

RECENT CHANGES IN PENALTIES, I.R.C. §§ 6702, 6694 and 6672

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NOTE: THE VIEWS EXPRESSED IN THIS OUTLINE ARE THOSE OF MARK H. HOWARD INDIVIDUALLY AND DO NOT REPRESENT OFFICE POLICY OF CHIEF COUNSEL FOR THE INTERNAL REVENUE SERVICE AND THIS PRESENTATION HAS NOT BEEN REVIEWED FOR TECHNICAL OR SUBSTANTIVE ACCURACY.

RECENT CHANGES IN PENALTIES UNDER THE IRC

I. Changes to I.R.C. § 6702

A. Legislative history for the 1982 statute

When Congress created this penalty in 1982, it identified as the problem of the day the sorts of frivolous returns people were filing at that time. The oft cited Senate Report gave the following reasons for the change:

Reasons for Change

The committee is concerned with the rapid growth in deliberate defiance of the tax laws by tax protestors. The Internal Revenue Service had 13,600 illegal protest returns under examination as of June 30, 1981. Many of these protestors are induced to file protest returns through the criminal conduct of others. These advisors frequently emphasize the lack of any penalty when sufficient tax has been withheld from wages and encourage others to play the "audit lottery." The committee believes that an immediately assessable penalty on the filing of the protest forms will help deter the filing of such returns and will demonstrate the determination of the Congress to maintain the integrity of the income tax system.

S. Rep. No. 97-494, 97th Cong., 2d Sess. 277 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News [Vol. 2], 781, 1023.

In its explanation of the new penalty provision, the Senate stated, in relevant part:

The bill provides that an immediately assessable penalty of \$500 will be imposed on any individual who files any document which purports to be a return of income tax if (1) the document fails to contain information from which the substantial correctness of the amount of tax shown on the return can be judged or contains information that on its face indicates that the amount of tax shown on the return is substantially incorrect, and (2) such conduct arises from a position taken by the taxpayer on the purported return which is frivolous, or from a desire (which appears on the face of the purported return), to delay or impede the administration of the Federal income tax laws. The penalty will be imposed, therefore, only on purported returns that are patently improper and not in cases involving valid disputes with the Secretary. This penalty will not be imposed of course, in the case of innocent or inadvertent mathematical or clerical errors (as defined in sec. 6213(g)(2)(A) or (B)), including certain incorrect uses of tax tables, etc.

For example, the penalty under this provision is immediately assessable against any individual who files, as a purported Form 1040, a document appearing at first glance to be a Form 1040, but which contains altered or

incorrect descriptions of line items or other altered provisions. Such purported “returns” are clearly not designed to inform the Secretary of the filer’s taxable income and are not in processible form. The penalty will be immediately assessable against any individual filing a “return” in which many or all of the line items are not filled in except for references to spurious constitutional objections. Furthermore, the penalty is available against any individual filing a purported return in which insufficient information to calculate the tax is given or where the information given is clearly inconsistent (as where an individual claims 99 exemptions but lists only a few dependents) or where the return otherwise reveals a frivolous position or a desire to impede the tax laws. Moreover [sic], the penalty could be imposed against any individual filing a “return” showing an incorrect tax due or a reduced tax due, because of the individual’s claim of a clearly unallowable deduction, such as a “gold standard deduction” (i.e., a discount of dollars because the U.S. is not on the gold standard) or a “war tax” deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual’s estimate of the amount of his taxes going to the Defense Department budget, etc. In contrast, the penalty will not apply if the taxpayer shows the correct tax due but refuses to pay the tax. In such a case, of course, the Secretary can assess and collect the tax immediately. The penalty will not be imposed, however, if the taxpayer merely inadvertently fails to use the correct tax table, or makes inadvertent mathematical errors on his or her return, if however, the taxpayer deliberately uses incorrect tax tables, for example, to impede the tax system and that use otherwise satisfies the penalty requirements, the penalty will apply.

(emphasis added)

S. Rep. No. 97-494, 97th Cong., 2d Sess. at 277-278 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 781, 1024.

The subsequent Conference Report adopted much of the Senate Report but also described the application of the statute, in relevant part, as follows:

The amendment would provide for an immediately assessable penalty of \$500 on any individual who files a frivolous return. The penalty would apply only on documents purporting to be returns that are patently improper and not in cases involving valid disputes with the Secretary, or in cases involving purely inadvertent mathematical or clerical errors.

