

M e m o r a n d u m**320.0133**

To: Mrs. Joan M. Albu
Audit Evaluation & Planning Unit

Date: May 19, 1986

From: John Abbott
Tax Counsel

Subject: Section 7155 - penalty
Cumulative application of fraud or evasion penalties

In your April 8, 1985, memo to Mr. Gary Jugum, which was referred to me for reply, you relate that you are revising the Field Audit Manual and Regulation 1703 to incorporate new Revenue and Taxation Code Section 7155. You write:

We would appreciate a legal opinion regarding whether the penalties provided under Sections 6094.5, 6485 (or 6514, if applicable), 6511, and 7155 could be applied in total to the same determination, assuming, of course, that the facts warranted that application. Since the acts under Sections 6094.5, 6511, and 6514 are specific acts to evade payment of tax, it appears that each penalty is applicable when the act in question occurs with the requisite intent present without regard to the fact that the other penalties are also applicable. However, since the penalty under Section 6485 applies where any part of the deficiency is due to fraud, the issue that we see is whether the application of one or several of these other "fraud" penalties supersedes the Section 6485 penalty or whether this penalty is also applicable.

Also, would you consider the penalties provided under Sections 6094.5 and 7155 as fraud or intent to evade for purposes of the statute of limitation provisions of Section 6487. Since the Section 7155 penalty is applicable where a person fails to obtain a subpermit but the Section 6511 penalty would not apply if that person filed a return for other locations, the statute of limitations for failure to file might not be applicable to all Section 7155 violations.

Opinion

The penalty sections you are concerned with provide in summary as follows:

-Section 6094.5, misuse of resale certificate to evade tax, 10% of tax or \$500, whichever is greater.

-Section 6485, fraud or intent to evade deficiency determination, 25% of determination.

-Section 6511, failure to file return, 10% of tax. (This is neither a fraud or evasion penalty nor a negligence penalty.)

-Section 6514, fraud or intent to evade tax by failure to file return, 25% of tax, in addition to the Section 6511 penalty.

-Section 7155, knowing failure to obtain valid permit by due date of first return for the purpose of evading tax, 50% of tax due before permit obtained. However, this penalty is not applicable if either of the penalties imposed by Sections 6485.1 or 6514.1 (for out-of-state registrations of vehicles, vessels or aircraft) apply to the amount of tax.

In answer to your first question, I discussed this issue with Mr. Jugum's and Mr. Don Hennessy. Mr. Jugum's view is that the legal staff cannot support imposing two or more fraud or evasion penalties against the same determination, when the penalties apply to the same series of acts or course of action. For example, if a person, with intent to evade tax, both failed to obtain a permit and failed to file a return, the Section 7155 penalty and the Section 6514 penalty should not both be applied to the same determination.

In answer to your second question, we consider the Section 6094.5 and Section 7155 penalties to be fraud or evasion penalties for purposes of Section 6487, making the three-year statute of limitations (or eight years for failure to file) inapplicable.

JA:hb

cc: Gary J. Jugum
Donald Hennessy