

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:02:JQueener
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to: Michael Simmons
Program Manager, Office of Servicewide Penalties

from: Ashton P. Trice
Chief, Branch 2
Procedure and Administration

subject: Implementing the Section 6676 Penalty

You have asked several questions regarding the section 6676 penalty to which this memorandum replies.

Issues:

1. Whether and when the I.R.C. § 6676 penalty is subject to deficiency procedures?

[REDACTED]

3. What computations of the section 6676 penalty must the IRS provide to the taxpayer?

Conclusions:

1. As a rule, penalties are assessable without deficiency procedures when they are not dependent upon the determination of a deficiency. When an excessive amount of a refund claim is attributable to a disallowed refundable credit, the excessive amount is part of a deficiency and the section 6676 penalty on the excessive amount is subject to deficiency procedures. In all cases where the excessive amount is not part of a deficiency, the section 6676 penalty is assessable without following deficiency procedures.

[REDACTED]



3. The procedural requirements for all penalties are set forth in I.R.C. § 6751(a), which requires the Service to inform the taxpayer of the name of the penalty, the section of the Code under which the penalty is imposed, and the computation of the penalty. The computation must include the excessive amount on which the penalty is calculated, the formula for the penalty (i.e. that it is 20 percent of the excessive amount), and the actual amount of the penalty for the particular taxpayer in question.

Discussion

Issue 1:

No court has yet considered whether the section 6676 is subject to deficiency procedures. Nonetheless, applicable statutory provisions and case law lead to the conclusion that deficiency procedures apply to the penalty when the excessive amount subject to penalty is attributable to a refundable credit.

Section 6671, which appears in Subchapter B of Chapter 68 along with section 6676, states that the penalties provided by that subchapter shall be paid upon notice and demand, and shall be assessed and collected in the same manner as taxes. It further states that, except as otherwise provided, any reference in the Code to “tax” imposed by the Code is deemed to refer to the penalties set forth in Subchapter B. Likewise, section 6665(a) states that the additions to tax, additional amounts, and penalties provided by Chapter 68 shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes, again with “tax” referring to the tax, additional amounts, and penalties provided by Chapter 68. Some taxes, such as income taxes, are subject to deficiency procedures. Other taxes, such as employment taxes, are not subject to deficiency procedures. Therefore, there is no one procedure to assess taxes that apply to all penalties.

In interpreting section 6671 and 6665, the Tax Court has applied a rule that, when a penalty is dependent upon the determination of a deficiency, then the penalty is subject to deficiency procedures. If a penalty is not dependent upon the determination of a deficiency, then the penalty is not subject to deficiency procedures. See Smith v. Commissioner, 133 T.C. 424, 429 (2009) (“We conclude that section 6707A penalties are not included in the statutory definition of ‘deficiency.’ See IRC §§ 6671, 6211. Section 6707A penalties do not depend upon a deficiency. They may be assessed even if there is an overpayment of tax. The IRS imposes the penalty for failure to disclose a reportable transaction. We note that this Court has never exercised jurisdiction over an assessable penalty that was not related to a deficiency, even absent Congress’ explicitly circumscribing our jurisdiction.”)

*7. Accordingly, the computation of the section 6676 must also include the excessive amount to which the penalty applies, the formula for the penalty, and the amount of the penalty. [REDACTED]

Please contact Jacqueline Queener of Procedure & Administration, Branch 2, at (202) 317-6844 if you have any questions regarding this memorandum.