

Penalties Above 20%: What Are They, When Are They Applied, and How Do You Defend?

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The Growth of Penalties

Purpose of penalties

- “Penalties exist to encourage voluntary compliance by supporting the standards of behavior required by the [Code].”
- Internal Revenue Manual (“IRM”) 20.11.2 (Feb. 22, 2008)
- Not intended as a revenue raiser

More than 150 civil penalties authorized

- More than 10-fold increase from the 13 penalties in 1954 Code

Statistics (FY 2016)

- IRS assessed 29.3 million civil penalties totaling \$27.3 billion
- Approximately \$12.1 billion assessed against individuals, estates, trusts
- IRS abated 5.2 million civil penalties totaling \$8.9 billion

Developments in the Burden of Production

Burden of Production Updates

I.R.C. § 6751(b)(1)

- “No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.”
- Not applicable to:
 - Additions to tax under I.R.C. §§ 6651, 6654, or 6655; and
 - Other penalties automatically calculated via electronic means
- TIGTA 2013 Report Re: Preparer Penalties
 - 8% noncompliance rate in preparer context
 - Prevalence in deficiency cases?

Burden of Production Updates

- Deficiency cases:
 - Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017)
 - "[W]e hold that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty."
 - "[W]e further hold that compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which a penalty is asserted."
 - "Read in conjunction with § 7491(c), the written approval requirement of § 6751(b)(1) is appropriately viewed as an element of a penalty claim, and therefore part of the IRS's *prima facie* penalty case."
 - But see Graev v. Commissioner*, 147 T.C. No 16 (2016)
 - "Because respondent has not yet assessed the section 6662 penalties at issue in this [deficiency] case, it is premature to consider whether respondent has satisfied section 6751(b)."
- CDP cases:
 - Graev v. Commissioner*, 147 T.C. No. 16 (2016)
 - "We do not foreclose the possibility that a taxpayer who believes that a penalty has been assessed in violation of 6751(b)(1) might raise this issue in a postassessment collection due process (CDP) proceeding."

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FOIA and Discovery-Related Requests

Taxpayer Name: [REDACTED] Examiner: [REDACTED]
 TIN: [REDACTED] Date: [REDACTED]
 Tax Form: [REDACTED]
 Tax Year (s): [REDACTED]

Taxpayer Name: [REDACTED] Examiner: [REDACTED]
 TIN: [REDACTED] Date: 04/02/2014
 Tax Form: [REDACTED]
 Tax Year (s): [REDACTED]

CIVIL PENALTY APPROVAL FORM

Conclusion:

☒ appropriate
☐ not below

Reason(s) for Non-Assertion of Penalty(s): IRM 4.10.6.7(1)

No Change or Refund Case

Deficiency Case (Explanation required when adjustments made and penalties are not asserted. The applicable exceptions to the penalty must be documented)

Reason(s) for Assertion of Penalty(s): IRM 4.10.6.7(1)

This case involves a donation of a *Fayate Element* which was taken as a Charitable Contribution. The partnership has failed to substantiate the deduction taken. The penalty is being issued in accordance with IRM 4.10.6.7(1) - Gross Valuation Mismatch.

Group Manager Signature: [REDACTED] **Date:** [REDACTED]