H.R. Rep. No. 97-760, 97th Cong. 2nd Sess. at 277 (1982) (Conf. Rep.), reprinted in 1982-2 C.B 600, 651.

B. Initial statute passed in 1982

Through section 326(a) of the Tax Equity and Fiscal Responsibility Act of 1982 Congress added section 6702 to the Internal Revenue Code; section 6702 provided:

Sec. 6702 FRIVOLOUS INCOME TAX RETURN (a) CIVIL PENALTY.-- If B

- (1) any individual files what purports to be a return of the tax imposed by subtitle A but which--
 - (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
 - (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
- (2) the conduct referred to in paragraph (1) is due to--
 - (A) a position which is frivolous, or
 - (B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,then such individual shall pay a penalty of \$500.

Congress gave taxpayers a relatively easy mechanism to contest this penalty after the IRS assessed it. See, I.R.C. ' 6703 which gives the taxpayer the ability to contest the liability by paying 15 percent of the penalty within 30 days of notice and demand and then filing a suit for refund within 30 days of denial of the claim. See also, I.R.C. ' ' 6511, 6532 and 7422.

C. Amendment to I.R.C. § 6702 in December of 2006

Congress passed the Tax Relief And Health Care Act of 2006. When President Bush signed this legislation on December 20, 2006, it became Public Law 109-432. Section 407(a) of that law amended I.R.C. § 6702 to read as follows:

26 USCS § 6702

§ 6702. Frivolous tax submissions.

- (a) Civil penalty for frivolous tax returns. A person shall pay a penalty of \$ 5,000 if--
 - (1) such person files what purports to be a return of a tax imposed by this title but which--
 - (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
 - (B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

- (2) the conduct referred to in paragraph (1)--
 - (A) is based on a position which the Secretary has identified as frivolous under subsection (c), or
 - (B) reflects a desire to delay or impede the administration of Federal tax laws.
- (b) Civil penalty for specified frivolous submissions.
 - (1) Imposition of penalty. Except as provided in paragraph (3), any person who submits a specified frivolous submission shall pay a penalty of \$ 5,000.
 - (2) Specified frivolous submission. For purposes of this section--
 - (A) Specified frivolous submission. The term "specified frivolous submission" means a specified submission if any portion of such submission--
 - (i) is based on a position which the Secretary has identified as frivolous under subsection (c), or
 - (ii) reflects a desire to delay or impede the administration of Federal tax laws.
 - (B) Specified submission. The term "specified submission" means--
 - (i) a request for a hearing under--
 - (I) section 6320 [26 USCS § 6320] (relating to notice and opportunity for hearing upon filing of notice of lien), or
 - (II) section 6330 [26 USCS § 6330] (relating to notice and opportunity for hearing before levy), and
 - (ii) an application under--
 - (I) section 6159 [26 USCS § 6159] (relating to agreements for payment of tax liability in installments),
 - (II) section 7122 [26 USCS § 7122] (relating to compromises), or
 - (III) section 7811 [26 USCS § 7811] (relating to taxpayer assistance orders).
 - (3) Opportunity to withdraw submission. If the Secretary provides a person with notice that a submission is a specified frivolous submission and such person withdraws such submission within 30 days after such notice, the penalty imposed under paragraph (1) shall not apply with respect to such submission.
- (c) Listing of frivolous positions. The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection. The Secretary shall not include in such list any position that the Secretary determines meets the requirement of section 6662(d)(2)(B)(ii)(II) [26 USCS § 6662(d)(2)(B)(ii)(II)].
- (d) Reduction of penalty. The Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws.
- (e) Penalties in addition to other penalties. The penalties imposed by this section shall be in addition to any other penalty provided by law.

D. Key points to note in the changed I.R.C. § 6702

1. The penalty increased from \$500 to \$5,000.
2. Previously the statute only applied to income tax returns. Now § 6702(a) applies to all returns.
2. Previously the statute applied to frivolous returns as determined by the Service and case law. Now § 6702(c) requires the Service to publish a list of frivolous positions. Notice 2007-30, 2007 IRB LEXIS 201, sets out a list of 40 frivolous arguments and includes a catch all provision which states as follows:

Returns or submissions that contain positions not listed above, which on their face have no basis for validity in existing law, or which have been deemed frivolous in a published opinion of the United States Tax Court or other court of competent jurisdiction, may be determined to reflect a desire to delay or impede the administration of Federal tax laws and thereby subject to the \$5,000 penalty.

