

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

# Notice

CC-2011-004

November 1, 2010

Written Management Approval  
Required to Assess the Section  
6702 Penalty for Frivolous Tax

**Subject:** Submissions

Upon incorporation  
into the CCDM

**Cancel Date:**

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## Purpose

This Notice alerts Chief Counsel attorneys that the section 6702 penalty for frivolous tax submissions is subject to the preassessment written management approval provision of section 6751(b)(1).

## Background

Section 6702(a) imposes a \$5,000 penalty against any person who "files what purports to be a return" but which "does not contain information on which the substantial correctness of the self-assessment may be judged" or "contains information that on its face indicates that the self-assessment is substantially incorrect" based on a frivolous position or a desire to delay or impede the administration of federal tax laws. Section 6702(b) imposes a \$5,000 penalty against any person who submits a "specified frivolous submission" as defined in section 6702(b)(2).

Section 6751(b)(1) provides that no penalty "shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." As an exception to this general rule, section 6751(b)(2) provides that managers need not approve any addition to tax under sections 6651, 6654, or 6655, or any other penalty automatically calculated through electronic means.

Section 6702 penalties cannot be automatically calculated through electronic means. A Service employee must make an independent determination that the taxpayer took a frivolous position or desired to delay tax administration on a document that purported to be a return before the Service may assess the section 6702(a) penalty. See IRM 4.10.12.1.3; IRM 20.1.10.10.2.2. Similarly, a Service employee must make an independent determination that the taxpayer submitted a specified frivolous submission before the Service may assess the section 6702(b) penalty. See IRM 5.1.9.3.16; IRM 5.20.10; IRM 8.22.2.2.10.3. In this respect, section 6702 penalties are unlike penalties under sections 6651, 6654, and 6655, which are assessed automatically in the

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course of processing returns at Service campuses according to objective data, such as the date a return is received, the amounts reported on the return, and the tax paid.

Several courts have held that the section 6702 penalty does not require supervisory approval because the penalty satisfies the exception in section 6751(b)(2)(B) for penalties “automatically calculated through electronic means.” See Lindberg v. Commissioner, T.C. Memo. 2010-67; Deyo v. United States, No. 3-04-cv-2043, 2006 WL 2699024, at \*3 (D. Conn. Sept. 18, 2006), aff’d on other grounds, 296 Fed. Appx. 157, 158–60 (2d Cir. 2008); Brousseau v. United States, No. 3:04-1025, 2005 WL 2177009, at \*3 (M.D. Tenn. Sept. 8, 2005); Borchardt v. Commissioner, 338 F. Supp.2d 1040, 1044 (D. Minn. 2004); Cole v. United States, No. 1:02-CV-137, 2002 WL 31495841, at \*6 (W.D. Mich. Oct. 21, 2002).

These cases provide minimal analysis and conclude that no managerial approval is required because the section 6702 penalty is “an automatic penalty for a fixed amount.” See, e.g., Borchardt, 338 F.Supp.2d at 1044. The standard established for the section 6751(b)(2)(B) exception, however, is not that the penalty is “an automatic penalty for a fixed amount,” but that it is “automatically calculated through electronic means.” The section 6702 penalty is for a fixed amount, but it is not automatically calculated through electronic means and, therefore, does not come within the exception. It may only be assessed after written management approval.

### **Instructions**

Chief Counsel attorneys should not argue that section 6702 penalties for frivolous tax returns or specified frivolous submissions satisfy the exception to preassessment written management approval under section 6751(b)(2)(B).

Any questions regarding the preassessment procedures applicable to, or the assessment of, the section 6702 penalty should be directed to Procedure and Administration, Branch 1 at (202) 622-4910 or Branch 2 at (202) 622-4940.

                  /s/                    
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(Procedure & Administration)