

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

CC:PA:02:RWyzik
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date: February 26, 2010

to: Susan Deidrich
Senior Program Manager
Office of Service Wide Penalties

from: Ashton P. Trice
Chief, Branch 2
(Procedure & Administration)

subject: Request advice on IRC Section 6676 Claims for Refund or Credit Penalty in Relation to Joint and Several Liability

This memorandum responds to your request for advice.

ISSUES

1. Does the section 6676 penalty apply separately to each spouse or are the spouses jointly and severally liable?
2. When spouses file a joint claim for refund subject to a section 6676 penalty, does the "reasonable basis" exception to the penalty apply separately to each spouse?

CONCLUSION

Husbands and wives who file a joint claim for refund or credit are jointly and severally liable for any section 6676 penalty arising from that claim. The reasonable basis exception cannot be applied in a way that one spouse is liable for the penalty and the other is not.

FACTS

To illustrate a situation in which your question arises, you provided the following example.

A and B are husband and wife. They filed a joint return for 2006. In 2009 they filed an amended return based on B's belief that a 401k distribution was reported twice

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on the original return. A knows that the income was not reported twice because A converted one of the two identical distributions for personal use. Both A and B sign the amended return.

LAW AND ANALYSIS

Joint and Several Liability

Section 6676 imposes a penalty on persons making a claim for refund in an excessive amount. When a husband and wife file a joint return, liability with respect to the tax reported on the return and penalties calculated on the basis of the tax reported (or unreported) on the return is joint and several. See Jordan v. Commissioner, T.C. Memo 2009-223, 16-17; Steffen v. Commissioner, T.C. Memo 2009-229 (finding that additions to tax and penalties imposed on a joint return apply jointly and severally to both spouses); I.R.C. §§ 6013(e)(3) and 6665(a). The section 6676 penalty is calculated on the basis of the excessive amount of tax reported that a taxpayer erroneously claims as a refund or credit. Both spouses, therefore, are jointly and severally liable for the § 6676 penalty when they make an excessive, joint claim for refund or credit with respect to tax reported on a joint return.

You mentioned various cases involving the section 7201 and 7206 criminal penalties in which the associated fines did not apply jointly and severally. The imposition of the section 6676 penalty is distinguishable from the imposition of the section 7201 and 7206 fines. The section 6676 penalty is a civil penalty to which section 6013(e)(3) applies via sections 6665 and 6671. Unlike section 6676, the section 7201 and 7206 felonies are criminal statutes to which section 6013(e)(3) does not apply. Under sections 7201 and 7206, it is possible that both spouses signing a joint return could be convicted of the section 7201 or 7206 felonies separately and each would be subject to the associated fines separately. See United States v. White, 417 F.2d 89, 93 (2nd Cir. 1969) (affirming the conviction of both spouses under section 7201 and the imposition of the \$10,000 against each spouse). Those cases provide no insight to the application of the section 6676 civil penalty.

Reasonable Basis Exception

The section 6676 penalty does not apply if the person can show that “the claim for [the] excessive amount has a reasonable basis.” I.R.C. § 6676(a). Because the penalty is joint and several, one spouse may not qualify for the reasonable basis exception if the other does not. If either spouse is liable for the penalty, then both spouses are liable for the penalty by virtue of the liability being joint and several.

We also note that consideration of whether a claim has a reasonable basis is different from the typical exception to many other penalties for taxpayers acting with reasonable cause and good faith. See, e.g., I.R.C. § 6664(c). A reasonable cause analysis typically considers the extent of a taxpayer’s efforts to determine its own proper tax liability. See Treas. Reg. § 1.6664-4(b). A taxpayer’s good faith is subjective. Whether

a claim has a reasonable basis, however, is not dependent on the subjective state of mind of the taxpayer presenting the claim or the actions of the taxpayer in determining the appropriateness of the claim. The statute requires an examination of the claim itself to determine whether it has a reasonable basis.

While section 6676 does not define “reasonable basis” and there are no regulations in effect under that statute, we look to the definition of “reasonable basis” in regulations promulgated under the section 6662 accuracy-related penalty for guidance. Those regulations define “reasonable basis” as follows:

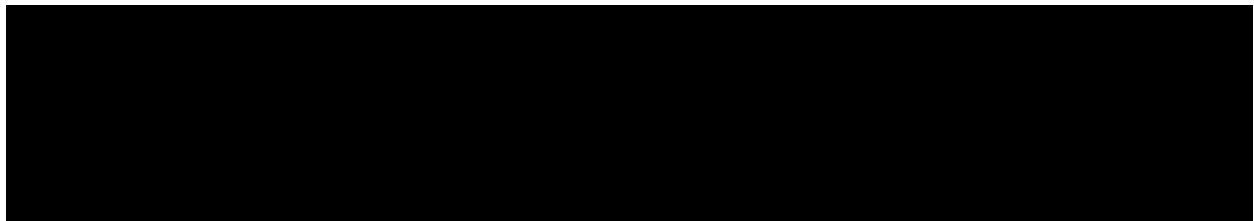
Reasonable basis is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonably based on one or more of the authorities set forth in § 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in § 1.6662-4(d)(2).

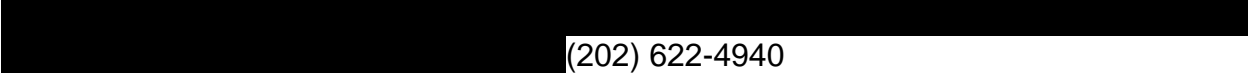
Treas. Reg. § 1.6662-3(b)(3).

Because the reasonable basis standard is satisfied based on a showing of facts and authority for the position stated in the claim, applying the test to each spouse separately would be inappropriate; the claim is either supported by facts and authority or it is not. If either spouse can demonstrate that the claim was based on the mentioned authority, then the claim has a reasonable basis, regardless of which spouse made the demonstration.

In the example, the fact that B believes that a 401k distribution was reported twice on the original return is irrelevant. A taxpayer’s state of mind has no bearing on meeting the reasonable basis standard. In this scenario, the claim does not have a reasonable basis because there is no factual basis supporting the claim; the distribution was not reported twice. Nor is the claim based on one of the authorities set forth in Treasury Regulation § 1.6662-4(d)(3)(iii). Because there is no reasonable basis for the claim, the section 6676 penalty applies to both A and B jointly and severally.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS





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