3. The amended statute added a new I.R.C. § 6702(b) which imposed the penalty on frivolous submissions including:

CDP requests related to liens and levies;
Requests for installment payment agreements;
Requests for offers in compromise;
Requests for relief submitted to the Taxpayer Advocate Office.

4. The amended statute added a new I.R.C. § 6702(d) which gives the Service discretion to reduce the amount of the penalty.

II. Changes to I.R.C. § 6694, Return Preparer Penalty

A. Legislative history for I.R.C. § 6694

Congress passed the Tax Reform Act of 1976 in September of 1976 and it became Public Law 94-455 when President Gerald Ford signed it on October 4, 1976. Section 1203(b)(1) of that law added a new I.R.C. § 6694. The lengthy Joint Committee Explanation details the growth of tax return preparation as a business, problems identified by the Service with some return preparers, and the need of the government for tool to penalize abuses by return preparers. Staff of the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess., at 345-356 (Comm. Print 1976), reprinted in 1976-3, Vol 2, C.B. 1, 357-369. See also, S.Rep. No. 94-1236, 94th Cong. 2nd Sess. at 483-484 (1976) (Conf. Rep.), reprinted in 1976-3 C.B. Vol. 3 at 887-888; S. Rep. No. 94-938, 94th Cong. 2nd Sess. at 349-359 (1976), reprinted in 1976-3 C.B. Vol. 3 49, 387-397.

B. Amendment of I.R.C. ' 6694

Congress passed the Small Business and Work Opportunity Tax Act of 2007, Title VIII, Subtitle B of U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations. It became Pub. L. 110-28, 121 Stat 112, when President Bush signed it on May 25, 2007. Section 8246 of the Act amends several provisions of the Code to extend the application of the income tax return preparer penalties to all tax return preparers, alter the standards of conduct that must be met to avoid imposition of the penalties for preparing a return which reflects an understatement of liability, and increase applicable penalties. The amendments are effective for tax returns prepared after the date of the enactment, May 25, 2007.

C. I.R.C. ' 6694 after the May, 2007, amendments

26 USC § 6694. Understatement of taxpayer's liability by tax return preparer.

(a) Understatement due to unreasonable positions.

(1) In general. Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a position described in paragraph (2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of--

(A) \$ 1,000, or

(B) 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Unreasonable position. A position is described in this paragraph if--

(A) the tax return preparer knew (or reasonably should have known) of the position,

(B) there was not a reasonable belief that the position would more likely than not be sustained on its merits, and

(C)

(i) the position was not disclosed as provided in section 6662(d)(2)(B)(ii) [26 USCS § 6662(d)(2)(B)(ii)], or

(ii) there was no reasonable basis for the position.

(3) Reasonable cause exception. No penalty shall be imposed under this subsection if it is shown that there is reasonable cause for the understatement and the tax return preparer acted in good faith.

(b) Understatement due to willful or reckless conduct.

(1) In general. Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a conduct described in paragraph (2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of--

(A) \$ 5,000, or

(B) 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Willful or reckless conduct. Conduct described in this paragraph is conduct by the tax return preparer which is--

(A) a willful attempt in any manner to understate the liability for tax on the return or claim, or

(B) a reckless or intentional disregard of rules or regulations.

(3) Reduction in penalty. The amount of any penalty payable by any person by reason of this subsection for any return or claim for refund shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

(c) Extension of period of collection where preparer pays 15 percent of penalty.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is a tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a) [26 USCS § 7421(a)], the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Preparer must bring suit in district court to determine his liability for penalty. If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under subsection (a) or (b) is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the tax return preparer fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable

30-day period referred to in this paragraph.

(3) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 [26 USCS § 6502] on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(d) Abatement of penalty where taxpayer's liability not understated. If at any time there is a final administrative determination or a final judicial decision that there was no understatement of liability in the case of any return or claim for refund with respect to which a penalty under subsection (a) or (b) has been assessed, such assessment shall be abated, and if any portion of such penalty has been paid the amount so paid shall be refunded to the person who made such payment as an overpayment of tax without regard to any period of limitations which, but for this subsection, would apply to the making of such refund.

