

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Associate Area Counsel
SB/SE:5 (Las Vegas)

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subject: **IRC SECTION 6673(a)(1) and CDP RIGHTS**

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Must the Internal Revenue Service ("Service") provide an I.R.C. § 6330 notice and right to a hearing before serving a levy to collect an I.R.C. § 6673(a)(1) penalty?

CONCLUSION

Sections 6330(a)(1) and (3) require that notice be given to a taxpayer when the Service intends to levy to collect the amount of the unpaid tax. Because the section 6673(a)(1) penalty is collected in the same manner as a tax, notice and a right to a hearing must be given to the taxpayer.

BACKGROUND

When the Tax Court determines that a taxpayer is making frivolous arguments, it has the discretion to impose section 6673(a)(1) penalties against a taxpayer. See Pierson v. Commissioner, 115 T.C. 576 (2000); Craig v. Commissioner, 119 T.C. 252 (2002). Section 6673(a)(1) states that whenever it appears to the Tax Court that:

(1) proceedings have been instituted or maintained by the taxpayer primarily for delay, (2) the taxpayer's position in such proceedings is frivolous or groundless, or (3) the taxpayer unreasonably failed to pursue

available administrative remedies, the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of \$25,000.

The taxpayer can appeal the imposition of a section 6673(a)(1) penalty to the appropriate federal appellate court.

After the Tax Court case becomes final, the Service assesses the penalty. If a taxpayer fails to pay the penalty after being issued notice and demand, the liability is assigned to Compliance for collection. However, Compliance has been holding cases involving section 6673(a)(1) penalties as they are unsure whether taxpayers receive section 6330 rights for these liabilities.

LAW AND ANALYSIS

Section 6671(a) states that penalties and liabilities provided for by subchapter B are to be assessed and collected in the same manner as taxes. A section 6673(a)(1) penalty is a penalty provided for by subchapter B. Thus, section 6673(a)(1) penalties are assessed and collected in the same manner as a tax.

Section 6330(a)(1) states that no levy may be made on any person unless such person has been notified in writing of their right to a hearing before such levy is made.¹ Section 6330(3)(A) states that the required notice must include the amount of the unpaid tax. When read together, these subsections provide that the Service must give notice to the taxpayer in order to levy to collect an unpaid tax. Because the section 6673(a)(1) penalty is assessed and collected as a tax, notice must be given to the taxpayer when the Service intends to levy to collect this penalty.

Section 6330(a)(1) states, in pertinent part, that the Service is required to notify a person of the right to a hearing only once for the taxable period to which the unpaid tax relates. A penalty imposed under section 6673(a) does not relate to a taxable period, but instead is imposed for the act of making frivolous arguments. You accordingly suggest that the requirements of section 6330 only apply to taxes that relate to a “taxable period.” We conclude that that in using the phrase “taxable period,” Congress did not intend to limit the type of taxes that are subject to the section 6330 requirements. Congress intended that taxpayers have rights under section 6330 with respect to collection of assessed taxes generally, and there is no suggestion in the language of the statute or the legislative history that it was attempting to carve out a

¹ Section 6330(a)(1) states in full:

(1) In General—No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax in paragraph (3)(A) relates.

category of nonperiod-based taxes.² The controlling language in determining whether section 6330 applies is the term “unpaid tax.”

You argue that because a section 6673(a)(1) penalty is not included in the list of additional assessments that would require a second notice according to Treas. Reg. § 301.6330-1(d)(2) Q&A-D1, section 6330 rights should not be given for the collection of 6673(a)(1) penalties. Section 301.6330-1(d)(2) Q&A-D1 states that a taxpayer is entitled to more than one pre-levy hearing under section 6330 for the same tax period where the tax involved is a different type of tax or where the same type of tax is involved, but the amount of the tax has changed as a result of an additional assessment of tax for that period or an additional accuracy related or filing-delinquency penalty has been assessed. This provision further states that a taxpayer is not entitled to an additional hearing under section 6330 if the additional assessments represent accruals of interest or penalties. We conclude that this regulation is not applicable because the section 6673(a)(1) penalty is not directly related to an underlying tax liability or return but is instead imposed for conduct in the Tax Court proceeding. Thus, the section 6673(a)(1) penalty is not for the same tax period within the meaning of section 301.6330-1(d)(2) Q&A-D1.

You also argue that Congress originally intended that section 6673(a)(1) act as a reimbursement to the Government for costs incurred in responding to frivolous arguments, and so it is more in the nature of a damages provision rather than a penalty provision. However, you concede that it is now undisputed that section 6673(a)(1) is a penalty provision for which no financial damages need be proven by the Government. Bagby v. Commissioner, 102 T.C. 596 (1994). We further note that it could undermine the Service’s authority to assess and collect these penalties if we argued that section 6671(a) was not controlling for section 6330 purposes. We believe that the safest course from a tax administration perspective is to treat the section 6673(a)(1) penalties like other taxes for all purposes: assessment, collection, and section 6330 rights.

You also argue that a separate hearing under section 6330 for the section 6673(a)(1) penalty is not warranted because the taxpayer already had the opportunity to protest the imposition of the penalty in the Tax Court case and had the opportunity to appeal the penalty award. We concede that the taxpayer cannot challenge the penalty on the merits in the section 6330 hearing. The taxpayer’s prior opportunity to contest the penalty precludes the taxpayer from challenging the merits of the penalty under section 6330(c)(2)(b) and also pursuant to the doctrine of res judicata. However, the taxpayer can still raise some limited issues, including eligibility for an installment agreement and whether the proposed collection action balances the need for efficient collection of taxes against the taxpayer’s concern that any collection action be no more intrusive than necessary. So a section 6330 hearing would still serve a limited function.

² We note in this regard that a penalty for promoting abusive tax shelters under section 6700 is another penalty imposed by the Internal Revenue Code that is not connected to a taxable period. See Planned Investments, Inc. v. United States, 881 F.2d 340 (6th Cir. 1989).

We, thus, conclude that since the section 6673(a)(1) penalty is to be treated as a tax, a notice offering a right to a hearing under section 6330 must be sent to the taxpayer.

Your office has made a separate request for advice as to whether the section 6673(a)(1) penalty can be compromised in a section 6330 proceeding. We are still evaluating this issue and will address it in a separate memorandum to be issued to your office in the near future.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call _____ if you have any further questions.