Private Causes of Action Under the Internal Revenue Code

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Introduction

There are several sections of the Internal Revenue Code (“Code”) which provide a cause of action for improper actions by both government and private actors. These materials survey several of those Code sections. The panel discussion will discuss the private causes of action and the manner in which practitioners may go about bringing them.

§ 7434. Civil damages for fraudulent filing of information returns

(a) In general.--If any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return.

(b) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the greater of $5,000 or the sum of:
(1) any actual damages sustained by the plaintiff as a proximate result of the filing of the fraudulent information return (including any costs attributable to resolving deficiencies asserted as a result of such filing),
(2) the costs of the action, and
(3) in the court's discretion, reasonable attorneys' fees.

(c) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce the liability created under this section may be brought without regard to the amount in controversy and may be brought only within the later of:
(1) 6 years after the date of the filing of the fraudulent information return, or
(2) 1 year after the date such fraudulent information return would have been discovered by exercise of reasonable care.

(d) Copy of complaint filed with IRS--Any person bringing an action under subsection (a) shall provide a copy of the complaint to the Internal Revenue Service upon the filing of such complaint with the court.

(e) Finding of court to include correct amount of payment.--The decision of the court awarding damages in an action brought under subsection (a) shall
include a finding of the correct amount which should have been reported in the information return.

(f) Information return.--For purposes of this section, the term “information return” means any statement described in section 6724(d)(1)(A).

When is Payment Considered Made?

Treas. Reg. § 1.6041-1(h):

(h) When payment deemed made. For purposes of a return of information, an amount is deemed to have been paid when it is credited or set apart to a person without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and is made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.

Information Returns – What Is the Fraud?

1099 vs W-2 – Actual or Real Damages

Section 7434 allows a plaintiff to “bring a civil action for damages” against any party that “willfully files a fraudulent information return” on the plaintiff's behalf. 26 U.S.C. § 7434(a). According to the statute, a defendant found liable in any such action will owe to the plaintiff damages “in an amount equal to the greater of $5,000 or the sum of—(1) any actual damages sustained by the plaintiff ... (2) the costs of the action, and (3) in the court's discretion, reasonable attorneys' fees.” Id. at § 7434(b).

How Are Workers Damaged by a Misclassification?


- Congress created a statutory right for employees to have accurate tax documents filed on their behalf, and it provided that employers who violated that right would be liable to the employee “in an amount equal to the greater of $5,000 or the sum of” any actual damages, costs, and attorneys' fees. 26 U.S.C. § 7434(b) (emphasis added). Congress's decision to “describe[] these permissible damages in the disjunctive” indicates that a plaintiff “can bring a claim to recover statutory damages ... as an alternative to a claim for actual damages.” Hammer, 754 F.3d at 500.

What Forms Are Covered by Section 7434?

26 U.S.C. § 6724

(1) Information return.--The term “information return” means--

(A) any statement of the amount of payments to another person required by--

(i) section 6041(a) or (b) (relating to certain information at source),

(ii) section 6042(a)(1) (relating to payments of dividends),

(iii) section 6044(a)(1) (relating to payments of patronage dividends),

(iv) section 6049(a) (relating to payments of interest),

(v) section 6050A(a) (relating to reporting requirements of certain fishing boat operators),

(vi) section 6050N(a) (relating to payments of royalties),

(vii) section 6051(d) (relating to information returns with respect to income tax withheld),

(viii) section 6050R (relating to returns relating to certain purchases of fish), or

(ix) section 110(d) (relating to qualified lessee construction allowances for short-term leases),

(B) any return required by--

(i) section 6041A(a) or (b) (relating to returns of direct sellers),

(ii) section 6043A(a) (relating to returns relating to taxable mergers and acquisitions),

(iii) section 6045(a) or (d) (relating to returns of brokers),

(iv) section 6045B(a) (relating to returns relating to actions affecting basis of specified securities),
(v) section 6050H(a) or (h)(1) (relating to mortgage interest received in trade or business from individuals),

(vi) section 6050I(a) or (g)(1) (relating to cash received in trade or business, etc.),

(vii) section 6050J(a) (relating to foreclosures and abandonments of security),

(viii) section 6050K(a) (relating to exchanges of certain partnership interests),

(ix) section 6050L(a) (relating to returns relating to certain dispositions of donated property),

(x) section 6050P (relating to returns relating to the cancellation of indebtedness by certain financial entities),

(xi) section 6050Q (relating to certain long-term care benefits),

(xii) section 6050S (relating to returns relating to payments for qualified tuition and related expenses),

(xiii) section 6050T (relating to returns relating to credit for health insurance costs of eligible individuals),

(xiv) section 6052(a) (relating to reporting payment of wages in the form of group-life insurance),

(xv) section 6050V (relating to returns relating to applicable insurance contracts in which certain exempt organizations hold interests),

(xvi) section 6053(c)(1) (relating to reporting with respect to certain tips),

(xvii) subsection (b) or (e) of section 1060 (relating to reporting requirements of transferors and transferees in certain asset acquisitions),

(xviii) section 4101(d) (relating to information reporting with respect to fuels taxes),

(xix) subparagraph (C) of section 338(h)(10) (relating to information required to be furnished to the Secretary in case of elective recognition of gain or loss),

