

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

Number: **200512016**

Release Date: 3/25/2005

CC:PA:APJP:B02:DJTaylor

PRENO-158911-04

UILC: 6701.00-00

date: February 08, 2005

to: Constantina Crusade
Appraiser
(Large & Mid-Size Business)
Field Specialists, Engineering, Territory 1870 - New Haven, Team 1876 - King of Prussia

Joseph A. Roussos
General Engineer
(Large & Mid Size Business)
Field Specialists, Engineering, Territory 1840 - Ft Lauderdale, Team 1846 - Baileys Crossroads

from: Blaise G. Dusenberry
Special Counsel, Administrative Provisions & Judicial Practice
(Procedure & Administration)

subject: SECTION 6701 APPRAISERS

This memorandum responds to your request for information concerning the imposition of a penalty under section 6701 of the Internal Revenue Code against appraisers. Specifically, you requested general information regarding: the elements of a section 6701 penalty; the administrative procedures for identifying and asserting a section 6701 penalty; the Service's authority to impose an injunction under section 7408; the procedures challenging a section 6701 penalty; the availability of Appeals review of a section 6701 penalty; and the application of Circular 230 to appraisers with respect to section 6701 penalties. Our responses are set forth below.

Background

Your office is developing guidance to assist Internal Revenue Agents in determining whether to impose a section 6701 penalty on appraisers whose appraisals result in taxpayers' understatements of income tax. For purposes of your guidance, you define an "appraiser" as anyone who values (or purports to value) tangible or intangible property of any kind.

To assist in developing this guidance, you have requested information regarding the operation of section 6701. Specifically, you seek guidance concerning the criteria that Service personnel should consider to determine whether to assess a section 6701 penalty, the administrative procedures to impose a section 6701 penalty, and the rights of a person who has been the subject of a section 6701 penalty assessment.

1. Discussion

A. Elements of Section 6701

Section 6701 imposes a penalty on "any person who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document, who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and who knows that such portion (if so used) would result in an understatement of the liability for tax of another person." The penalty applies with respect "to each such document," and is in the amount of \$10,000, if the document relates to the tax liability of a corporation, and \$1,000 if the document relates to the tax liability of any other person. § 6701(b). The Service may assess only one penalty under section 6701 per document for a taxpayer for a taxable period or event.

There are no temporary, proposed, or final regulations issued for section 6701.

The first element of section 6701 requires assistance in return or document preparation. Although most cases arising under section 6701 involve penalties imposed on income return preparers, Congress intended the penalty to apply in numerous situations. The Senate Finance Committee Report ("Senate Report") refers to a similar criminal penalty that has been interpreted to apply to a variety of cases. S. Rep. No. 97-494 at 275 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1021. Specifically the Senate Report refers to United States v. Siegel, 472 F. Supp. 440, 443 (N.D. Ill. 1979), cert. denied, 445 U.S. 989 (1982), in which the defendants, who were neither taxpayers nor tax preparers, were charged with supplying documents to a taxpayer that they knew contained materially false matters. In Siegel, the defendants were floor brokers in a foreign exchange. 472 F. Supp. at 444. The court held that the defendants' claim that the case was unique because neither the taxpayer nor the tax preparer had been charged or knew of the false statements was simply a distinction without difference. Id.

The legislative history of the Deficit Reduction Act of 1984, P.L. 98-369, indicates that Congress specifically authorized the Service to assess section 6701 penalties for appraisers that engage in conduct that violates section 6701. See House Report No. 98-432(II) (Mar. 5, 1984). The Service has issued guidance indicating that an appraiser may be assessed a penalty under section 6701. Treas. Reg. section 1.170A-13(c)(5)(D) provides that an appraiser's "intentionally false or fraudulent overstatement of the value of the property described in the qualified appraisal or appraisal summary may subject the appraiser to a civil penalty under section 6701 for aiding and abetting an understatement of tax liability."

