

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2009-014

May 7, 2009

Litigation Position to Meet the
Burden of Production for Section
Subject: 6654 Addition to Tax

Effective until further
Cancel Date: notice

Purpose

This Notice describes procedures that should be followed in Tax Court cases in which the addition to the tax for failure to pay estimated tax under section 6654 has been determined and the respondent has the burden of production under section 7491(c).

Background

In general, in a court proceeding, the burden of proof is on the taxpayer. See T.C. Rule 142(a); I.R.C. § 7491(a). The burden of proof is the ultimate burden of persuasion placed on a party to establish facts by a certain standard, for example by a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. Pursuant to section 7491(a), if, in a court proceeding, a taxpayer introduces credible evidence regarding a factual issue, the burden of proof may shift to the respondent if the taxpayer complies with all the limitations set forth in section 7491(a)(2).

Pursuant to section 7491(c), the respondent has the burden of production in any court proceeding with respect to any penalty or addition to tax. In contrast with the burden of proof, the burden of production is the burden of producing sufficient evidence on an issue to prevail assuming that the other party produces no evidence. See Higbee v. Commissioner, 116 T.C. 438, 446 (2001). Generally, this means that, with respect to penalties or additions to tax, the Commissioner must make a prima facie case that imposition of the penalty or addition to tax is appropriate. Once the Commissioner meets his burden of production, the taxpayer must present evidence sufficient to "persuade a Court that the Commissioner's determination is incorrect." Higbee, 116 T.C. at 446-47. Questions about the burden of production on the section 6654 addition to tax have arisen when the taxpayer fails to place the penalty in dispute in the petition and when the taxpayer fails to prosecute properly the case.

Discussion

In general, if the taxpayer fails to dispute the section 6654 addition to the tax in the petition, then respondent will not be required to produce evidence that the penalty is appropriate, since the

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taxpayer is deemed to have conceded the penalty under T.C. Rule 34(b)(4). Funk v. Commissioner, 123 T.C. 213, 217-18 (2004); Swain v. Commissioner, 118 T.C. 358, 363-65 (2002); Robleto v. Commissioner, T.C. Memo. 2008-195; Jackson v. Commissioner, T.C. Memo. 2007-116. If the taxpayer disputes the penalty or addition to the tax, the respondent must introduce sufficient evidence to establish that the imposition of the penalty or addition to the tax is appropriate.

Section 6654 imposes an addition to tax on taxpayers who underpay their annual estimated tax liability. The estimated tax liability is generally (farmers and fishermen only have to make one payment) paid through four required installment payments, which in total equal the required annual payment. I.R.C. § 6654(c). The required annual payment is the lesser of: (1) 90 percent of the tax shown on an individual's return for the tax year in question (or, if no return is filed, 90 percent of the tax for such year), or (2) if an individual filed a return for the immediately preceding year, 100 percent of the tax shown on that return.¹ I.R.C. § 6654(d)(1)(B).

Sections 6654(e)(1) and (2) provide two mechanical exceptions to the section 6654 addition to tax.² First, the addition to tax is not applicable if the tax shown on the taxpayer's return for the year at issue (or, if no return is filed, the tax for that year), reduced by any allowable credit for wage withholding (I.R.C. § 31) is less than \$1,000.³ Second, the addition to tax is not applicable if the taxpayer's tax for the preceding year was zero. Mackey v. Commissioner, T.C. Memo. 2004-70.

In Wheeler v. Commissioner, 127 T.C. 200 (2006), the Tax Court held that the Commissioner failed to satisfy his burden of production with respect to section 6654 because he failed to demonstrate that the taxpayer was required to make estimated payments in 2003, the year in dispute. The court noted that respondent introduced sufficient evidence to show that the taxpayer was required to file a Federal income tax return for 2003, that the taxpayer failed to file a Federal income tax return for 2003, and that the taxpayer failed to make any estimated tax payments that year. Nevertheless, the Tax Court did not sustain the section 6654 addition to tax because "respondent did not introduce evidence sufficient to prove that petitioner had an obligation to make any estimated tax payments for 2003." Wheeler, 127 T.C. at 211 (emphasis in original). To show the taxpayer's obligation to make estimated tax payments, respondent, "at a minimum," must produce evidence to show whether the taxpayer filed a return for the preceding tax year and, if so, the amount of tax shown on that return. Id. at 212.