IRC	Penalty	IRM	Assess Penalty Yes/No	Reference
6651(b)(1)	Failure to file information and non-filing returns (and other penalties)	20.1.2.2.7	X	
6651(b)(2)	Failure to file	20.1.2.2.8.4	X	
6651(b)(3)	Estimated Tax - Individual	20.1.2.2.10	X	
6651(b)(4)	Estimated Tax - Corporate	20.1.2.2.11	X	
6651(b)(5)	Estimated Tax - Corporate	20.1.2.2.12	X	
6651(b)(6)	Estimated Tax - Corporate	20.1.2.2.13	X	
6651(b)(7)	Estimated Tax - Corporate	20.1.2.2.14	X	
6651(b)(8)	Estimated Tax - Corporate	20.1.2.2.15	X	
6651(b)(9)	Estimated Tax - Corporate	20.1.2.2.16	X	
6651(b)(10)	Estimated Tax - Corporate	20.1.2.2.17	X	
6651(b)(11)	Estimated Tax - Corporate	20.1.2.2.18	X	
6651(b)(12)	Estimated Tax - Corporate	20.1.2.2.19	X	
6651(b)(13)	Estimated Tax - Corporate	20.1.2.2.20	X	
6651(b)(14)	Estimated Tax - Corporate	20.1.2.2.21	X	
6651(b)(15)	Estimated Tax - Corporate	20.1.2.2.22	X	
6651(b)(16)	Estimated Tax - Corporate	20.1.2.2.23	X	
6651(b)(17)	Estimated Tax - Corporate	20.1.2.2.24	X	
6651(b)(18)	Estimated Tax - Corporate	20.1.2.2.25	X	
6651(b)(19)	Estimated Tax - Corporate	20.1.2.2.26	X	
6651(b)(20)	Estimated Tax - Corporate	20.1.2.2.27	X	
6651(b)(21)	Estimated Tax - Corporate	20.1.2.2.28	X	
6651(b)(22)	Estimated Tax - Corporate	20.1.2.2.29	X	
6651(b)(23)	Estimated Tax - Corporate	20.1.2.2.30	X	
6651(b)(24)	Estimated Tax - Corporate	20.1.2.2.31	X	
6651(b)(25)	Estimated Tax - Corporate	20.1.2.2.32	X	
6651(b)(26)	Estimated Tax - Corporate	20.1.2.2.33	X	
6651(b)(27)	Estimated Tax - Corporate	20.1.2.2.34	X	
6651(b)(28)	Estimated Tax - Corporate	20.1.2.2.35	X	
6651(b)(29)	Estimated Tax - Corporate	20.1.2.2.36	X	
6651(b)(30)	Estimated Tax - Corporate	20.1.2.2.37	X	
6651(b)(31)	Estimated Tax - Corporate	20.1.2.2.38	X	
6651(b)(32)	Estimated Tax - Corporate	20.1.2.2.39	X	
6651(b)(33)	Estimated Tax - Corporate	20.1.2.2.40	X	
6651(b)(34)	Estimated Tax - Corporate	20.1.2.2.41	X	
6651(b)(35)	Estimated Tax - Corporate	20.1.2.2.42	X	
6651(b)(36)	Estimated Tax - Corporate	20.1.2.2.43	X	
6651(b)(37)	Estimated Tax - Corporate	20.1.2.2.44	X	
6651(b)(38)	Estimated Tax - Corporate	20.1.2.2.45	X	
6651(b)(39)	Estimated Tax - Corporate	20.1.2.2.46	X	
6651(b)(40)	Estimated Tax - Corporate	20.1.2.2.47	X	
6651(b)(41)	Estimated Tax - Corporate	20.1.2.2.48	X	
6651(b)(42)	Estimated Tax - Corporate	20.1.2.2.49	X	
6651(b)(43)	Estimated Tax - Corporate	20.1.2.2.50	X	
6651(b)(44)	Estimated Tax - Corporate	20.1.2.2.51	X	
6651(b)(45)	Estimated Tax - Corporate	20.1.2.2.52	X	
6651(b)(46)	Estimated Tax - Corporate	20.1.2.2.53	X	
6651(b)(47)	Estimated Tax - Corporate	20.1.2.2.54	X	
6651(b)(48)	Estimated Tax - Corporate	20.1.2.2.55	X	