(xx) section 264(f)(5)(A)(iv) (relating to reporting with respect to certain life insurance and annuity contracts),

(xxi) section 6050U (relating to charges or payments for qualified long-term care insurance contracts under combined arrangements),
section 6039(a) (relating to returns required with respect to certain options),

section 6050W (relating to returns to payments made in settlement of payment card transactions),

section 6055 (relating to returns relating to information regarding health insurance coverage),

section 6056 (relating to returns relating to certain employers required to report on health insurance coverage), or

section 6050Y (relating to returns relating to certain life insurance contract transactions), and¹

(C) any statement of the amount of payments to another person required to be made to the Secretary under--

(i) section 408(i) (relating to reports with respect to individual retirement accounts or annuities), or

(ii) section 6047(d) (relating to reports by employers, plan administrators, etc.), and

(D) any statement required to be filed with the Secretary under section 6035.

Such term also includes any form, statement, or schedule required to be filed with the Secretary under chapter 4 or with respect to any amount from which tax was required to be deducted and withheld under chapter 3 (or from which tax would be required to be so deducted and withheld but for an exemption under this title or any treaty obligation of the United States).

The Complaint – Elements of Claim Under Section 7434

To establish a claim of tax fraud under 26 U.S.C. § 7434, a plaintiff must prove:

• that the employer issued an information return;
• that the information return was fraudulent; and

Persons Liable – Willfulness

• Circuit courts around the country have found that “willfulness” in the context of the statute “connotes a voluntary, intentional violation of a legal
duty,” and that tax fraud typically requires “intentional wrongdoing.” *Vandenheede v. Vecchio*, 541 Fed.Appx. 577, 580 (6th Cir.2013) (citing *Maciel v. Comm'r*, 489 F.3d 1018, 1026 (9th Cir.2007); *Granado v. Comm'r*, 792 F.2d 91, 93 (7th Cir.1986)).

**Measure of Damages**

  - Congress created a statutory right for employees to have accurate tax documents filed on their behalf, and it provided that employers who violated that right would be liable to the employee “in an amount equal to the greater of $5,000 or the sum of” any actual damages, costs, and attorneys' fees. 26 U.S.C. § 7434(b) (emphasis added). Congress's decision to “describe[] these permissible damages in the disjunctive” indicates that a plaintiff “can bring a claim to recover statutory damages ... as an alternative to a claim for actual damages.” *Hammer*, 754 F.3d at 500.

**Recent Cases**


In short, substantially for the reasons provided by Magistrate Judge Gorenstein in the R&R, the Court concludes that Section 7434 “afford[s] a damages remedy for victims” of “the malicious reporting of false payments.” *Liverett*, 192 F. Supp. 3d at 654. Pacheco is not such a person because he does not allege that Defendants maliciously reported false payments to the IRS; instead, he alleges that Defendants failed to report anything about him at all. See ECF No. 45, ¶ 24. For this reason, the R&R is ADOPTED to the extent it recommends holding that Pacheco lacks a cause of action under Section 7434, and Defendants' motion to dismiss is GRANTED.

Regarding Plaintiff’s claim for fraudulent filing of tax return pursuant to 26 U.S.C. § 7434 against both Defendants, Ms. Vanderbilt testified that, after consulting a personal acquaintance who is a “CPA,” she told Mr. Peer twice in the same week that she should be classified as an employee and not an independent contractor. She testified that in 2019, she nevertheless received through U.S. Mail an IRS Form 1099-MISC for the 2018 fiscal year. Plaintiff submitted this document as Exhibit 3, and it indeed lists that Boat Bottom Express LLC paid Valerie Vanderbilt “nonemployee compensation” of $48,684.63 for 2018. Plaintiff argues that this evidences Defendants unlawfully giving false information to the IRS indicating that she was an independent contractor, when in fact she was an employee pursuant to the $1,000 per month verbal contract discussed above. Ms. Vanderbilt testified that she was not involved in the furnishing of the Form 1099 at issue, and did not send it to the IRS, as she was no longer working for BBE at that point. The Court finds that Defendant BBE (listed on the form as “PAYER”) furnished the document at issue to the IRS, and as such, Defendant BBE is liable to Plaintiff for $5,000.00 in statutory damages pursuant to 26 U.S.C. § 7434.
§ 7431. Civil damages for unauthorized inspection or disclosure of returns and return information

(a) In general.--

(1) Inspection or disclosure by employee of United States.--If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) Inspection or disclosure by a person who is not an employee of United States.--If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.

(b) Exceptions.--No liability shall arise under this section with respect to any inspection or disclosure--

(1) which results from a good faith, but erroneous, interpretation of section 6103, or

(2) which is requested by the taxpayer.

(c) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of--

(1) the greater of--

(A) $1,000 for each act of unauthorized inspection or disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of--

(i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus

(ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action, plus
(3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party (as determined under section 7430(c)(4)).

(d) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure.

(e) Notification of unlawful inspection and disclosure.--If any person is criminally charged by indictment or information with inspection or disclosure of a taxpayer's return or return information in violation of--

(1) paragraph (1) or (2) of section 7213(a),

(2) section 7213A(a), or

(3) subparagraph (B) of section 1030(a)(2) of title 18, United States Code,

the Secretary shall notify such taxpayer as soon as practicable of such inspection or disclosure. The Secretary shall also notify such taxpayer if the Internal Revenue Service or a Federal or State agency (upon notice to the Secretary by such Federal or State agency) proposes an administrative determination as to disciplinary or adverse action against an employee arising from the employee's unauthorized inspection or disclosure of the taxpayer's return or return information. The notice described in this subsection shall include the date of the unauthorized inspection or disclosure and the rights of the taxpayer under such administrative determination.

