregard

*In re Flanary & Sons Trucking, Inc.,* 93 A.F.T.R.2d (RIA) 2004–1078 (Bankr.E.D.Tenn.2004), the bankruptcy court concluded that the taxpayer did not act with intentional disregard where an officer testified that he had mailed the Forms W–2 and W–3 and that if they had not been received by the Service, it was not because of intentional disregard on his part. The bankruptcy court noted that “[w]hile a taxpayer's testimony as to the mere mailing of the return may be insufficient as a matter of law to establish actual filing, such testimony is clearly pertinent when ascertaining whether the taxpayer knowingly or willfully disregarded its filing obligations.”

Mr. Hom testified convincingly that he believed that he filed the 2004 and 2006 Forms W–2 and W–3 because he had retained copies of the forms on his computer and he was in the habit of storing the copies on his computer after the forms were filed. In addition, there was no pattern of conduct that would indicate that petitioner consistently failed to file Forms W–2 and W–3 since the forms were unfiled only for 2004 and 2006. We conclude that while the evidence is insufficient to establish actual filing, the evidence does establish that petitioner did not intentionally disregard its filing obligation for Forms W–2 and W–3. Therefore, petitioner is not liable for the penalty for intentional disregard of the filing requirement under section 6721(e). [[3]](#footnote-3)

## Testimony of mailing considered as evidence of taxpayer not intentional disregard

There was no intentional disregard where a taxpayer filed some W-2 forms late, but took its filing obligations seriously, had a system to insure they were met, and was unaware the forms had not been filed. Although testimony that the forms were timely mailed could not be considered in the Sixth Circuit on the issue of whether the forms had been timely filed where the filer did not use certified or registered mail (see [T-10774](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0108086225&pubNum=114508&originatingDoc=I88e7f0e8582c11ddb9b7ead008c6b935&refType=DS&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite))), the testimony could be considered on the issue of whether there had been intentional disregard of filing requirements. Thus, the taxpayer was subject to the penalty for failure to file an information return, but not the penalty for the intentional disregard of its filing requirement.[[4]](#footnote-4)

To: Internal Revenue Service  
(use the address provided in your letter)

Re: Request for appeal hearing regarding penalty abatement

[Your Name]

[Your Address]  
[Your EIN]

[MMM DD, YYYY]

Subject: Requesting appeal of 854C findings

## Statements of Fact

1. Forms W-2 and W-3 were timely filed on date.
2. Documents have been provided each time requested, within 30 days.
3. Employees received their copies of W-2.

## Reliance on Law

Reg. §301.6721-1(f)(3) provides that the facts and circumstances to be considered include, but are not limited to:

1. Whether the failure to file timely is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely;
2. Whether correction was promptly made upon discovery of the failure;
3. Whether the filer corrects a failure to file with 30 days after the date of any written request from IRS to file; and
4. Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely.

## Reasonable Cause

#### No pattern of conduct

In reference to the above, the 2 years previous and 2 years since this period, show timely filed W-2’s & W-3.

#### Correction was promptly made

#### Refiled within 30 days of notification

Copies of the documents have been provided each time we were notified that they were needed. The last time was when RO Collins came to our location & we provided him the documents on site.

#### Cost of compliance

There is no significant cost in preparing & filing the W-2’s & W-3. In fact, the process is automated by our software, nullifying even a cost for man hours. The penalties in this case were over $70,000. Any rational person would comply with the reporting requirements and avoid the risk of this penalty.

## Lastly, all reasonable evidence shows that there was no intentional disregard.

In a summary opinion the Tax Court held that where an officer of a small corporation failed to file the corporation’s Forms W-2 with the Social Security Administration but did send the forms to his employees and believed he sent them to SSA, the corporation was liable for the failure to file penalty, but not the intentional disregard penalty.

We maintain that we did timely file the W-2’s & W-3 with SSA and our employees did get their W-2’s as evidenced by their filing of their Forms 1040.

We are requesting abatement of the penalty assessed on date in the amount of $ for failure to file W-2’s and W-3 with intentional disregard. As we have shown, the items were timely filed, and copies provided when asked. At the very least, our actions demonstrate that there is no intentional disregard.

I am willing to provide any clarifications that you may require. Please feel free to contact me at [XXX-XXX-XXX].

Sincerely,

[Your name]

1. 26 C.F.R. § 301.6721-1 [↑](#footnote-ref-1)
2. American Vending Group, Inc. v. U.S., 2009 WL 1654535 (D.Md.,2009) [↑](#footnote-ref-2)
3. John C. Hom & Associates, Inc. v. C.I.R., No. 1465-13S L, 2015 WL 4880975, at \*4 (T.C. Aug. 17, 2015) [↑](#footnote-ref-3)
4. [Flanary & Sons Trucking Inc in, (2004, Bktcy Ct TN) 93 AFTR 2d 2004-1078, 2004-1 USTC ¶50181](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004241970&pubNum=0000863&originatingDoc=I88e7f0e8582c11ddb9b7ead008c6b935&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) . [↑](#footnote-ref-4)