6651(b)(49)	Estimated Tax - Corporate	20.1.2.2.56	X	
6651(b)(50)	Estimated Tax - Corporate	20.1.2.2.57	X	
6651(b)(51)	Estimated Tax - Corporate	20.1.2.2.58	X	
6651(b)(52)	Estimated Tax - Corporate	20.1.2.2.59	X	
6651(b)(53)	Estimated Tax - Corporate	20.1.2.2.60	X	
6651(b)(54)	Estimated Tax - Corporate	20.1.2.2.61	X	
6651(b)(55)	Estimated Tax - Corporate	20.1.2.2.62	X	
6651(b)(56)	Estimated Tax - Corporate	20.1.2.2.63	X	
6651(b)(57)	Estimated Tax - Corporate	20.1.2.2.64	X	
6651(b)(58)	Estimated Tax - Corporate	20.1.2.2.65	X	
6651(b)(59)	Estimated Tax - Corporate	20.1.2.2.66	X	
6651(b)(60)	Estimated Tax - Corporate	20.1.2.2.67	X	
6651(b)(61)	Estimated Tax - Corporate	20.1.2.2.68	X	
6651(b)(62)	Estimated Tax - Corporate	20.1.2.2.69	X	
6651(b)(63)	Estimated Tax - Corporate	20.1.2.2.70	X	
6651(b)(64)	Estimated Tax - Corporate	20.1.2.2.71	X	
6651(b)(65)	Estimated Tax - Corporate	20.1.2.2.72	X	
6651(b)(66)	Estimated Tax - Corporate	20.1.2.2.73	X	
6651(b)(67)	Estimated Tax - Corporate	20.1.2.2.74	X	
6651(b)(68)	Estimated Tax - Corporate	20.1.2.2.75	X	
6651(b)(69)	Estimated Tax - Corporate	20.1.2.2.76	X	
6651(b)(70)	Estimated Tax - Corporate	20.1.2.2.77	X	
6651(b)(71)	Estimated Tax - Corporate	20.1.2.2.78	X	
6651(b)(72)	Estimated Tax - Corporate	20.1.2.2.79	X	
6651(b)(73)	Estimated Tax - Corporate	20.1.2.2.80	X	
6651(b)(74)	Estimated Tax - Corporate	20.1.2.2.81	X	
6651(b)(75)	Estimated Tax - Corporate	20.1.2.2.82	X	
6651(b)(76)	Estimated Tax - Corporate	20.1.2.2.83	X	
6651(b)(77)	Estimated Tax - Corporate	20.1.2.2.84	X	
6651(b)(78)	Estimated Tax - Corporate	20.1.2.2.85	X	
6651(b)(79)	Estimated Tax - Corporate	20.1.2.2.86	X	
6651(b)(80)	Estimated Tax - Corporate	20.1.2.2.87	X	
6651(b)(81)	Estimated Tax - Corporate	20.1.2.2.88	X	
6651(b)(82)	Estimated Tax - Corporate	20.1.2.2.89	X	
6651(b)(83)	Estimated Tax - Corporate	20.1.2.2.90	X	
6651(b)(84)	Estimated Tax - Corporate	20.1.2.2.91	X	
6651(b)(85)	Estimated Tax - Corporate	20.1.2.2.92	X	
6651(b)(86)	Estimated Tax - Corporate	20.1.2.2.93	X	
6651(b)(87)	Estimated Tax - Corporate	20.1.2.2.94	X	
6651(b)(88)	Estimated Tax - Corporate	20.1.2.2.95	X	
6651(b)(89)	Estimated Tax - Corporate	20.1.2.2.96	X	
6651(b)(90)	Estimated Tax - Corporate	20.1.2.2.97	X	
6651(b)(91)	Estimated Tax - Corporate	20.1.2.2.98	X	
6651(b)(92)	Estimated Tax - Corporate	20.1.2.2.99	X	
6651(b)(93)	Estimated Tax - Corporate	20.1.2.2.100	X	

380-Penalty Approval Form
Rev. 6/2016

Worksheet 4 300 -1.1

U.S. 1041 24-7

380-Penalty Approval Form
Rev. 6/2016

Worksheet 4 -1.2

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