



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

8.11.7

NOVEMBER 20, 2014

EFFECTIVE DATE

(11-20-2014)

PURPOSE

- (1) This transmits revised IRM 8.11.7, Penalties Worked in Appeals, Abusive Transaction Penalties.

BACKGROUND

- (1) This section contains general information about Abusive Transaction Penalties.

MATERIAL CHANGES

- (1) Made editorial changes throughout.
- (2) Moved the following IRM sections due to the restructuring of the APS IRM:
 - Moved IRM 8.11.7.1.3, *Carding in Procedures for Abusive Transaction Penalties* to IRM 8.20.5.34.8, *IRC 670X Cases - Abusive Transaction Penalties Case Carding*
 - Moved IRM 8.11.7.1.4, *Closing Procedures for Abusive Transaction Penalties* to IRM 8.20.7.13.1, *Abusive Transaction IRC 6707A Penalty Closing Procedures*.
 - Moved IRM 8.11.7.6.5, *Carding Procedures for IRC 6707A Penalty Cases* to IRM 8.20.5.34.9, *IRC 6707A Penalty Case Carding*.
 - Moved IRM 8.11.7.6.6, *Closing Procedures for IRC 6707A Penalty Cases* to IRM 8.20.7.13.1, *Abusive Transaction IRC 6707A Penalty Closing Procedures*.
- (3) Revised IRM 8.11.7.6 , *IRC 6707A Penalties Overview*, to Incorporate interim guidance AP-08-0714-0004, *Implementation of the Appeals Judicial Approach and Culture (AJAC) Project Examination and General Matters - Phase 2*.

EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 8.11.7 dated 10-29-2013 (effective MM-DD-YYYY). Incorporated Interim Guidance Memorandum AP-08-0714-0004, *Implementation of the Appeals Judicial Approach and Culture (AJAC) Project Examination and General Matters - Phase 2*, which was issued July 2, 2014, into this IRM.

AUDIENCE

Appeals

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8.11.7

Abusive Transaction Penalties

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8.11.7.1
(10-01-2012)
Introduction

- (1) This section provides procedural and processing guidance on abusive transaction penalties worked in Appeals.
- (2) Abusive transaction penalties are asserted to stop fraudulent, unscrupulous and/or incompetent tax return preparers, abusive transaction promoters, and material advisors who fail to furnish information or maintain lists with respect to reportable transactions.
- (3) The terms "post-assessed" and "pre-assessed" are used throughout this section. When a penalty is immediately assessable and is assessed prior to coming to Appeals, it is considered a post-assessed penalty subject to post-assessment appeal rights. When a penalty is not assessed prior to coming to Appeals, it is considered a pre-assessed penalty subject to pre-assessment appeal rights. Generally, the penalties in this section are post-assessed and are not subject to deficiency procedures.
- (4) For the purposes of this section, the acronyms used for Appeals Technical Employees are ATEs, Account and Processing Support is APS, and Appeals Centralized Database System is ACDS.

8.11.7.1.1
(10-01-2012)
Appeals Coordinated Issue (ACI)

- (1) The ATE should research the *Appeals Website* to determine if the issue is an Appeals coordinated issue and if there is a Subject Matter Expert designated to the issue.
- (2) If the penalty is a coordinated issue:
 - Add Feature Codes "AI" and "IT" when the coordinated issue is first identified. Either APS or ATE may update ACDS with the Feature Codes.
 - If the ATE has a penalty issue that is coordinated, the ATE must make a referral to Appeals Technical Guidance through their manager upon assignment or preliminary review using Form 13381, Appeals Technical Guidance Referral. For more information on coordinated issues, see IRM 8.2.1.6, *Preliminary Review of a Case-ATE*, and IRM 8.7.3 *Technical Guidance and International Programs*.
 - Appeals employees must secure review and concurrence from the Technical Specialist before finalizing any resolution of the issue, including the penalty computation.