The second element of section 6701 requires that a person know, or have reason to believe, that the document will be used in any material matter. Although "material" has not been defined under section 6701, it has been defined under a comparable criminal penalty, section 7206. See Mattingly v. United States, 924 F.2d 785, 788 (8th Cir. 1991) (observing that "[i]n connection with 6701, it appears that Congress specifically intended to create a provision to penalize aiding and abetting conduct similar to that conduct punished under 7206"). In general, any "false statements relating to gross income, irrespective of the amount constitute a material misstatement in violation of Sec. 7206(1)." United States v. DeGroot, 122 F.R.D. 131, 143 (W.D.N.Y. 1988). As a result, any failure to report income is material. See United States v. Young, 804 F.2d 116, 119 (8th Cir. 1986) (finding that omission of any information to complete gross income is material); see also United States v. Holland, 880 F.2d 1091, 1096 (9th Cir. 1989).

The third element of section 6701 requires that a person "know" that, if so used, the document will result in an understatement of the tax liability of another person. Section 6701 applies regardless of whether the taxpayer whose tax is understated has knowledge of, or consents to, the actions which resulted in the understatement. Section 6701(d). In Sansom v. United States, 703 F. Supp. 1505 (N.D. Fla. 1988), motion denied, 707 F. Supp. 1296 (N.D. Fla. 1989), the Service assessed a section 6701 penalty against an accountant who was an income tax return preparer. The issue was whether the preparer knew that his action would result in an understatement of tax liability for his client. The court noted that to impose a penalty under section 6701, the burden is on the government to prove that the preparer had knowledge that his conduct would result in an understatement of tax liability. Id. at 1508. The court concluded that actual knowledge is necessary to prove a violation under section 6701. Id. at 1510. See also Mattingly v. United States, 924 F.2d 785 (8th Cir. 1991) ("[w]e believe actual knowledge, as opposed to the less stringent willful blindness, is required.").

To the extent that courts have examined the issue of the level of proof with respect the section 6701 penalty, courts are divided. Courts in the First Circuit, Second Circuit, Eighth Circuit, and Ninth Circuit have held that the Service must prove that the taxpayer is liable for the section 6701 penalty with a preponderance of evidence. See Rodrigues v. United States, 797 F. Supp. 122 (D.R.I. 1992); Barr v. United States, 67 F.3d 469 (2nd Cir. 1995); Mattingly v. United States, 924 F.2d 785 (8th Cir. 1991); In re Mitchell,

109 B.R. 434 (Bankr. W.D. Wash. 1989) rev'd on other grounds, 977 F.2d 1318 (9th Cir. 1992); United States v. Schiff, 269 F. Supp. 2d 1262 (D. Nev. 2003). One court in the Eleventh Circuit has concluded that the Service must present clear and convincing proof. See Warner v. United States, 700 F.Supp. 532 (S.D. Fla. 1988). Courts from the DC Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, and Tenth Circuit have not addressed this issue.

To summarize, the Service would be required to show by a preponderance of the evidence, that an appraiser helped prepare or present a document that led to an understatement of tax by a taxpayer, for an appraiser to be held liable for a section 6701 penalty. The Service would also need to demonstrate that the appraiser had actual knowledge that the taxpayer would rely on the document that would lead to an understatement. Particular cases should be considered individually until the application of section 6701 in this context is more established; agents should consult local Counsel offices for assistance.