(f) Definitions.--For purposes of this section, the terms “inspect”, “inspection”, “return”, and “return information” have the respective meanings given such terms by section 6103(b).

(g) Extension to information obtained under section 3406.--For purposes of this section--

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any inspection or use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.
For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.

(h) Special rule for information obtained under section 6103(k)(9).--For purposes of this section, any reference to section 6103 shall be treated as including a reference to section 6311(e).

Elements of a Claim

- In order to recover under section 7431 for violations of section 6103, a taxpayer must show by a preponderance of the evidence that:
  - the disclosure was unauthorized;
  - the disclosure was made “knowingly or by reason of negligence”;
  and
  - the disclosure violated section 6103. Flippo v. United States, 670 F.Supp. 638, 641 (W.D.N.C.1987), aff’d per curiam, 849 F.2d 604 (4th Cir.1988).

Return Information

“Return information” under section 6103 is defined as: *a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense ...*

What Constitutes a Disclosure

A “disclosure” is “the making known to any person in any manner whatever a return or return information.” 26 U.S.C. § 6103(b)(8).

Safe Harbor – Section 6103(k)(6)

- According to section 6103(k)(6), there are exceptions to the general rule against disclosure of taxpayer information.
- Disclosure is allowed when three requirements are met:
  - the information is “with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of [the Internal Revenue Code]”;
  - the information sought is “not otherwise reasonably available”; and
• it is necessary to make disclosures of return information in order to obtain the additional information sought.

• Not Otherwise Reasonably Available
  o In deciding whether the information was not otherwise reasonably available, a court may not delve into the subjective intent of the IRS agent and whether she had sufficient justification to seek the information at issue. Courts ask not whether the information was necessary to the IRS's duties but whether, once the IRS decided it required the information, the disclosures were necessary to obtain the information and the information was not otherwise reasonably available. see Barrett v. United States, 795 F.2d 446, 451 (5th Cir. 1986). The implementing regulations for section 6103 give guidance on the definition of “not otherwise reasonably available” by noting that disclosure may occur when the information sought cannot “otherwise reasonably be obtained in accurate and sufficiently probative form, or in a timely manner, and without impairing the proper performance of the official duties, or if such activities cannot otherwise properly be accomplished without making such disclosure.” 26 C.F.R. § 301.6103(k)(6)–(1)(a).

Persons Authorized to Make Disclosures

• Section 7431(a)(2) of the Code allows a cause of action against “any person who is not an officer or employee of the United States” if that person unlawfully discloses return information. 26 U.S.C. § 7431(a)(2) (emphasis added).
  o A “person” is defined in the Code as “an individual, a trust, estate, partnership, association, company or corporation.” 26 U.S.C. § 7701(a)(1).
  o Based on this definition, Marsoun v. United States, 525 F.Supp.2d 206, 213 (D.D.C. 2007) found that § 7431(a)(2) “does not authorize a right of action against a State, its agencies, or state employees sued in their official capacities (the latter, of course, being no different than a suit against the state).”

Good Faith

• Section 7431(b) carves out a good-faith exception to the liability imposed by § 7431(a). It provides that “[n]o liability shall arise … with respect to any inspection or disclosure … which results from a good faith, but erroneous, interpretation of section 6103.” 26 U.S.C. § 7431(b)(1).
• Whether the government's erroneous interpretation of § 6103 was in good faith turns on whether the government violated *1166 “clearly established
statutory or constitutional rights of which a reasonable person would have known.” *McDonald v. United States*, 102 F.3d 1009, 1011 (9th Cir.1996) (internal quotation marks omitted).

- The burden is on the government to plead and prove good faith as an affirmative defense.

**Damages**

- **Actual Damages and Statutory Damages**
  - Section 7431(c)(1)(A) provides that an aggrieved taxpayer is entitled to statutory damages of $1,000 for “each act” of unauthorized inspection or disclosure. The word “act” is not defined in the statute, and thus it is presumed to have its ordinary meaning. *Smith v. United States*, 507 U.S. 197, 201, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993); *see also Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012) (holding that “[w]hen a term goes undefined in a statute, we give the term its ordinary meaning,” and consulting dictionaries to determine ordinary meaning).
  - The ordinary meaning of the word “act” is “a thing done or being done.” Webster's Third New Int'l Dict. of the Engl. Lang., at 20 (1961). The “thing done or being done” in the statute here is the act of unauthorized inspection or disclosure—in this case a single act of disclosure, the errant mailing of the Report.

- **Punitive Damages**
  - Section 7431(c)(1)(B)(ii) authorizes a punitive damage award only if the disclosures are willful or grossly negligent.
    - Willful conduct is “that which was done without ground for believing that it was lawful or conduct marked by a careless disregard of whether one has a right to act in such a manner.” *Smith v. United States*, 730 F.Supp. 948, 955 (C.D.Ill.1990), rev'd on other grounds, *Smith v. United States*, 964 F.2d 630 (7th Cir.1992).
    - Conduct that is grossly negligent is that which is either willful or marked by “wanton or reckless disregard of the rights of another.” *Id.; see also Marré v. United States*, 38 F.3d 823, 826 (5th Cir.1994).