8.11.7.1.2
(10-29-2013)
Consideration of the Abusive Transaction Penalties by Technical Employees

- (1) The ATE considers appeals of abusive transaction penalties in the same manner as appeals of any other proposed liability not subject to the deficiency procedures of subchapter B of Chapter 63 of the Internal Revenue Code.
- (2) There may be two case files: a penalty case file and a related income tax case file. Each case file will be a separate work unit and may come separately to Appeals.
- (3) The statute of limitations may be different on the income case and the penalty case for pre-assessed penalties.
- (4) The ATE should use the following forms to process Abusive Transaction Penalty Cases unless noted in a specific penalty section:
 - Form 5402 , *Appeals Transmittal and Case Memo*, is the transmittal document for all Abusive Transaction penalty cases when closing the case with abatement, adjustment or sustention.

- Form 866, *Agreement as to Final Determination of Tax Liability*, to secure an agreement where an Appeals settlement has been made.
- Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*, to process the request for assessment, adjustment or abatement. Always use the most current version of Form 8278.

Note: If penalties are to be assessed upon closing, use Form 8278 to input the assessment information. These penalty cases are identified with Transaction Code 240 and applicable Penalty Reference Code shown on the Form 8278 for the specific penalty. APS needs to be alerted on the Form 5402 to process the Form 8278 when the case is closed.

8.11.7.1.3
(11-20-2014)
Carding In Procedures for Abusive Transaction Penalties

- (1) Moved APS general guidelines for establishing these penalty cases on ACDS to IRM 8.20.5.34.8, *IRC 670X Cases - Abusive Transaction Penalties Case Carding*.

8.11.7.1.4
(11-20-2014)
Closing Procedures for Abusive Transaction Penalties

- (1) Moved APS general guidelines for closing these penalty cases on ACDS to IRM 8.20.7.13.1, *Abusive Transaction IRC 6707A Penalty Closing Procedures*.

8.11.7.2
(10-01-2012)
IRC 6700 - Penalty for Promoting Abusive Tax Shelters

- (1) For a discussion of the IRC 6700 Penalty, see IRM 20.1.6.13, *Penalty for Promoting Abusive Tax Shelters -IRC 6700*.

8.11.7.3
(10-29-2013)
IRC 6701- Penalties for Aiding and Abetting

- (1) For a discussion of the IRC 6701 penalty, see IRM 20.1.6.14, *Penalties for Aiding and Abetting-IRC 6701* and IRM 4.32.2.11.4, *IRC 6701- Penalties for Aiding and Abetting Understatement of Tax Liability*.

8.11.7.4
(10-01-2012)
Promoter Rights for IRC 6700 and IRC 6701

- (1) For discussion of Promoter Rights for IRC 6700 and IRC 6701, see IRM 4.32.2.11.7.1 , *Promoter Rights for IRC 6700 and IRC 6701*.

8.11.7.4.1
(10-01-2012)
Special Claim Procedures for Penalties Under IRC 6700 and IRC 6701

- (1) For a discussion, see IRM 4.32.2.11.7.1.1, *Special Claim Procedures for Penalties Under IRC 6700 and IRC 6701*.

8.11.7.4.2
(10-29-2013)
IRC 6703 Appeals Claim Procedures

- (1) Control cases on Appeals Centralized Database System (ACDS). Refer to IRM 8.20.3 for procedures for controlling cases on ACDS.
- (2) The TYPE code would be either IRC 6700 or IRC 6701 depending on the issue.

- (3) Consider an IRC 6703 claim for refund in the same manner as any other claim for refund.
 - Settle claims based on potential hazards of litigation.
 - Base decisions on the facts and circumstances of each case, subject to the approval of the Appeals Team Manager (ATM).
 - Coordinate decisions to abate IRC 6700 and IRC 6701 penalties with local Counsel prior to taking abatement action to insure related cases are handled consistently.
- (4) Issuance of a Claim Disallowance letter (Letter 1364) by certified mail is necessary when the claim is disallowed to begin the two-year period in which to file a refund suit under IRC 6532.
- (5) Send the following correspondence to the taxpayer:

IF	THEN
The determination is to abate the penalty	Send the taxpayer a letter acknowledging the abatement.
The determination is to sustain the penalty	Send the taxpayer a certified letter of Claim Disallowance (Letter 1364) by certified mail.