B. Proof of the Actual Knowledge Requirement of Section 6701

The actual knowledge element of section 6701 requires that the person against whom the penalty is imposed "assist in the creation of a tax document, know the use of the tax document, and know such document will understate another's tax liability." Mattingly, supra, at 791. As the existence of actual knowledge is a question of fact, and no bright line rule defines this requirement, it is helpful to review cases in which courts analyzed the actual knowledge requirement. Set out below is a summary of relevant cases in which the actual knowledge requirement of section 6701 was at issue:

- United States v. Fisher, 2004 WL 489822 (N.D. Tex. 2004): The Court ruled that, for purposes of the section 6701 penalty, when the promoter of an abusive tax scheme assures customers that the purported tax benefits are available despite consistent rejection of similar schemes by the courts, the promoter has actual knowledge that his statements will result in an understatement.
- Gard v. United States, 1992 WL 113456 (N.D. Ga. 1992): The Service imposed section 6701 penalties on a lawyer based on allegations that the lawyer played a part in the development of an "abusive" tax shelter program. The opinion does not provide the specific facts of the case. However, the opinion notes that the government essentially argued that the lawyer should have known better. The court concluded the following: "At best, [the government's] evidence suggests that [the lawyer] should have known that the document at issue would result in an understatement of the liability for the tax of another. However...what [the lawyer] should have known is not the appropriate test under section 6701. [The lawyer] must possess actual knowledge that an understatement of the tax liability of another will result before the statutory penalty applies to him."
- Rodrigues v. United States, 797 F. Supp. 122 (D.R.I. 1992): A certified public accountant ("CPA") sought refund of section 6701 penalty assessed by the

Service for allegedly preparing tax returns which knowingly understated tax liability. The Service argued that Pre-filing Notification Letters ("PFN letters") were sent to each of the CPA's client involved stating that losses generated by particular tax shelters would not be allowable deductions. The Service further asserted that the CPA claimed the deductions even though his clients had shown him the PFN letter. The court ruled that the Service did not clearly establish that the CPA had a copy of the PFN letters sent to the two clients whose taxes were prepared in 1984. The court noted that even assuming that the Service established the CPA's knowledge of the PFN letter, the Service still did not show that CPA knew that the deductions were not allowed because language of the PFN letters stated that the deductions "may be disallowed."

- Mattingly v. United States, 924 F.2d 785 (8th Cir. 1991): A tax preparer sold master recording audiotape and videotape tax shelters to his clients. In a typical transaction, an investor leased a tape or tapes from a corporate or partnership lessor, and the lessor "passed through" investment tax credit pursuant to a section 38 election, usually in an amount greater than the total lease payments. The Service determined the tapes in question were greatly overvalued, and imposed section 6701 penalties on the tax preparer. The court held that the trial court's "willful blindness" jury instruction regarding the section 6701 penalty was at worst harmless error. The court concluded that, while the jury instructions were imperfect in that they could more clearly emphasize the importance of finding specific intent, the instructions do not authorize the substitution of willful blindness for the element of knowledge. Furthermore, the court found that even if the jury was mistaken about the role of willful blindness, the record indicates that the jury was presented with sufficient evidence of actual knowledge to find the tax preparer liable, thus making any error harmless. This evidence includes: (1) the numerous written, telephonic, and in-person contacts between the preparer and the Service which the preparer should have alerted and informed of problems with the tape valuations and tax credits in the year prior to which the preparer was held liable for the penalty (e.g., the Service communicating to the preparer that tapes were not correctly valued); and (2) no probative evidence of the tax preparer to have met business and profit motive requirements.
- In re Mitchell, 109 B.R. 434 (Bankr. W.D. Wash. 1989) rev'd on other grounds, 977 F.2d 1318 (9th Cir. 1992): The court found that a tax preparer had actual knowledge that two hydroelectric generating plants had not been "placed in service" so as to qualify for tax credit claimed in tax returns. The evidence that the tax preparer knew that the plants were either incomplete or produced insufficient energy to "power a hairdryer" met the government's burden.
- Sansom v. United States, 703 F.Supp. 1505 (N.D. Fla.1988): The court granted a tax preparer's motion for attorney's fees because the Service brought action against the tax preparer and had no evidence that the tax preparer had the knowledge required by section 6701. The Service contended that the tax

preparer failed to investigate the results of the audit for the returns of prior years of the preparer's clients to determine whether the clients were eligible for income averaging for the year at issue. The court held that the Service's argument failed to meet the requirement of showing that tax preparer knew that his method of preparing the return would result in an underpayment for his clients.