(e) Understatement of liability defined. For purposes of this section, the term 'understatement of liability' means any understatement of the net amount payable with respect to any tax imposed by this title or any overstatement of the net amount creditable or refundable with respect to any such tax. Except as otherwise provided in subsection (d), the determination of whether or not there is an understatement of liability shall be made without regard to any administrative or judicial action involving the taxpayer.

(f) Cross reference. For definition of tax return preparer, see section 7701(a)(36) [26 USCS § 7701(a)(36)].

D. Key points to note in the changed I.R.C. § 6694

1. Made the penalty applicable to all tax returns and not just income tax returns;
2. Changed the penalty for I.R.C. § 6694(a) from \$250 to greater of \$1000 or 50 percent of any fee;
3. Changed the penalty under I.R.C. § 6694(b) for willful and reckless disregard of rules and regulations from \$1,000 to greater of \$5,000 or 50 percent of any fee;
4. Standard for § 6694(a) previously was:
 - Unrealistic possibility of being sustained on the merits
 - Preparer knew or should have known
 - Position not disclosed or frivolous

5. New standard¹ for § 6694(a) is:
 - Preparer knew (or should have known) of the position
 - No reasonable belief that position would more likely than not be sustained
 - Position not disclosed² or no reasonable basis

E. Interaction of I.R.C. § 6702 and I.R.C. § 6694

Section 6694 has an obvious application to those instances where the return preparer has prepared a return subject to the penalty under I.R.C. ' 6702. In most instances, we think the IRS would have adequate justification to apply the penalty under I.R.C. § 6694(b) of at least \$5,000 per frivolous return prepared.

F. Matters for consideration related to I.R.C. § 6694 change

1. In a letter dated June 7, 2007, the AICPA asked the Service to provide transitional relief. 2007 TNT 125-24.

2. Notice 2007-54, 2007-27 I.R.B. 1 (June 11, 2007) gives relief

Questions for resolution:

- What are activities representing preparation of a tax return
- Who is a return preparer within the meaning of section 7701(a)(36)
- How the statute applies to signing and nonsigning preparers.

Transitional relief applies prior law to all returns, amended returns, and refund claims due on or before December 31, 2007 (determined with regard to any extension of time for filing); to 2007 estimated tax returns due on or before January 15, 2008; and to 2007 employment and excise tax returns due on or before January 31, 2008.

¹ Notice 2007-54 describes the change in the standard as follows:

Section 8246 of the Act amends the standards of conduct under section 6694(a) in two ways. First, for undisclosed positions, the Act replaces the realistic possibility standard with a requirement that there be a reasonable belief that the tax treatment of the position would more likely than not be sustained on its merits. Second, for disclosed positions, the Act replaces the not-frivolous standard with the requirement that there be a reasonable basis for the tax treatment of the position.

² Under both the prior and current law, disclosure under section 6694(a) is adequate if made on a Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement, attached to the return, amended return, or refund claim, or pursuant to the annual revenue procedure authorized in Treasury Regulation sections 1.6694-2(c)(3) and 1.6662-4(f)(2).

3. AICPA in a July 10, 2007, letter to Congress complains of the changes to I.R.C. § 6694 and requests corrective legislation to equalize the return preparer standard with the taxpayer standard. 2007 TNT 136-79
4. Tax Executives Institute sent a letter to Congress dated Sep. 19, 2007, opposing the extension of the return preparer penalty standard to taxpayers. 2007 TNT 183-32
5. Proposed regulation changes dated Sep. 19, 2007, extend the Circular 230 requirements to all return preparers and changes the practice standards to make them consistent with the recent changes to I.R.C. § 6694.³ See, REG-138637-07, 2007 IRB LEXIS 853 (Sep. 24, 2007).
6. Are reporting agents return preparers. See I.R.C. § 7701(a)(36) and Rev. Proc. 2007-38; 2007 IRB LEXIS 536; 2007-25 I.R.B. 1442 (June 18, 2007)

³ The explanation for the proposed regulation change provides, in part, as follows:

This document contains proposed amendments to §10.34 of Circular 230. Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Pursuant to section 330 of title 31, the Secretary has published the regulations in Circular 230 (31 CFR part 10).