**Attorneys’ Fees**
Section 7431(c)(2)(3) allows a plaintiff to recover reasonable attorney's fees against the United States but only if the plaintiff is a “prevailing party” within the meaning of 26 U.S.C. § 7430(c)(4).
  o Section 7430(c)(4) defines “prevailing party” as a party who either “has substantially prevailed with respect to the amount in controversy” or “has substantially prevailed with respect to the most significant issue or set of issues presented.”
  o However, “[a] party shall not be treated as a prevailing party ... if the United States establishes that the position of the United States in the proceeding was substantially justified.” 26 U.S.C. § 7430(c)(4)(B).
Overview of Section 7433

- Section 7433 of the Internal Revenue Code, which was added as part of the Omnibus Taxpayer's Bill of Rights, is a limited waiver of sovereign immunity. 26 U.S.C. § 7433. It allows taxpayers to recover civil damages for certain unauthorized collection activities by the IRS, but only when IRS employees cause the damage through reckless or intentional disregard of the Internal Revenue Code or regulations during the collection of a federal tax. 26 U.S.C. § 7433(a). As a prerequisite to filing such an action, a taxpayer must exhaust all administrative remedies within the IRS. 26 U.S.C. § 7433(d)(1).

§ 7433. Civil damages for certain unauthorized collection actions

(a) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages.--In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority.--Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations.--

(1) Requirement that administrative remedies be exhausted.--A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.
(2) **Mitigation of damages.**--The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) **Period for bringing action.**--Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) **Actions for violations of certain bankruptcy procedures.**--

(1) **In general.**--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) **Remedy to be exclusive.**--

(A) **In general.**--Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) **Certain other actions permitted.**--Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that--

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

**Allegations and Conditions Precedent**

- Under 26 U.S.C. § 7433(d)(1), “[a] judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.”

- In order to meet the exhaustion requirement, the taxpayer must send an administrative claim to the Area Director including:
  - the name, address, phone numbers and taxpayer ID number for the claimant,
  - the grounds for the claim,
  - a description of the injuries sustained,
§ 301.7433–1 Civil cause of action for certain unauthorized collection actions.

(a) In general. If, in connection with the collection of a federal tax with respect to a taxpayer, an officer or an employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of the Internal Revenue Code or any regulation promulgated under the Internal Revenue Code, such taxpayer may bring a civil action for damages against the United States in federal district court. The taxpayer has a duty to mitigate damages. The total amount of damages recoverable is the lesser of $1,000,000 ($100,000 in the case of negligence), or the sum of:

(1) The actual, direct economic damages sustained as a proximate result of the reckless or intentional actions of the officer or employee; and

(2) Costs of the action.

An action for damages filed in federal district court may not be maintained unless the taxpayer has filed an administrative claim pursuant to paragraph (e) of this section, and has waited for the period required under paragraph (d) of this section.

(b) Actual, direct economic damages—(1) Definition. Actual, direct economic damages are actual pecuniary damages sustained by the taxpayer as the proximate result of the reckless or intentional, or negligent, actions of an officer or an employee of the Internal Revenue Service. Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages.

(2) Litigation costs and administrative costs not recoverable. Litigation costs and administrative costs are not recoverable as actual, direct economic damages. Litigation costs may be recoverable under section 7430 (see paragraph (h) of this section) or, solely to the extent described in paragraph (c) of this section, as costs of the action.

(i) Litigation costs. For purposes of this paragraph, litigation costs are any costs incurred pursuing litigation for relief from the action taken by the officer or employee of the Internal Revenue Service, including costs incurred pursuing a civil action in federal district court under paragraph (a) of this section. The term litigation costs includes the following:

(A) Court costs;
(B) Expenses of expert witnesses in connection with a court proceeding;
(C) Cost of any study, analysis, engineering report, test, or project prepared for a court proceeding; and
(D) Fees paid or incurred for the services of attorneys, or other individuals authorized to practice before the court, in connection with a court proceeding.
(ii) **Administrative costs.** For purposes of this section, administrative costs are any costs incurred pursuing administrative relief from the action taken by an officer or employee of the Internal Revenue Service, including costs incurred pursuing an administrative claim for damages under paragraph (e) of this section. The term administrative costs includes:

(A) Any administrative fees or similar charges imposed by the Internal Revenue Service; and

(B) Expenses, costs, and fees described in paragraph (b)(2)(i) of this section incurred pursuing administrative relief.

(c) **Costs of the action.** Costs of the action recoverable as damages under this section are limited to the following costs:

1. Fees of the clerk and marshall;

2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

3. Fees and disbursements for printing and witnesses;

4. Fees for exemplification and copies of paper necessarily obtained for use in the case;

5. Docket fees; and

6. Compensation of court appointed experts and interpreters.

(d) **No civil action in federal district court prior to filing an administrative claim—**

1. Except as provided in paragraph (d)(2) of this section, no action under paragraph (a) of this section shall be maintained in any federal district court before the earlier of the following dates:

   (i) The date the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or

   (ii) The date six months after the date an administrative claim is filed in accordance with paragraph (e) of this section.