2. Administrative Procedures for Identification and Assertion of a Section 6701 Penalty

You inquired about the administrative procedures for asserting 6701 penalties. The Internal Revenue Manual provides guidance regarding the identification and assertion of a section 6701 penalty. As the government has the burden of proof with respect to the section 6701 penalty, it can be assessed only by employees who have the requisite knowledge of the facts giving rise to the penalty. IRM 20.1.6.6.2. Therefore, the section 6701 penalty normally will be assessed by revenue agents and office auditors at a Service area office as a result of an examination of a tax return or document or in connection with a tax shelter registration examination. Id.

IRM 20.1.6.6.3 provides that persons subject to penalty under section 6701 will usually be identified by examiners through the examination process or by service center correspondence examinations in which a pattern (or suspected pattern) was evident. If a penalty under section 6701 might be appropriate, the examiner should provide relevant information to the Area 6701/7408 Coordinator to determine if a project is warranted.

When the Area 6701/7408 Coordinator reviews a tax plan or arrangement which if used by a taxpayer could result in the understatement of tax liability a section 6701 lead is established. There are two types of investigations: (a) a limited investigation involving a small number of tax returns (Committee approval not required), or (b) an extensive investigation involving a large number of tax returns.

Under IRM 20.1.6.6.3, a number of factors (e.g., education level, expertise in accounting, work experience, the assistance or advice upon which the penalty is based, and how the advice or assistance affected the taxpayer's liability) are weighed in connection to an investigation in section 6701 cases. Note that there is no statute of limitations on a section 6701 assessment because the penalty does not depend on the filing of a return. IRM 20.1.6.6

3. Injunctions under Section 7408

You inquired about the Service's injunction authority in cases involving appraisers. Section 7408 authorizes the Service to bring a civil action in the name of the United States to enjoin a person from engaging in specified prohibited conduct, including

conduct subject to the penalty under section 6701.¹ Accordingly, as a technical matter, in a proper case, an injunction could be sought against an appraiser.

To obtain an injunction under section 7402(a), the government must show that a person engaged in conduct subject to penalty under section 6701 and that injunctive relief is appropriate to prevent the recurrence of such conduct. When addressing likelihood of recurrence, courts have looked to the following factors: (1) the gravity of the harm caused by the offense, (2) the extent of the taxpayer's participation and his degree of scienter, (3) the isolated or recurrent nature of the infraction and the likelihood that the taxpayer's customary business activities might again involve him in such transactions, (4) the taxpayer's recognition of his own culpability, and (5) the sincerity of his assurances against future violations. United States v. Raymond, 228 F.3d 804, 813 (7th Cir. 2000), cert. denied, 533 U.S. 902, 121 S.Ct. 2242, 150 L.Ed.2d 230 (2001); United States v. Kaun, 827 F.2d 1144, 1149-50 (7th Cir. 1987).

The government does not need to satisfy the traditional requirements for equitable relief because section 7408 expressly authorizes the issuance of an injunction. Trailer Train Co. v. State Bd. Of Equalization, 697 F.2d 860, 869 (9th Cir. 1983), cert. denied, 464 U.S. 846 (1983); United States v. Buttorff, 761 F.2d 1056 (5th Cir. 1985).

4. Taxpayer Challenges to a Section 6701 Penalty

You inquired about the procedures a taxpayer must follow to challenge a section 6701 penalty assessment. A taxpayer, including an appraiser, who is assessed a penalty under section 6701 has several procedural avenues to challenge the penalty. First, under section 6703, the appraiser could pay 15 percent of the entire assessed amount of the section 6701 penalty. Second, the appraiser could follow the general refund procedures of section 7422 to challenge the imposition of the section 6701 penalty. As courts have held the section 6701 penalty is divisible, the appraiser may pay the entire amount of one \$1,000 penalty assessed to file a claim for refund on all of the section 6701 penalties imposed. Finally, the appraiser could treat the section 6701 penalty as a divisible tax for purposes of the section 6703 procedures. Thus, the appraiser could pay 15 percent of one section 6701 penalty assessed in order to challenge all of the related section 6701 penalties assessed.