- (6) Alert APS by notating on the Form 5402 to process any abatement action on Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*, at the time of closing the case.
- (7) For additional information, see IRM 4.32.2.11.7.1.1, *Special Claim Procedures for Penalties Under IRC 6700 and IRC 6701*.

8.11.7.5
(10-01-2012)
**IRC 6707 - Failure to
Furnish Information
Regarding Reportable
Transactions**

- (1) For a discussion on IRC 6707, *Failure to furnish information regarding reportable transactions*, see IRM 20.1.6.16, *Failure to Furnish Information Regarding Reportable Transactions - IRC 6707*.
- (2) These cases are controlled on ACDS with TYPE Code = 6707.
- (3) Promoter penalties under IRC 6707 were designated as Appeals Coordinated Issues on July 23, 2003 (along with other preparer and promoter penalties). See IRM 8.11.7.1.1, *Appeals Coordinated Issue (ACI)*.
- (4) The ATE who is considering a case under IRC 6707 will follow general guidance for Abusive Transaction penalties. See IRM 8.11.7.1.2, *Consideration of the Abusive Transaction Penalties by Technical Employees*.
- (5) For more information, see IRM 4.32.2.11.5.2, *Computation of IRC 6707 Penalties* and IRM 20.1.6.16, *Failure to Furnish Information Regarding Reportable Transactions*.

8.11.7.5.1
(10-01-2012)
**Promoter Rights for IRC
6707 and IRC 6708
Assessments**

- (1) For a discussion, see IRM 4.32.2.11.7.2, *Promoter Rights for IRC 6707 and IRC 6708 Assessments*.

8.11.7.6
(11-20-2014)
**IRC 6707A Penalties
Overview**

- (1) IRC 6707A penalties are one of several “stand-alone” penalties (penalties that do not require an associated income tax examination) that are not be subject to deficiency procedures. IRC 6707A penalties are assessable penalties with no reasonable cause exceptions. The 6707A penalty is in addition to any other penalty that may be imposed and applies without regard to whether the transaction ultimately results in an underpayment.
- (2) Generally, IRC 6707A penalty cases originate in Compliance [Large Business and International (LB&I), Small Business Self Employed (SBSE) or Tax Exempt/Government Entities (TE/GE)]. See IRM 20.1.6.17.2, *Operating Division IRC 6707A Functional Procedures*.
- (3) Compliance Examiners are responsible for identifying income tax returns to which the IRC 6707A penalty applies. Examiners are responsible for submitting to Appeals both the related unagreed income tax return case and the unagreed IRC 6707A penalty case. If the income tax case is agreed, only the IRC 6707A penalty case is submitted to Appeals, but it must include a copy of the original income tax return and related documents.
- (4) Once the 30-day letter is issued, the taxpayer or an authorized representative can request that Appeals consider the proposed penalty by filing a protest with Compliance.
- (5) An IRC 6707A penalty and/or the underlying liability income tax case may not be submitted to Appeals if there are less than 365 days remaining on the statute of limitations. If Appeals returns a case to Examination with new evidence or new issues, there must be at least 210 days remaining on the statute of limitations when the case is received in Exam. Examination may not return the case to Appeals with less than 180 days remaining on the statute of limitations when received in Appeals.
- (6) If the statutory period for assessment of the IRC 6707A penalty is about to expire and the taxpayer will not agree to an extension, complete Form 8278 to have the penalty assessed and continue consideration of the case giving the taxpayer post-assessment appeal rights.
- (7) If both the underlying income tax liability issue and the IRC 6707A penalty are appealed, Compliance will mail both case files to the appropriate Field Appeals Office according to the zip code routing instructions posted on the Appeals web site. Compliance should send the 6707A case to Appeals when the protest is received and should not “hold” the case pending receipt of a protest in any income tax case. Similarly, if the income tax case is completed and a protest is received, Compliance should send that case to Appeals and should not “hold” the case pending completion of the 6707A case and receipt of the 6707A protest.
- (8) If the underlying income tax liability issue is agreed, Compliance will forward only the appealed IRC 6707A penalty case to the appropriate Field Appeals Office, according to the zip code routing instructions posted on the Appeals web site. Compliance will include the taxpayer’s protest and copies of the following documents in the penalty case file:
 - original filed income tax return
 - Power of Attorney, if any
 - agreement form
 - current transcripts of income tax return