2. If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations.
(e) Procedures for an administrative claim—(1) Manner. An administrative claim for the lesser of $1,000,000 ($100,000 in the case of negligence) or actual, direct economic damages as defined in paragraph (b) of this section shall be sent in writing to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer currently resides.

(2) Form. The administrative claim shall include:

(i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim;

(ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(v) The signature of the taxpayer or duly authorized representative. For purposes of this paragraph, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(f) No action in federal district court for any sum in excess of the dollar amount sought in the administrative claim. No action for actual, direct economic damages under paragraph (a) of this section shall be instituted in federal district court for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (e) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(g) Period of limitations—(1) Time for filing. A civil action under paragraph (a) of this section must be brought in federal district court within 2 years after the date the cause of action accrues.
(2) Right of action accrues. A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(h) Recovery of costs under section 7430. Reasonable litigation costs, including attorney's fees, not recoverable under this section may be recoverable under section 7430. If following the Internal Revenue Service's denial of an administrative claim on the grounds that the Internal Revenue Service did not violate section 7433(a), a taxpayer brings a civil action for damages in a district court of the United States, and establishes entitlement to damages under this section, substantially prevails with respect to the amount of damages in controversy and meets the requirements of section 7430(c)(4)(A)(iii)(relating to notice and net worth requirements), the taxpayer will be considered a “prevailing party” for purposes of section 7430. Such taxpayer, therefore, will generally be entitled to attorney's fees and other reasonable litigation costs not recoverable under this section. For purposes of this paragraph, if the Internal Revenue Service does not respond on the merits to an administrative claim for damages within six months after the claim is filed, the Internal Revenue Service's failure to respond shall be considered a denial of the claim on the grounds that the Internal Revenue Service did not violate section 7433(a). Administrative costs, including attorney's fees incurred pursuing an administrative claim under paragraph (e) of this section, are not recoverable under section 7430.

Exhausting Administrative Claims

- It has been previously held that similar complaints alleging § 7433 violations may be dismissed under Rule 12(b)(6) on the theory that the plaintiffs in those cases had not contested that they failed to exhaust the administrative remedies promulgated in 26 C.F.R. § 301.7433–1. See Lindsey, 448 F.Supp.2d at 54–55; Turner, 429 F.Supp.2d at 154–55. Therefore,
  - “in light of the Supreme Court's ruling in Jones, it is clear that a plaintiff's complaint cannot be dismissed under Rule 12(b)(6) merely because that plaintiff failed to allege that he exhausted his administrative remedies in his opposition to a motion to dismiss ... [or] in the complaint itself. Under either scenario, the appropriate procedural mechanism for bringing a case to closure when there is no evidence in the record that the plaintiff exhausted the administrative remedies available to him is a motion of summary judgment under Federal Rule of Civil Procedure 56, not a motion to dismiss under Rule 12.”

Damages

- If a plaintiff establishes that an officer or employee of the IRS intentionally, recklessly, or negligently disregarded Title 26, the plaintiff...
is entitled to damages. 26 U.S.C. § 7433(a). The statute caps damages at the lesser of $1,000,000 (or $100,000 in the case of negligence) or the sum of (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the IRS's conduct and (2) the costs of the action. 26 U.S.C. § 7433(b). The plaintiff has the obligation to mitigate her actual, direct economic damages. 26 U.S.C. § 7433(d)(2).

- Actual, direct economic damages are “actual pecuniary damages sustained by the taxpayer as the proximate result of the [negligent] actions of an [IRS employee].” 26 C.F.R. § 301.7433–1(b)(1). “Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages.” Id. Any actual pecuniary damages must be proximately caused by the IRS's negligent collection activity. Compare 26 U.S.C. § 7433(b)(1) (allowing recovery for damages “as a proximate result” of negligent collection activity), with 26 U.S.C. § 7432 (allowing recovery for damages which, “but for the actions of the defendant,” would not have been sustained).

**Equitable Remedy and Exhaustion of Administrative Remedies**

  - The first, known as “non-jurisdictional exhaustion,” is a “judicially created doctrine” that the court may, under certain circumstances and “in its discretion, excuse.” Id.
  - The second, called “jurisdictional exhaustion,” is a statutory “predicate to judicial review ... rooted, not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts.” Id. (citing *E.E.O.C. v. Lutheran Soc. Servs.*, 186 F.3d 959, 963–64 (D.C.Cir.1999)). “If the statute does mandate exhaustion, a court cannot excuse it.” Id. at 1247–48 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000)). Because courts “presume exhaustion is non-jurisdictional,” id. at 1248, there must be “[s]weeping and direct statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim.” *Weinberger v. Salji*, 422 U.S. 749, 757, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

**Limitations Period**

- Section 7433 contains a two-year statute of limitations: “Notwithstanding any other provision of law, an action to enforce liability created under this
section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.” 26 U.S.C. § 7433(d)(3).

- The IRS’s regulations implementing Section 7433(d)(3) provide that the right of action “accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.” 26 C.F.R. § 301.7433–1(g)(2).

