

**Office of Chief Counsel  
Internal Revenue Service**  
memorandum  
CC:SB

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to: Holly L. McCann  
Chief, Excise Tax Program  
(Small Business/ Self-Employed)

from: Thomas R. Thomas  
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subject: Application of Section 6717, Refusal of Entry

This responds to your request for advice dated August 19, 2009 relating to the imposition of the §6717 penalty. This advice may not be used or cited as precedent.

Issue

Whether the IRS can impose more than one penalty under §6717 on a taxpayer who refuses to admit entry or refuses to permit another action authorized by §4083(d)(1).

Conclusion

Multiple \$1,000 penalties under §6717 may be imposed on a single taxpayer, but the penalty should be determined on a case by case basis based on a review of all the surrounding facts and circumstances.

Facts

This advice addresses the situation where a fuel compliance agent (FCA) makes an authorized attempt to enter the premises of a trucking company pursuant to §4083(d)(1) to inspect the company's 750-gallon fuel storage tank, three propulsion tanks, and the company's books and records, but is refused entry.

Law and Analysis

Section 4041 imposes an excise tax on certain fuels. There are several exemptions from the general imposition of tax under §4041. Congress provided the Secretary with administrative authorities to ensure that these exemptions are not abused. Section 4083(d)(1) provides that the Secretary, in administering compliance with §4041 and related penalties, may "enter any place at which taxable fuel is produced or is stored (or may be stored) for purposes of (i) examining the equipment used to determine the

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amount or composition of such fuel and the equipments used to store such fuel, (ii) taking and removing samples of such fuel, and (iii) inspecting any books and records and any shipping papers pertaining to such fuel,” and may detain for the purposes set out above any container that contains or may contain taxable fuel.

Section 4083(d)(3) lists the civil penalties applicable to a refusal of entry or other refusal. First, the penalty under §7342 shall apply to any refusal of entry and is \$1,000 per refusal. This penalty is rarely imposed because the IRS can not “assess this penalty in the same manner as it would a tax. It must first seek the assistance of the Department of Justice to obtain a judgment.” H.R. Conf. Report 108-755, at 685 (2004). Congress realized that obtaining a judgment against the taxpayer was burdensome and rendered the penalty under §7342 ineffective for enforcement. To remedy the situation, Congress enacted §6717 in 2004. The provision reads:

In addition to any other penalty provided by law, any person who refuses to admit entry or to permit any other action by the Secretary authorized by section 4083(d)(1) shall pay a penalty of \$1,000 for such refusal.

There is no case law or legislative history addressing whether the IRS can impose this penalty upon multiple violations. The language of §7432 makes clear that the penalty shall be imposed on “every such refusal.” Section 6717, however, does not contain similar language.

When an FCA makes an authorized attempt to enter a trucking company’s premises to inspect the company’s fuel storage tank, three propulsion tanks, and the company’s books and records, but is refused entry onto the property, whether the taxpayer is liable for one or multiple penalties under §6717 will depend on the FCA’s actions.

If an FCA asks only to enter a trucking facility and is denied entry, the taxpayer is subject to a \$1,000 penalty under §6717 for refusing the FCA entry. If the FCA takes no further action or makes no other requests, no additional penalty will apply. The refusal of entry does not also constitute a refusal to examine, sample or inspect books and records as described in §4083(d)(1).

If, however, the FCA specifically asks for entry onto the premises, and asks to be allowed to inspect the company’s fuel storage tank, to be allowed to inspect the three propulsion tanks, and to be allowed to review the company’s books and records, then five additional \$1,000 penalties can be asserted; four \$1,000 penalties under §6717 for refusing to allow the FCA to examine each of the four tanks (i.e., the one fuel storage tank and each of the three propulsion tanks) to determine the amount or composition of such fuel and the equipment used to store the fuel. In addition, a \$1,000 penalty may be asserted under §6717 for refusing the FCA to inspect the company’s books and records.

### Case Development, Hazards, and Other Considerations

While we believe the above application of §6717 is correct, there are hazards in imposing §6717 in this way. First, the language of §6717 itself could be read to impose a \$1,000 penalty on the refusal of entry *or* the refusal to permit any of the actions listed in §4083(d)(1), but not both. Under this argument, the taxpayer discussed above would be liable for a penalty of either \$1,000 for refusal of entry or \$5,000 for refusal to allow the FCA to examine the storage tank (\$1,000), three propulsion tanks (\$3,000), and inspect the company's books and records (\$1,000).

Second, the language used in §7342 could be compared to that in §6717. It can be argued that if Congress intended multiple penalties to apply under §6717, it would have included language similar to that found in §7342. Section 7342 specifically provides that the \$1,000 penalty applies for "every such refusal" to permit entry or examination. No such language is found in §6717. This would mean that only a single penalty of \$1,000 could be imposed against a taxpayer that denies entry to a site. In support thereof, a taxpayer could contrast the language used in §4083(d)(3)(A), which describes the imposition of §7342, with the language in §4083(d)(3)(B), which describes the imposition of §6717, ultimately arguing that this language demonstrates that only one penalty (i.e., refusal of entry or refusal with respect to the items described in §4083(d)(1)) should be imposed under §6717). Section 4083(d)(3) reads [emphasis added]:

(A) Forfeiture. The penalty provided by section 7342 shall apply to **any refusal** to admit entry or other refusal to permit an action by the Secretary authorized by paragraph (1), except that section 7342 shall be applied by substituting "\$1,000" for "\$500" **for each such refusal**.

(B) Assessable penalty. For additional assessable penalty for the refusal to admit entry or other refusal to permit an action by the Secretary authorized by paragraph (1), see section 6717.

The Tax Court recently discussed finding Congressional intent from Congressional silence. The court wrote that "it is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another." *Lantz v. Commissioner*, 132 T.C. 131 (2009). The Tax Court overlooked both Supreme Court and appellate precedent that strongly caution against finding Congressional intent from Congressional silence. For example, in *Castro v. Chicago Housing Authority*, 360 F.3d 721 (7<sup>th</sup> Cir. 2004), the Seventh Circuit considered a statutory provision where the statute and the legislative history were silent. The court stated "all we can deem from congressional silence on the issue is just that - that Congress was silent on the issue. As we recently noted, "inferences from congressional silence are treacherous; oversights are common in the hurly-burly of congressional enactment; omissions are not enactments; and even deliberate omissions are often subject to alternative interpretations." See also *Burns v. United States*, 501 U.S. 129,

136 (1991); *Brown v. Gardner*, 513 U.S. 113, (1994) (Congressional silence lacks persuasive significance); *Crosby v. Natl. Foreign Trade Council*, 530 U.S. 363, 388 (2000) (“The State’s inference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous.”); *Alto Diary v. Veneman*, 336 F.3d 560, 566 (7<sup>th</sup> Cir. 2003). The Court of Appeals for the Seventh Circuit recently discredited the Tax Court’s reasoning in reversing *Lantz*.

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