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From:

Sent: Friday, February 10, 2012 4:29:23 PM

To:

Cc:

Subject: Request for opinion concerning consideration of IRC 6701 penalty during CDP hearing

Based on the facts you provided, the taxpayers did not receive a prior opportunity under section 6330(c)(2)(B) to dispute the liability for the section 6701 penalties assessed against them (section 6330(c)(4) does not apply to this case). First, the section 6701 penalty is imposed on a per document basis and is divisible so long as the entire penalty assessment for a single year relates to the same scheme. Because the assessment against each taxpayer relates to erroneous stimulus payments, the 6701 penalty assessments are divisible. Therefore, Exam should have considered both taxpayers' claims for refund, because each taxpayer included a payment for a divisible portion of a single section 6701 penalty with their refund claims.

Under section 6703(c)(2), the taxpayers could not file a refund suit in district court until the earlier of the day after the refund claims were denied or after the expiration of 6 months after the filing of the refund claims. Because Exam did not consider the taxpayers' claims for refund and did not issue claim disallowance letters, the taxpayers could not file a suit in district court until the expiration of 6 months after the filing of the refund claims. At that time the CDP hearing had already commenced. Thus, the opportunity to file a suit in district court and dispute the section 6701 penalty liabilities did not expire prior to the CDP hearing. See *Mason v. Commissioner*, 132 T.C. 305 (2009) (a simultaneous opportunity to dispute an underlying liability is not a prior opportunity under section 6330(c)(2)(B)).

Please let me know if you have any further questions.