- The language in the regulation—a “reasonable opportunity”—sets a relatively low bar. In other contexts, courts have said that the “reasonable opportunity to discover” language in a statute of limitations “bars a suit if the plaintiff had such notice as would lead a reasonable person either to sue or to launch an investigation that would likely uncover the requisite facts.” Sparshott v. Feld Entertainment, Inc., 311 F.3d 425, 428–29 (D.C.Cir.2002) (interpreting 18 U.S.C. § 2520(e)).

**Must be Unauthorized Collection**

- Based upon the plain language of the statute, which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under § 7433 for an improper assessment of taxes. See also Miller v. United States, 763 F.Supp. at 1543 (noting the difference between an assessment activity and a collection activity).

- Courts have previously determined that § 7433 is not the proper vehicle for recovering damages relating to an improper assessment of taxes. Shaw v. United States, 20 F.3d 182, 184 (5th Cir.1994). In Shaw, the Court observed that demonstrating an improper assessment of taxes and establishing improper collection activities involve proof of distinctive facts. Id. “[T]o prove a claim for improper assessment, a taxpayer must demonstrate why no taxes are owed, but to prove a claim for improper collection practices, the taxpayer must demonstrate that the IRS did not follow the prescribed methods of acquiring assets.” Id.
The Right of Contribution Under Section 6672(d)

Overview

- The Internal Revenue Code requires employers to withhold from employees' wages federal income taxes and social security contributions. 26 U.S.C. §§ 3102(a), 3402(a). These sums are deemed to be held “in trust” for the United States. Id. at § 7501(a). If the trust funds are not paid over, the government may impose a 100 percent penalty for the withheld taxes on any person required to collect, account for, or pay over the withheld taxes (commonly referred to as a “responsible person”), who willfully fails to do so. Id. at § 6672(a); Barnett v. Internal Revenue Serv., 988 F.2d 1449, 1453 (5th Cir.1993). Section 6672(d) provides a right of contribution where more than one person is liable for the penalty. 26 U.S.C. § 6672(d).
- Under § 6672(d), “where more than 1 person is liable for the penalty under [§ 6672(a) ] with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty.” Thus, to be entitled to contribution under § 6672(d), Plaintiff must establish that McNeil is a responsible person who willfully failed to collect, account for, or pay over the withheld taxes.

Overview of the TFRP

A. Introduction

1. In General:
   a. Authorization of the Penalty: I.R.C. § 6672(a) imposes personal liability on any person required to collect, truthfully account for, and pay over taxes held in trust who willfully fails to do so. This liability is known as the trust fund recovery penalty (again, “TFRP”).
   i. Collection Device or Penalty? An issue that often arises is whether the I.R.C. § 6672 TFRP is a collection device with respect to which interest does not accrue independent of the underlying employment tax liability or whether the TFRP is a separately assessable penalty with respect to which interest accrues independent of the underlying employment tax. Courts are split on this issue.
ii. **Collection Device:** One set of courts, including the United States Tax Court (“Tax Court”), recognizes the I.R.C. § 6672 TFRP “as a collection device by assessment of unpaid employment tax against an individual as a ‘responsible person’.” Robinson v. Commissioner, 117 T.C. 308, 318 (2001); see also Aardema v. Fitch, 684 N.E.2d 884, 896 (Ill. App. Ct. 1997).

iii. **Penalty:** Another set of courts, including the U.S. Courts of Appeals for the Second, Seventh, and Ninth Circuits, hold that the I.R.C. § 6672 imposes a penalty and is not a mere collection device. See, e.g., Mortenson v. Nat’l Union Fire Ins. Co., 249 F.3d 667 (7th Cir. 2001); Duncan v. Commissioner, 68 F.3d 315, 317-319 (9th Cir. 1995), aff’g in part, rev’g in part, and remanding in part, T.C. Memo. 1993-370; Kalb v. United States, 505 F.2d 506, 510 (2d Cir. 1974).

iv. **Why This Matters:** Whether the TFRP is a penalty or a collection device affects not only the accrual of interest, but also the procedure that must be complied with to assess the penalty; namely, I.R.C. § 6751(b)(1) (discussed below).

b. **Amount of the Penalty:** The amount of the liability is equal to the amount of the tax evaded, not collected, or not accounted for and paid over. I.R.C. § 6672(a).

c. **Full Unpaid Trust Fund Amount Will Be Collected Only Once:** The full unpaid trust fund amount will be collected only once in a particular case, whether it is collected from the employer/collecting agent, from one or more of its responsible persons, or from a combination of the employer/collecting agent and one or more of its responsible persons.

i. **Dixon v. Commissioner:** In Dixon v. Commissioner, 141 T.C. 173, 193 (Sept. 3,
2013), the United States Tax Court (“Tax Court”) summarized the “well-established IRS policy against double collection of trust fund taxes”. The Court went on to note that an employer’s payment of employment tax must be credited toward a responsible person’s potential liability for the I.R.C. § 6672 penalty to avoid double collection of the same tax. Id. at 194-194.

ii. IRS’s Policy Statements: The IRS’s policy statements also state that the TFRP, including interest and penalties, should be collected only once (either from the business or from one or more of its responsible persons). See I.R.M., pt. 1.2.14.1.3(2) (June 9, 2003) (Policy Statement 5-14); see also IRM, pt. 5.17.7.1.9(2) (Aug. 1, 2010) (“If, after the assertion of the TFRP, the corporation pays the delinquent tax, the TFRP assessment will be abated.”).