- 30-day letter and IRC 6707A penalty computation
- information from flow-through entities (Form K-1 , etc...)

8.11.7.6.1
(10-01-2012)
**IRC 6707A - Failure to
Include Reportable
Transaction with Return**

- (1) For a discussion of the IRC 6707A, *Penalty for failure to include reportable transaction information with return*, see IRM 20.1.6.17, *Failure to Include Reportable Transaction with Return - IRC 6707A*.
- (2) IRC 6707A can have pre-assessment or post-assessment appeal rights. See IRM 4.32.4.6.2, *Sending the Case to Appeals - Pre-Assessment Consideration* and IRM 4.32.4.6.3, *Sending the Case to Appeals - Post-Assessment Consideration*.
- (3) This section addresses the procedures for IRC 6707A penalties considered by Appeals. These cases are controlled on ACDS with TYPE Code = 6707A.
- (4) IRC 6707A penalties were added by the American Jobs Creation Act of 2004 (AJCA), which provides a separate penalty applicable to taxpayers who fail to disclose a reportable transaction on their returns.
- (5) On September 27, 2010, the President signed HR 5297 (Small Business Jobs and Credit Act of 2010) [P.L. 111 - 240] into law, amending subsection (b) of IRC 6707A effective for assessments made **after December 31, 2006**.

8.11.7.6.2
(10-01-2012)
**IRC 6707A Penalty
Cases as Appeals
Coordinated Issues
(ACI)**

- (1) IRC 6707A penalty issues were designated as Appeals Coordinated Issues on February 23, 2006.
- (2) Add Feature Codes "AI" and "IT" when the coordinated issue is first identified. Either APS or the ATE may update ACDS with the Feature Codes.
- (3) Appeals employees having a work unit with an IRC 6707A penalty issue must make a referral to Appeals Technical Guidance through their manager upon assignment or preliminary review using Form 13381, *Appeals Technical Guidance Referral*. For more information on coordinated issues, see IRM 8.2.1.6, *Preliminary Review of a Case-ATE*, and IRM 8.7.3 *Technical Guidance and International Programs*.
- (4) Appeals employees must secure review and concurrence from the Technical Specialist before finalizing any resolution of the issue including the penalty computation.

8.11.7.6.3
(10-01-2012)
**Issue Consideration of
IRC 6707A Penalty
Cases**

- (1) Appeals Officers work appeals of IRC 6707A penalties in the same manner as appeals of any other proposed liability not subject to the deficiency procedures of subchapter B of Chapter 63 of the Internal Revenue Code.
- (2) The following references maybe helpful:
 - Small Business Jobs and Credit Act of 2010, P.L. 111-240
 - Treasury Regulation 1.6011-4
 - Discussion papers for various types of plans under IRC 6707A

Note: Consult with area Counsel for legal guidance, when necessary.

8.11.7.6.4
(10-01-2012)

**Forms for Processing
IRC 6707A Penalty
Cases**

- (1) ATEs will prepare and use the following forms to process IRC 6707A penalty cases:
 - Form 5402, Appeals Transmittal and Case Memo, is the transmittal document for all IRC 6707A penalty cases when closing the case with abatement, adjustment or sustention.
 - Form 866, Agreement as to Final Determination of Tax Liability, to secure an agreement where an Appeals settlement has been made.
 - Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*, to process the request for assessment, adjustment or abatement.