A. Section 6703 Procedures

The penalty under section 6701 is subject to the special administrative provisions of section 6703. Under section 6703(c), if, within 30 days after the day on which the notice and demand of any penalty under section 6701 is made, a taxpayer may pay 15 percent

¹ Section 819 of the American Jobs Creation Act of 2004, PL 108-357, effective October 22, 2004, amended section 7408 to expand upon the specified conduct for which a court may issue an injunction. Even before the amendment of section 7408 by the American Jobs Creation Act of 2004, section 7408 authorized the Service to bring an action to enjoin conduct subject to the section 6701 penalty.

of the penalty imposed pursuant to 6701, and the taxpayer would be entitled to administrative and judicial review.

If a taxpayer initiates a suit pursuant to the provisions of section 6703, the Service is prohibited from collecting the penalties imposed under section 6701 until there has been a final resolution of a suit brought to determine the liability of a taxpayer. See section 6703(c).

For example, assuming an appraiser is assessed three \$1,000 penalties under section 6701, the appraiser could pay \$450 (\$3,000 total penalty multiplied by 15 percent), and file a claim for refund under the section 6703 procedures. The advantage to the appraiser of paying 15 percent of the entire section 6701 penalty under section 6703 is that the Service is barred from collecting the penalties imposed under section 6701 until there has been a final resolution of the section 6703 proceeding.

B. Section 7422 Procedures

Section 6703 is not the only statutory basis for bringing a refund action with respect to section 6701 penalties. While section 6703(c) creates procedures only available to individuals assessed penalties under section 6701, it does not preclude the same taxpayers from bringing their refund actions under section 7422. In re Nelson, 143 B.R. 93, 99 (N.D.Tex 1992). The court in Nelson noted that "Congress specifically included actions contesting section 6701 understatement penalties in section 7422." Id.

Section 7422 provides a general statutory basis for, and procedures applicable to "Civil actions for refund." Section 7422(a) states:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary....

To meet the jurisdictional requirements of a refund suit pursuant to section 7422, a taxpayer must make full payment of assessed taxes due before the matter may be adjudicated. See Flora v. United States, 362 U.S. 145, 177 (1960). In general, the partial payment of assessed taxes or a proposed deficiency is insufficient to support district court jurisdiction of a refund suit. Id.

A limited exception to the "full payment rule" of Flora has developed with respect to divisible tax assessments. A divisible tax is one that may be divided into separate portions or transactions, and only a portion of the tax must be paid before a claim is filed. See Steele v. United States, 280 F. 2d 89, 91 (8th Cir. 1960). The taxpayer may then file a claim for refund of the amount paid, and for abatement of the balance of the assessment. Id.

In Steele, the court held that a taxpayer assessed a penalty under section 6672 need only pay the divisible amount of the penalty assessment attributable to a single employee's withholding before instituting a refund action. Id. The taxpayer, therefore, may pay the withholding tax of one employee for one taxable period in order to meet the jurisdictional requirement of section 6532. Boynton v. U.S., 566 F.2d 50, 52 (5th Cir. 1977). This relaxed requirement, known as the "partial payment" rule, is based on the theory that section 6672 assessments represent a cumulation of separable assessments for each employee from whom taxes were withheld. Id. The partial payment rule has been applied to other assessments of divisible taxes, including employment and social security taxes. See Marvel v. U.S., 548 F.2d 295, 298 (10th Cir. 1977).