d. Tax Forms to Which the TFRP Can Relate: Assessments of the TFRP are possible based on liabilities for the following tax forms:

i. Form 941, Employer’s QUARTERLY Federal Tax Return;

ii. Form 720, Quarterly Federal Excise Tax Return;

iii. Form CT-1, Employer’s Annual Railroad Retirement and Unemployment Return;

iv. Form 943, Employer’s Annual Federal Tax Return for Agricultural Employees;

v. Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons;

vi. Form 945, Annual Return of Withheld Federal Income Tax;

vii. Form 944, Employer’s ANNUAL Federal Tax Return;
IRS Policy With Respect to the TFRP

- **Appropriateness of TFRP Assessments**
  - The trust fund recovery penalty, applicable to withheld income and employment (social security and railroad retirement) taxes or collected excise taxes, will be used to facilitate the collection of tax and enhance voluntary compliance. If a business has failed to collect or pay over income and employment taxes, or has failed to pay over collected excise taxes, the trust fund recovery penalty may be asserted against those determined to have been responsible and willful in failing to pay over the tax. Responsibility and willfulness must both be established. The withheld income and employment taxes or collected excise taxes will be collected only once, whether from the business, or from one or more of its responsible persons. See I.R.M., pt. 1.2.14.1.3(2) (June 9, 2003).

- **Collect the Correct Amount of Tax, Not to Necessarily Impose a Penalty**
  - Collection of the withheld income and employment taxes or collected excise taxes is achieved when the Service’s right to retain the amount collected is established. See I.R.M., pt. 1.2.14.1.3(3) (June 9, 2003).

**TFRP Assessments**

- Any person required to collect, truthfully account for, and pay over any “trust fund tax” who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof. I.R.C. § 6672.

- Two conditions *must* be satisfied in order for a person to be assessed:
  - The person was “responsible;”
  - The person was “willful.”

**Factors In Determining Responsible Person Status**

- In determining an individual's status as a responsible person
under § 6672(a), courts consider whether the individual:
  o  (1) is an officer or member of the board of directors;
  o  (2) owns a substantial amount of stock in the company;
  o  (3) manages the day-to-day operations of the business;
  o  (4) has the authority to hire or fire employees;
  o  (5) makes decisions as to the disbursements of funds and payment of creditors; and
  o  (6) possesses the authority to sign company checks.

IRM pt 5.7.3.3.1 (08-06-2015)

Establishing Responsibility

1. Responsibility is a matter of status, duty, and authority. A determination of responsibility is dependent on the facts and circumstances of each case.

2. Potential responsible persons include:
   • Officer or employee of a corporation
   • Partner or employee of a partnership
   • Corporate director or shareholder
   • Another corporation
   • Employee of a sole proprietorship
   • Limited liability company (LLC) member, manager or employee
   • Surety lender
   • Other person or entity outside the delinquent business organization
   • Payroll Service Provider (PSP)
   • Responsible parties within a PSP
   • Professional Employer Organization (PEO)
   • Responsible parties within a PEO
   • Responsible parties within the common law employer (client of PSP/PEO)
   • Business entities (including corporations, S corporations, LLC, etc.) that are determined to be the collection agency in the case of certain collected excise taxes

☐ A responsible person has:
  • Duty to perform
  • Power to direct the act of collecting trust fund taxes
  • Accountability for and authority to pay trust fund taxes
  • Authority to determine which creditors will or will not be paid

☐ To determine whether a person has the status, duty and authority to ensure that the trust fund taxes are paid, consider the duties of the officers as set forth in the corporate by-laws as well as the ability of the individual(s) to sign checks. In addition, determine the identity of the individuals who:
• Are officers, directors, or shareholders of the corporation
• Hire and fire employees
• Exercise authority to determine which creditors to pay
• Sign and file the excise tax or employment tax returns, such as Form 941, *Employer’s Quarterly Federal Tax Return*
• Control payroll/disbursements
• Control the corporation’s voting stock
• Make federal tax deposits

**Release of 6672(d) Liability Via Contract**

• “It is well established that federal common law properly is invoked to determine the validity of a release of a statutorily-conferred federal right.” [*United States v. Northrup*, 59 F.3d 953, 960 (9th Cir.1995)].
  
  • In order to determine whether a release provision is enforceable in light of public policy concerns, a court is required
    o “(1) to determine whether the agreement waives a right that impacts upon the public interest;
    o (2) determine whether a *substantial* public interest would be impaired by enforcement of the agreement; and
    o (3) to ascertain the reasons apart from the general interest in settling disputes that support enforcing the agreement.” *Id.* at 962; *see also Town of Newton v. Rumery*, 480 U.S. 386, 392, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396-99 (9th Cir.1991).
  
  • The policy “favoring enforcement of private agreements and the encouragement of settling litigation ... is admittedly important.” *Davies*, 930 F.2d at 1398. Accordingly, “[i]n a case presenting no public interest that would be harmed by enforcement of the waiver provision, the countervailing interest in settlement will be enough to justify enforcement.” *Id.* Where there is a public interest in non-enforcement, but the interest is not “substantial,” a court considers “all the factors that bear on whether ‘the public interest in enforcement of the agreement outweigh[s] the policies furthered by non-enforcement.’” *Northrup*, 59 F.3d at 962 (citing *Davies*, 930 F.2d at 1396).