Note: If IRC 6707A penalties are to be assessed upon closing, use Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties* to input the assessment information. IRC 6707A penalty cases are identified with Transaction Code 240 and Penalty Reference Code 648. Both spouses will be individually assessed if both file a Married Filing Joint return. Appeals receives most IRC 6707A penalty cases before assessment.

8.11.7.6.5
(11-20-2014)

**Carding Procedures for
IRC 6707A Penalty
Cases**

- (1) Moved APS general guidelines for establishing IRC 6707A penalty cases on ACDS to IRM 8.20.5.34.9, *IRC 6707A Penalty Case Carding*.

8.11.7.6.6
(11-20-2014)

**Closing Procedures for
IRC 6707A Penalty
Cases**

- (1) Moved APS general guidelines for closing these penalty cases on ACDS to IRM 8.20.7.13.1, *Abusive Transaction IRC 6707A Penalty Closing Procedures*.

8.11.7.6.7
(10-01-2012)

ATE Closing Actions

- (1) If the penalty relates to a non-listed reportable transaction, the ATE forwards the copy of the penalty file to LB&I Pre-Filing Technical Guidance Joint Committee per IRM 4.32.4.9 for potential rescission request. See IRM 20.1.6.17.4, *Rescission Requests*.
- (2) If the penalty relates to a listed transaction and the taxpayer is a publicly traded company, Appeals should send a copy of the Form 8278 and attachments to the Office of Tax Shelter Analysis (OTSA). OTSA will review to ensure compliance with IRC 6707A(e) which provides for disclosures to the Securities and Exchange Commission (SEC) where a taxpayer has an SEC reporting requirement and has participated in a listed transaction.

8.11.7.6.8
(10-29-2013)

Rescission Requests

- (1) Unlike most other penalties, IRC 6707A allows the Commissioner to rescind the imposition of the penalty with respect to reportable non-listed transactions if it would "promote compliance with the tax laws and effective tax administration." The penalty cannot be rescinded with respect to a listed transaction. A decision to rescind must be accompanied by a record describing the facts, reasons for the decision and the amount rescinded.
- (2) While a taxpayer may challenge, in Appeals and in court, the determination that it engaged in a reportable transaction or that it failed to timely and adequately disclose its participation in such a transaction, it cannot seek such review of the Commissioner's refusal to rescind the penalty. The IRS is

required to submit an annual report to Congress summarizing the application of the IRC 6707A penalty and the rescission provision.

- a. The Deputy Commissioner for Services and Enforcement will be delegated the responsibility to determine for the Commissioner whether to rescind the penalty in part or in full.
- b. The taxpayer must seek rescission within 30 days of notice and demand or full payment of the penalty, whichever is earlier.
- c. Currently, a taxpayer may seek rescission only if:
 - the Service did not offer an opportunity to go to Appeals prior to assessment of the penalty;
 - Appeals has concluded its consideration of the issue; or
 - the taxpayer has, in writing, both waived its right to such consideration and conceded its liability for the penalty.
- d. Listed reportable transactions are not eligible for rescission consideration.

Note: Rev. Proc. 2007-21, 2007-9 I.R.B. 613, provides detailed information about how a taxpayer will seek rescission and factors that will support a rescission request. Rescission requests should be sent to the address listed at IRM 4.32.4.7.2(12).

8.11.7.7
(10-01-2012)
**IRC 6708 - Failure to
Maintain Lists of
Advisees with Respect
to Reportable
Transactions**

- (1) This penalty is imposed on any person required to maintain a list under IRC 6112(a), *Material advisors of reportable transactions must keep list of advisees, etc.*, who fails to make such list available. These cases are controlled on ACDS with TYPE Code = 6708.
- (2) See IRM 20.1.6.18, *Failure to Maintain Lists of Advisees with Respect to Reportable Transactions*.
- (3) A material advisor who fails to make the list available upon written request of the Service within 20 business days after the request will be subject to a penalty of \$10,000 for each day of such failure after the 20th business day.
- (4) The penalty does not apply for any day where the failure to comply is due to reasonable cause.