In Hankin v. United States, 891 F.2d 480 (3d Cir. 1989), the court treated section 6701 penalties as divisible. Id. at 481; See also Barr v. United States, 689 F.Supp. 1248, 1249 (E.D.N.Y. 1988) (denying the Service's motion for sanctions when the taxpayer obtained jurisdiction in a refund action by paying just \$1,000 for each assessment of multiple \$1000 section 6701 penalties). As the 6701 penalty is treated like a divisible tax, the taxpayer is only required to pay the amount of one penalty assessed to provide a court with jurisdiction.

For example, assuming an appraiser is assessed three \$1,000 penalties under section 6701, the appraiser could pay one \$1,000 penalty to challenge the total section 6701 penalty of \$3,000. Unlike section 6703, the section 7422 procedures do not prohibit the Service from continuing to collect the assessed penalty.

C. Divisible Tax for Purposes of Section 6703 Procedures

Although the partial payment rule generally applies only in refund actions under section 7422 that involve divisible taxes, some authority suggests that a taxpayer may pay only a portion of a section 6701 penalty to be entitled to bring an action under section 6703. Cases indicate that the Service, pursuant to Penalty Policy Statement P-5-16, has permitted taxpayers to make partial payment of a section 6701 penalty under the section 6703 procedures and has withheld collection efforts with respect to related section 6701 penalties pending resolution of the single penalty. In Hankin v. United States, 891 F.2d 480 (3d Cir. 1989), the court noted:

Because the [sections 6701 and 6700] penalties assessed against [the taxpayer] were divisible into separate portions or transactions, an IRS policy provides for reasonable forbearance with respect to collection. IRS Policy Statement, PS P-5-16 (approved Mar. 1, 1984). Pursuant thereto, the IRS agreed that if [the taxpayer] paid one penalty for one transaction for each of the years in question, he could follow the procedures outlined in section 6703 to litigate the merits of the assessment of all the penalties. The IRS agreed that it would 'not attempt to

collect the other penalties not brought into issue by the 15 percent jurisdictional payment absent [a] jeopardy situation....' Id. at 481-482.

Penalty Policy Statement P-5-16 requires withholding collection for divisible taxes when the government's interest is protected. Specifically, P-5-16 provides:

When a refund suit is pending on a divisible assessment, the Service will exercise forbearance with respect to collection provided that the interests of the government are adequately protected and the revenue is not in jeopardy. However, any refunds due the taxpayer may be credited to the unpaid portion of the liability pending the outcome of the suit. IRM 1.2.1.5.3.

Penalty Policy Statement P-5-16 is somewhat limited in its application. In Church of Scientology of California v. United States, 920 F.2d 1481 (9th Cir. 1990), the court upheld the Service's argument that P-5-16 is an administrative policy rather than a taxpayer's legal right. Id. at 1488; See also IRM 25.3.1.4.

Moreover, P-5-16 requires only the forbearance of collection. Under P-5-16, the Service may assess penalties while a refund suit is pending on a divisible tax. Interest will apply to assessed penalties even the Service forbears collection pursuant to P-5-16. Furthermore, P-5-16 applies only to pending suits and not to administrative claims for refund.

For example, assuming an appraiser is assessed three \$1,000 penalties under section 6701, the appraiser could pay \$150 (one \$1,000 penalty multiplied by 15 percent), and file a claim for refund for the entire amount assessed (\$3,000) under the section 6703 procedures. Under P-5-16, the Service would be barred from collection providing its interests were not in jeopardy.

5. Appeals Review of Section 6701 Penalties

You asked whether a taxpayer could seek Appeals review of a section 6701 assessment. There is no pre-assessment right to Appeals review for the penalty imposed under section 6701. The post-assessment Appeals rights set forth in Treas. Reg. section 601.106(a)(1)(iv) do not apply to the section 6701 penalty. That regulation states in part:

This postassessment appeal procedure applies to all but the following . . . penalties:

* * * *

(a) Penalties that are not subject to a reasonable cause or reasonable basis determination....

Treas. Reg. section 601.106(a)(i)(iv)(d).

