Office of Chief Counsel Internal Revenue Service **memorandum**

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- date: October 27, 2014
 - 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?

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.



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. <u>See Smith v.</u> <u>Commissioner</u>, 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.")

When a disallowed refund on an original return is based on a refundable credit, that portion of the refundable credit will not be part of an underpayment. <u>Rand v.</u> <u>Commissioner</u>, 141 T.C. 376 (2013). However, the excess amount of the refund claimed will be part of a deficiency. <u>Id</u>.; see also I.R.C. § 6211(b)(4). The section 6676 penalty on this amount is also subject to deficiency procedures because the penalty is dependent upon the existence of a deficiency. If there were no deficiency arising from the disallowed refundable credit, there would be no excessive amount to which a section 6676 could apply. Therefore, in the case of its application to a refundable credit (other than EIC), a section 6676 penalty is subject to deficiency procedures because the penalty is dependent upon the existence of an underlying deficiency.

In all other cases in which the section 6676 penalty is applicable, the penalty is not dependent on the existence of a deficiency. Accordingly, the penalty is assessable without deficiency procedures when an excessive amount of a claim for credit or refund arises from an item or transaction other than an erroneous refundable credit.



Issue 3:

I.R.C. § 6751(a) sets forth the procedural requirements the Service must satisfy when it sends a notice of penalty. Specifically, the Service must inform the taxpayer of "the name of the penalty, the section of the [Code] under which the penalty is imposed and a computation of the penalty". Generally, this includes the base number from which the penalty is calculated, the formula for the penalty, and the amount of the penalty. That amount of the detail is currently supplied in statutory notices of deficiency with respect to additions to tax and penalties determined on the notice. The Tax Court has concluded that the information included in the statutory notice of deficiency regarding the computations of the I.R.C. §§ 6651 and 6654 additions to tax "satisfies the requirements of section 6751(a)." <u>Oropeza v. Commissioner</u>, T.C. Memo. 2008-94, at

¹ Section 6676(a) provides that the penalty cannot apply to a claim for a refund or credit relating to the earned income credit under section 32.

*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.

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