

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Industry Director - LMSB (Financial Services)

from: Area Counsel, LMSB
(Financial Services)

subject: **Allocation of the Section 6707 Penalty
Among Co-promoters**

We have been asked how the promoter penalty under section 6707 is to be collected in the (fairly typical) case of multiple promoters of the same transaction. As detailed below, the section 6707 penalty is a joint and several liability, which means that all co-promoters are each liable for 100% of the penalty, but that the Service ultimately collects only the full amount once.^{1/}

Discussion

Section 6707(a) of the Internal Revenue Code provides that if a person who is required to register a tax shelter under I.R.C. § 6111(a) fails to register the tax shelter on or before the date described in I.R.C. § 6111(a)(1), the person shall pay a penalty with respect to the registration equal to the greater of 1 percent of the aggregate amount invested in the tax shelter or \$500. See I.R.C. § 6707(a)(2). Temp. Treas. Reg. § 301.6707-1T Q&A(9) provides that where the principal organizer and other participants fail to register a tax shelter before the day on which the first offering for sale of an interest in the tax shelter occurs, the principal organizer and the other participants are jointly and severally liable for the penalty.

Joint and several liability is a legal concept in which a number of individuals are liable for 100% of a given tax or penalty. The Service, however, may not collect more than 100% of joint and several liability from all of the individuals combined.

^{1/} The penalty under section 6708 is not a joint and several liability and this advice does not apply to section 6708.

In the prototypical situation, there are generally at least two, and often more, co-promoters for any given transaction. In such case, the Service could pursue one, all or any combination of co-promoters to collect the single § 6707 penalty. For illustrative purposes, assume investment boutique firm A and accounting firm B promoted a transaction for which the § 6707 penalty is \$100. Because A and B are jointly and severally liable, A and B are each liable for the entire \$100. The total penalty is, however, only \$100 and the Service is entitled to receive only \$100, not \$200 (i.e., not \$100 from each promoter).

Although I.R.C. § 6707 does not expressly provide for joint and several liability, Temp. Treas. Reg. § 301.6707-1T construes the statute in this manner. There is no question that the Service must follow the regulation, because the Service is bound by its own valid regulations. Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110 (1939).

There is no formal guidance on precisely how the joint and several liabilities under I.R.C. § 6707 are to be administered or allocated among co-promoters. The question is, however, analogous to the joint and several liability imposed under I.R.C. § 6672 for failure to pay taxes withheld (trust fund taxes). As with the liability for trust fund taxes governed by section 6672, the Service may recover the I.R.C. § 6707 penalty from one, all or any combination of joint promoters subject only to the constraint that the Service may not collect more than the entire penalty. Thus, we look to the cases decided under section 6672 for guidance in determining the rights and responsibilities of the parties in cases of joint and several liability for the section 6707 promoter penalty.

More than one person may be "responsible persons" under I.R.C. § 6672 and every responsible person is held liable for the total amount of trust fund taxes not paid. The fact that more than one person is a "responsible person" under section 6672 does not reduce the liability of any of the other responsible persons, or allow any particular responsible person to avoid collection on the ground that the government should first collect the tax from someone else. USLife Title Ins. Co. of Dallas v. United States, 784 F.2d 1238, 1243 (5th Cir. 1986). Although each responsible person is liable for the entire amount of the unpaid withholding tax, the Service does not recover more than 100 percent of the underlying tax regardless of the number of responsible persons involved. The Service has stated its policy to collect only 100% of the amount due from any group of jointly liable persons. McCray v. United States, 910 F.2d 1289, 1290 (5th Cir. 1990); see

also IRM 4.23.9.13(3). The Service's settlement with one or more "responsible persons" does not foreclose the Service from pursuing another "responsible person" for the full amount due. The Service must, however, ultimately administratively abate the liability to the extent the total amount collected from all of the "responsible persons" exceeds the amount of trust fund taxes and interest due. Id.

Similar to section 6672 penalty cases, the Service could assert the full amount of the section 6707 penalty against a given promoter even if the Service had settled with a co-promoter in the same transaction. This is so because "no right of contribution between responsible persons exists under the statute, expressly or by implication, and that it is not appropriate for the Court to develop federal common law of contribution in this area." Rice v. Pearce, 574 F. Supp. 23, 26 (S.D. Iowa 1986); Sinder v. United States, 655 F.2d 729 (6th Cir. 1981).² See generally Estate of Ravetti v. United States, 37 F.3d 1393 (9th Cir. 1994); Garvey v. Commissioner, T.C. Memo 1993-354.

The Service appears to have no set procedure for abating or equalizing payments among joint and severally liable responsible persons, which seems to be accomplished on an ad hoc, or case by case basis. It is clear, however, that no abatement is made, or required, until the "expiration of the statutory period for commencement of a refund suit or, if a refund suit is filed, upon final adjudication of the action." Gens v. United States, 615 F.2d 1335, 1340 (Ct. Cl. 1982) (citation omitted); see also USLife, supra, 784 F.2d at 1243-44.

Thus, the Service could settle with one of several co-promoters and still seek the full amount of the section 6707 penalty from each and every co-promoter, subject to the condition that the Service may collect the full amount of the penalty only once.

²/For penalties assessed after July 30, 1996, each responsible person has a right of contribution. See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 903(a), 110 Stat. 1460 (1996). A claim for contribution, however, must be made separate from an action for collection of such penalty brought by the United States or a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty. See I.R.C. § 6672(d). Section 6707 and the regulations promulgated thereunder contain no such provision.