Section 6701 is not subject to a reasonable cause determination. Thus, post-assessment Appeals procedures under Treas. Reg. section 601.106(a)(1)(iv) are not available for the section 6701 penalty.

In accordance with section 6703, however, post-assessment post-payment Appeals review procedures are provided in the IRM for section 6701. Section 8.11.1.10 of the IRM addresses the Appeals procedures for penalties, such as the section 6701 penalty, that are subject to the procedural rules of section 6703. Specifically, section 8.11.1.10.1 provides for post-assessment Appeals rights for the section 6701 penalty if the person against whom the penalty has been imposed pays at least 15 percent of the assessed amount and files an administrative claim for refund.

6. Whether Circular 230 applies

Circular 230 sets forth the duties of practitioners before the Service and the grounds and procedures for disbarment and suspension. 31 CFR § 10.0. Circular 230 is applicable to all who practice before the Service, not just attorneys.

In 1985, the Service amended Circular 230 to conform to legislative changes requiring the disqualification of an appraiser who is assessed a penalty under section 6701 of the Internal Revenue Code for aiding and abetting the understatement of a tax liability. 50 Fed. Reg. 42014.

Under Circular 230, the Secretary of the Treasury, or his or her delegate, after due notice and opportunity for hearing, may disqualify any appraiser with respect to whom a penalty has been assessed under section 6701(a) of the Code. 31 CFR § 10.50(b). If an appraiser is disqualified, the appraiser is barred from presenting evidence or testimony in any administrative proceeding before the Department of Treasury or the Service, unless and until authorized to do so by the Director of Practice.² *Id.* Any appraisal made by a disqualified appraiser after the effective date of disqualification will not have any probative effect in any administrative proceeding before the Department of the Treasury or the Service. *Id.* We suggest you contact the office of the Director of Practice to establish procedures for referral to that office of appraisers in appropriate cases.

Conclusion

To summarize our conclusions, the Service may assess a section 6701 penalty on an appraiser. The imposition of a section 6701 penalty requires the appraiser's knowledge that false statements would lead to an understatement of tax.

² The Office of Director of Practice is established in the Office of the Secretary of the Treasury, and is appointed by the Secretary of the Treasury, or his or her designate. 31 CFR § 10.1

The Internal Revenue Manual provides guidance regarding the identification and assertion of section 6701 penalties. Generally, the section 6701 penalty will be assessed by revenue agents and office auditors at a Service area office as a result of an examination of a tax return or document or in connection with a tax shelter registration examination.

Section 7408 authorizes the Service to bring a civil action to enjoin a person from engaging in specified prohibited conduct, including conduct subject to the penalty under section 6701. To obtain an injunction under section 7402(a), the government must show that a person engaged in conduct subject to penalty under section 6701 and that injunctive relief is appropriate to prevent the recurrence of such conduct.

An appraiser assessed a penalty under section 6701 has several procedural avenues to challenge the penalty. First, under section 6703, the appraiser may pay 15 percent of the entire assessed amount of the section 6701 penalty. Second, the appraiser may use the general refund procedures of section 7422 to challenge the imposition of the section 6701 penalty. As courts have held that the section 6701 penalties are a divisible tax, the appraiser may pay the entire amount of one \$1,000 penalty assessed to file a claim for refund on all of the section 6701 penalties imposed. Third and finally, the taxpayer may treat the section 6701 penalty as a divisible tax for purposes of the section 6703 procedures, and therefore, may pay 15 percent of one \$1,000 penalty.

There is no pre-assessment right to Appeals review for the penalty imposed under section 6701. In accordance with section 6703, post-assessment post-payment Appeals review procedures are provided in the IRM for section 6701.

Circular 230 sets forth the duties of practitioners before the Service and the grounds and procedures for disbarment and suspension. Under Circular 230, the Secretary of the Treasury may disqualify any appraiser with respect to whom a penalty has been assessed under section 6701(a) of the Code.

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 202 622-7022 if you have any further questions.