

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

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subject: Questions regarding aiding and abetting penalties under I.R.C. § 6701

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

ISSUES

1. When a person submits a false document to the Service in support of a retirement plan's application for qualified status, may the Service assess a section 6701 penalty for aiding and abetting understatement of tax liability against the person for each taxpayer (for example, the plan's sponsor and each of the plan's participants) who relied on the erroneous qualified status to claim improper deductions?
2. Can the Service assess a separate section 6701 penalty for each false document the person submitted to the Service as part of a plan's application?
3. For which year should a section 6701 penalty be assessed?

CONCLUSIONS

1. No. The Service can assess only one section 6701 penalty against the person for submitting a false document, even if the document results in multiple taxpayers understating their tax liability.
2. Under section 6701(b)(3), the Service can assess only one penalty for all false documents that relate to a single plan's application for qualified status.

3. Section 6701 does not require the Service to assess the penalty for a particular taxable year. The Service's internal procedures identify the assessment with a specific year to satisfy computer programming requirements and the Service has a general practice of identifying an assessment of the section 6701 penalty with the year that the false document was submitted to the Service.

Facts

For certain sponsored retirement plans to obtain qualified status, the plan's sponsor must apply for qualified status with the Service. For certain plans, the application may be made on a Form 5307, "Application for Determination for Adopters of Modified Volume Submitter (VS) Plans." Under various circumstances, these applications, including supplemental documents, have to be filed with the Service by a specific date. A plan sponsor's representative may make the required submissions on behalf of the plan's sponsor. A plan's qualified status gives tax advantages to the plan's sponsor and beneficiaries.

In conjunction with a promoter examination, the Service identified an employee plan professional who submitted a series of false documents to the Service in the course of his representation of multiple plans. The false documents included Forms 5307 that were used to apply for qualified status, and in many instances also included documents that were submitted to supplement the applications. As the applications were false, the plans were not actually qualified. The plans' sponsors and beneficiaries treated the plans as qualified, and as a result, they understated their tax liabilities. The Service wishes to assess penalties under section 6701 against the employee plan professional who filed the false documents.

LAW AND ANALYSIS

Section 6701 imposes a penalty for each false document that a person helps prepare or present if, (1) the person knows or has reason to believe that the document will be used in connection with any material matter arising under the internal revenue laws, and (2) the person knows that use of the document would result in an understatement of the tax liability of another person. Filing false Forms 5307 and related documents can support liability for a section 6701 penalty. See Berger v. United States, 87 F.3d 60, 64 (2d Cir. 1996) (holding that filing a false Form 5300, "Application for Determination for Employee Benefit Plan," can support liability for a section 6701 penalty).

The section 6701 penalty applies with respect to each false document a person helps prepare or present. I.R.C. § 6701(a) ("shall pay a penalty with respect to each . . . document"). As such, the Service may assess only one section 6701 penalty per false document, even if one false document results in multiple taxpayers understating income. See Kuchan v United States, 679 F.Supp. 764, 767 (N.D. Ill. 1988) (upholding the assessment of 191 section 6701 penalties only because plaintiff prepared a transmittal letter attached to, and referencing 191 false Schedule C's, not because 191

taxpayers understated their tax liability). In Berger, the Service assessed a section 6701 penalty for each tax year that was affected by a false Form 5300. Berger v. United States, 79 A.F.T.R.2d 97-2547, at *2 (Apr. 11, 1997). The court held that section 6701 only imposes a penalty per false document, not per tax year affected. Id. at *5. Similarly, section 6701 penalties are not imposed per taxpayer affected. In this case, the number of section 6701 penalties cannot exceed the number of false documents that the person prepared, even though each false application resulted in multiple taxpayers understating their tax liability.

In some cases, the number of penalties the Service can assess may be less than the number of false documents a person helped prepare or present. Under section 6701(b)(3), only one penalty can be assessed against a person for all of the false documents that relate to (1) the same taxpayer, and (2) the same taxable period or event, even if the documents were prepared or presented in different years. The Service may assess separate section 6701 penalties against a person for helping prepare or present false documents relating to different taxpayers, even though the documents relate to the same period or event. Mattingly v. United States, 924 F.2d 785, 793 (8th Cir. 1991). In Berger, the Service determined that an employee plan professional submitted multiple false Forms 5300, Forms 2848 and other document as part of twenty-three employee plans' applications for qualified status. 87 F.3d at 61-62. The Service assessed section 6701 penalties based on the application, not for each false document submitted, and the court noted that the number of section 6701 penalties could not exceed the number of Forms 5300 submitted. Berger, 79 A.F.T.R.2d 97-2547 *5. Similarly, here, all the documents were prepared with respect to the Forms 5307 and it was the false Forms 5307 that resulted in the understatements of tax. Therefore, in this case, the Service may assess one section 6701 penalty for all false documents that relate to a particular plan's application for qualified status.

Treas. Reg. § 301.6203-1 states that records supporting an assessment shall identify "the taxable period, if applicable..." As the court in Kuchan noted, section 6701 contains no provision fixing the year for which the penalty must be assessed. 679 F.Supp. at 767. While the court in Kuchan noted that it was logical for the section 6701 penalty assessment to be associated with the year in which the prohibited conduct occurs, it did so in the context of rejecting Kuchan's argument that the Service erred in not assessing the penalty for the year to which the underlying documents related, and Kuchan does not require that the penalty be assessed for a particular year. 679 F.Supp. at 767. Further, there is no statute of limitation on the assessment of section 6701 penalties and the penalty can be assessed at any time. See, e.g., Mullikin v. United States, 952 F.2d 920, 926-28 (6th Cir. 1991); Kuchan, 679 F.Supp. at 768. To the extent that the Service's internal procedures require assessing the penalty for a particular year to satisfy computer programming requirements, the Service's practice is to use the year that the false documents were prepared or presented.

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Please call (202) 317-6844 if you have any further questions.