**Jurisdiction – Courts That Can Hear a § 6672(d) Contribution Claim**

• All Federal courts are courts of limited jurisdiction and require specific jurisdictional authorization to exercise their authority.
• Federal jurisdiction in tax cases is limited. 26 U.S.C. § 7421.
- Section 6672(d) conferred jurisdiction upon the federal courts for claims of contribution for the trust fund recovery penalty, provided that the action is separate from, and is not joined or consolidated with any proceeding in which the IRS seeks to collect trust fund penalties from any responsible party with respect to the underlying trust funds.
- State court jurisdiction
  - If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. *Claflin v. Houseman*, 93 U.S. 130, 137, 23 L. Ed. 833 (1876)
  - This concept is limited by some states’ enactment of an enabling statute.

**Statute of Limitations to Bring a Contribution Claim**

- Congress did not set forth a specific limitations time for bringing an action under I.R.C. § 6672(d) when it enacted the statute in 1996.
- 28 U.S.C. § 1658 provides that except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
- When does the cause of action accrue?
  - Actual payment of money to the IRS.

**Proportionate Share**

- I.R.C. § 6672(d) authorizes a right of contribution for "an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty."

**Information Gathering**

- 26 U.S.C. § 6103(e)(9) provides

**Disclosure of certain information where more than 1 person subject to penalty under section 6672.**--If the Secretary determines that a person is liable for a penalty under section 6672(a) with respect to any failure, upon request in writing of such person, the Secretary shall disclose in writing to such person--
(A) the name of any other person whom the Secretary has determined to be liable for such penalty with respect to such failure, and

(B) whether the Secretary has attempted to collect such penalty from such other person, the general nature of such collection activities, and the amount collected.
§ 7435. Civil damages for unauthorized enticement of information disclosure

(a) In general.--If any officer or employee of the United States intentionally compromises the determination or collection of any tax due from an attorney, certified public accountant, or enrolled agent representing a taxpayer in exchange for information conveyed by the taxpayer to the attorney, certified public accountant, or enrolled agent for purposes of obtaining advice concerning the taxpayer's tax liability, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $500,000 or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the information disclosure, and
(2) the costs of the action.

Damages shall not include the taxpayer's liability for any civil or criminal penalties, or other losses attributable to incarceration or the imposition of other criminal sanctions.

(c) Payment authority.--Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the actions creating such liability would have been discovered by exercise of reasonable care.

(e) Mandatory stay.--Upon a certification by the Commissioner or the Commissioner's delegate that there is an ongoing investigation or prosecution of the taxpayer, the district court before which an action under this section is pending shall stay all proceedings with respect to such action pending the conclusion of the investigation or prosecution.

(f) Crime-fraud exception.--Subsection (a) shall not apply to information conveyed to an attorney, certified public accountant, or enrolled agent for the purpose of perpetrating a fraud or crime.

IRM pt. 34.5.7.2 (08-11-2004)
Section 7435. Taxpayers may bring suit for damages if any officer or employee of the Service intentionally compromises the determination or collection of any tax due from an attorney, certified public accountant, or enrolled agent representing the taxpayer in exchange for information concerning the taxpayer’s tax liability.

A. This does not apply to information conveyed to a tax professional for the purpose of perpetrating a fraud or crime.

B. The United States’ liability is limited to an amount equal to the lesser of $500,000 or the sum of (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the information disclosure, and (2) the costs of the action. Damages do not include a taxpayer’s liability for any civil or criminal penalties, or other losses attributable to incarceration or the imposition of other criminal sanctions.

C. The action must be brought within two years after the date the actions creating the liability would have been discovered by exercise of reasonable care.

D. If a taxpayer files suit, and the Service certifies that there is an ongoing investigation or prosecution of the taxpayer, the court is required to stay all proceedings with regard to such action until the conclusion of the investigation or prosecution.
The Government’s Right to Intervene

§ 7424. Intervention

If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. The provisions of section 2410 of title 28 of the United States Code (except subsection (b)) and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit. In any case in which the application of the United States to intervene is denied, the adjudication in such civil action or suit shall have no effect upon such lien.
§ 6713. Disclosure or use of information by preparers of returns

(a) Imposition of penalty. -- If any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who--

(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or

(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,

shall pay a penalty of $250 for each such disclosure or use, but the total amount imposed under this subsection on such a person for any calendar year shall not exceed $10,000.

(b) Enhanced penalty for improper use or disclosure relating to identity theft.--

(1) In general. -- In the case of a disclosure or use described in subsection (a) that is made in connection with a crime relating to the misappropriation of another person's taxpayer identity (as defined in section 6103(b)(6)), whether or not such crime involves any tax filing, subsection (a) shall be applied--

(A) by substituting “$1,000” for “$250”, and

(B) by substituting “$50,000” for “$10,000”.

(2) Separate application of total penalty limitation. -- The limitation on the total amount of the penalty under subsection (a) shall be applied separately with respect to disclosures or uses to which this subsection applies and to which it does not apply.

(c) Exceptions. -- The rules of section 7216(b) shall apply for purposes of this section.

(d) Deficiency procedures not to apply. -- Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) shall not apply in respect of the assessment or collection of any penalty imposed by this section.