On May 25, 2007, the President signed into law the Small Business and Work Opportunity Tax Act of 2007, Public Law 110-28 (121 Stat. 190), which amended several provisions of the Internal Revenue Code to extend the application of the income tax return preparer penalties to all tax return preparers, alter the standards of conduct that must be met to avoid imposition of the penalties for preparing a return that reflects an understatement of liability, and increase applicable penalties. On June 11, 2007, the IRS released Notice 2007-54, 2007-27 IRB 1 (see §601.601 (d) (2) (ii) (b)), providing guidance and transitional relief for the return preparer provisions under section 6694 of the Internal Revenue Code, as recently amended.

Final regulations are, simultaneously to these proposed regulations, being promulgated on September 26, 2007, modifying the general standards of practice before the IRS under Circular 230. Those final regulations finalize the standards with respect to documents, affidavits and other papers as proposed, with modifications. Those final regulations, however, do not finalize the standards with respect to tax returns under §10.34 (a) and the definitions under §10.34 (e) because of the amendments made by the Small Business and Work Opportunity Tax Act of 2007. Rather, the Treasury Department and the IRS are reserving §10.34 (a) and (e) in those final regulations and are simultaneously issuing this notice of proposed rulemaking proposing to amend this part to reflect these recent amendments to the Code.

The Treasury Department and the IRS have determined that the professional standards under §10.34 of Circular 230 should conform with the civil penalty standards for return preparers.

III. Addition of I.R.C. § 6676

A. Historical background of the statute

Congress passed the Small Business and Work Opportunity Tax Act of 2007, Title VIII, Subtitle B of U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations. It became Pub. L. 110-28, 121 Stat 112, when President Bush signed it on May 25, 2007. Act § 8247(c), 121 Stat. 204, provides: "The amendments made by this section [adding this section and amending the part analysis preceding 26 USCS § 6671] shall apply to any claim filed or submitted after the date of the enactment of this Act."

B. New statutory language

26 USC § 6676. Erroneous claim for refund or credit.

(a) Civil penalty. If a claim for refund or credit with respect to income tax (other than a claim for a refund or credit relating to the earned income credit under section 32 [26 USCS § 32]) is made for an excessive amount, unless it is shown that the claim for such excessive amount has a reasonable basis, the person making such claim shall be liable for a penalty in an amount equal to 20 percent of the excessive amount.

(b) Excessive amount. For purposes of this section, the term "excessive amount" means in the case of any person the amount by which the amount of the claim for refund or credit for any taxable year exceeds the amount of such claim allowable under this title for such taxable year.

(c) Coordination with other penalties. This section shall not apply to any portion of the excessive amount of a claim for refund or credit which is subject to a penalty imposed under part II of subchapter A of chapter 68 [26 USCS §§ 6662 et seq.].

C. Considerations

1. Deficiency process or immediately assessable?
2. Reasonable cause exception?
3. To be used when the Service cannot use I.R.C. § 6662
4. Any appeal available?
5. Statute of limitations on assessment
 - Based on underlying liability
 - Based on the date the taxpayer files the claim
6. LMSB claims filed at the end of the audit cycle

IV. Recent administrative changes.

A. After the preparation of the earlier portions of this outline, the Service issued three notices which will have an impact on the application of I.R.C. §§ 6694 and 6695 for the 2007 filing season.

B. Notices issued on December 31, 2007

1. Notice 2008-11

Transitional relief under Notice 2007-54 will apply to amended returns or claims for refund (other than 2007 employment and excise tax return) filed on or before Dec. 31, 2007 and to timely amended employment and excise tax returns for claims for refund filed on or before January 31, 2008.

Transitional relief under Notice 2007-54 will apply to original returns (other than 2007 employment and excise tax returns) filed on or before December 31, 2007, and to original employment and excise tax returns filed on or before January 31, 2008.

Transition relief under Notice 2007-54 for nonsigning preparers applies to advice provided on or before December 31, 2007.

2. Notice 2008-12

Provides guidance on returns which must be signed by the return preparer under I.R.C. § 6695.

3. Notice 2008-13

Lists returns or claims on which a preparer may be subject to penalty under I.R.C. § 6694.

Lists information returns and other documents which constitute a substantial portion of the taxpayer's tax return and which may subject the preparer to a penalty.

Provides guidance on what is a reasonable belief that the tax treatment of a position would more likely than not be sustained on the merits. It permits the return preparer to rely without verification on the information provided by the taxpayer but the preparer must make reasonable inquiry if information appears incorrect or incomplete. The notice contains substantial additional guidance and deserves your personal review.