Similarly, in Mackey, the court refused to sustain the addition to tax under section 6654 for 1995, the first of the three years in dispute. The court found that respondent failed to produce evidence that the taxpayer's tax liability in 1994 was greater than zero. Because it was possible that the section 6654(e)(2) exception applied to 1995, the court concluded that respondent failed to satisfy the section 7491(c) burden of production on the addition to tax for that year.

To sustain the burden of production for section 6654 addition to tax, respondent must introduce

¹ If an individual's adjusted gross income shown on the previous year's return is greater than \$150,000, a higher percentage may apply. I.R.C. § 6654(d)(1)(C).

² I.R.C. § 6654(e)(3) also provides waiver of the addition to tax in "certain cases", including when the addition would be against equity and good conscience and when the addition would be imposed against newly retired or disabled individuals meeting certain criteria.

³ The threshold amount of \$1,000 is effective for taxable years beginning after December 31, 1997. The threshold amount for taxable years before that date is \$500. Taxpayer Relief Act of 1997, Pub. L. 105-34, § 1202, 111. Stat. 994.

evidence to show: (1) that the taxpayer failed to make required estimated tax payments for the year in which the section 6654 addition to tax is determined; (2) that the taxpayer filed a return for the preceding tax year; and (3) that the taxpayer's liability for the preceding year was greater than zero. I.R.C. § 6654(d)(1)(B); Wheeler, 127 T.C. at 210-12; Mackey, T.C. Memo. 2004-70.

The simplest way to meet this burden of production is to have the parties stipulate to exhibits and factual statements that support the required annual payment calculations defined in section 6654. When stipulation is not possible, certified transcripts and other documents to support the calculation of tax liability for the year in dispute and the preceding year in accordance with section 6654(d)(1) should establish the prima facie case required by section 7491(c) that the addition to tax is appropriate.

For taxpayers who filed a valid income tax return for the preceding tax year, but failed to file a valid tax return for the year at issue, the following information should establish the section 7491(c) prima facie case that the section 6654 addition to the tax is appropriate:

- Copies of the taxpayer's Federal income tax return for the preceding tax year;
- Certified transcripts for the tax year at issue and for the preceding tax year, reflecting the IRS's records regarding the taxpayer's account balances. These transcripts can also be used for establishing the amount of tax due if the field attorney has not secured copies of the taxpayer's Federal income tax returns. If a copy of the taxpayer's Federal income tax return for the preceding year has not been secured, either a TFRFP return transcript⁴ or a Transcript Delivery System readable format return transcript⁵ should be obtained. If neither of these transcripts can be obtained, a RTVUE return transcript⁶ should be obtained; and
- The statutory notice of deficiency for the tax year at issue, and any other documentation and evidence reflecting that the taxpayer has an outstanding tax liability.

For taxpayers who did not file a Federal income tax return for the preceding tax year, the following information should establish the section 7491(c) prima facie case that the section 6654 addition to the tax is appropriate:

- A Certificate of Lack of Record that shows that the IRS's records reflect that the taxpayer did not file a return for the preceding tax year. See I.R.C. § 6654(d)(1)(B) flush language (stating the 100 percent of tax shown on the preceding tax year "safe harbor" provision of I.R.C. § 6654(d)(1)(B)(ii) does not apply if the preceding tax year was not a taxable year of 12 months or the individual did not file a return for the preceding year);
- If the taxpayer did not file a return for the year at issue, the Substitute for Return package, the statutory notice of deficiency, and any other documentation and evidence reflecting that the taxpayer has an outstanding tax liability. For information regarding

⁴ The TFRFP return transcript is available for all tax years after 1997, but is only available for taxpayers who e-filed for the requested tax year.

⁵ The Transcript Delivery System readable format return transcript is available for the current tax year and the three previous tax years. This transcript is available for all taxpayers who filed for the requested tax year.

⁶ Although a RTVUE return transcript contains the information necessary for the Tax Court to make the calculations to determine the section 6654 penalty, it is a technical transcript that may be difficult for the court and petitioner to read. The TFRFP return transcript and the Transcript Delivery System readable format return transcript usually appear similar to a Form 1040 series tax return.

