But I Don't Sell Tax Shelters! The Expanding Reach of the Code Sec. 6700 Promoter Penalty

By
Brian R. Lynn

Brian Lynn discusses the expanding reach of Code Sec. 6700 promoter penalty.

"I say to the hucksters, it's time to find an honest living."
—Senator Charles Grassley (R-Iowa)[1]

"Tax shelters are not fair to the corporations and taxpayers who strive to comply with the law. We need to work on restoring faith in our tax system. Every day we fail to address abusive tax shelter practices, honest taxpayers pay the bill."
—Senator Max Baucus (D-Montana)[2]

Tax-shelter bashing is a popular sport in Washington, D.C. these days. It is no secret that both Congress and the IRS have been hunting for anything that smells like a tax shelter over the last few years. The IRS has created the Office of Tax Shelter Analysis, launched disclosure initiatives and stiffened shelter-reporting and list-maintenance obligations. Congressional leaders have been less successful at instituting reform, but they continue to huff and puff about tax shelters; and they vow to pass additional shelter-penalty legislation. In an effort to combat shelters at every level, the IRS is expanding its use of the Code Sec. 6700 (Promoting Abusive Tax Shelters, Etc.) penalty beyond its usual suspects—the telemarketer and tax-protester crowd—into the realm of transactional tax lawyers who issue opinions on what the IRS considers to be aggressive tax transactions.

Two recent IRS developments illustrate this trend. First, the IRS announced last October that it successfully settled its first Code Sec. 6700[3] penalty case against a bond lawyer in connection with an opinion that he rendered on the tax-exempt status of interest on a new issue of municipal bonds. Second, the IRS issued a chief counsel advice this January addressing several Code Sec. 6700 issues in connection with the sale of what appeared to be a basis-shifting tax shelter.

Whether courts will uphold Code Sec. 6700 penalties against lawyers who render opinions in the recent wave of aggressive tax

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transactions is an open question. In general, however, the courts have interpreted Code Sec. 6700 to apply to legal opinions. In interpreting the "false or fraudulent" statement requirement of Code Sec. 6700, courts have rejected the "opinion can't be false" defense and held that, like factual statements, tax opinions that are erroneous can be false statements. And in applying the "knowledge or reason to know" requirement of Code Sec. 6700, most courts have not required the government to prove that the author of the opinion actually had "scienter," or knowledge that his views were erroneous when made; if the author's background and involvement in the transaction, as well as the surrounding facts, indicate that he "should have known" of the falsity of his statement, Code Sec. 6700 may apply. To date, however, the courts' consideration of these Code Sec. 6700 issues has been limited to fact situations involving egregious tax-shelter transactions in which the attorney rendering the opinion played a dual role as both the organizer of the shelter and the author of the tax opinion.

I. Structure and Recent Guidance

Congress introduced the Code Sec. 6700 promoter penalty 22 years ago in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)[4] to stop abusive tax shelters by penalizing what appeared to be the real problem in the shelter industry: the promoters.[5] It drafted the statute to cast a wide net for what was perceived to be a growing tax compliance problem. And while the IRS historically has been very selective in invoking this penalty, its view of Code Sec. 6700 appears to be changing. The IRS is dusting off Code Sec. 6700 in its new "war" on tax shelters.

Background

The tax-shelter industry's first heyday was the 1970s and early 1980s. Marginal rates were high, tax credits abounded, and taxpayers could generally use passive losses to offset active income. Most of these shelters were structured as partnerships, which made enforcement difficult because the IRS had to audit each partner separately. The IRS grew tired of this chase and encouraged Congress to help. Congress responded by passing TEFRA, which, among other things, consolidated partnership audits.

TEFRA also introduced the Code Sec. 6700 shelter-promoter penalty. Congress viewed this new penalty as a way to cut shelters off at the knees:

> Congress concluded that ... abusive tax shelters must be attacked at their source: the organizer and salesman. ... [P]revention of abusive shelter promotions will require less manpower than enforcement actions against numerous investor-taxpayers.[6]

To this end, Congress gave the IRS the power to assess a monetary penalty against promoters under Code Sec. 6700 and to enjoin them from further shelter-promotion activities under Code Sec. 7408.[7]

Statutory Structure

Prior to TEFRA, the IRS's only tools to go after promoters were the Code Sec. 6694(a) return-preparer penalty and the Code Sec. 7602 criminal aiding-a-false-return penalty.[8] These penalties were inadequate for two reasons. First, the Code Sec. 6694 penalty base was the the ultimate taxpayer's understatement of tax as a result of employing the tax shelter on his return, which could take years to determine. Second, these penalties could only be imposed against return preparers or those advising on return positions, so if a promoter merely sold shelter interests and distanced himself from the return-preparation function, he could escape liability.

Code Sec. 6700 is intentionally much broader. It punishes any person who:

- organizes (or assists in the organization of) or participates in the sale of any interest in an entity, plan or arrangement (a "tax shelter"); *and*
- in connection, makes or furnishes:
  1. a statement (addressing tax-benefit availability from participating in the tax shelter) which the promoter knows or has reason to know is false or fraudulent as to any material matter, or
  2. a "gross valuation overstatement.[9]

A striking aspect of Code Sec. 6700 is that it uses this shotgun approach to define the type of transactions that are potentially within its coverage. Virtually every tax planning project undoubtedly involves some type of "entity, plan or arrangement." Certainly, traditional tax-shelter investments (such as limited-partnership interests) fit this definition. The committee reports also point out that clubs distributing tax-protester materials qualify as an "entity, plan or arrangement,"[10] and the courts have agreed.[11] As a result, the Code Sec. 6700 cases usually boil down to disagreements over (1) whether the person made a

false statement, and (2) whether that person "knew or had reason to know" the statement was false.

Penalty Amounts. Congress also divorced the penalty amount from the tax liability of the ultimate taxpayer (thus eliminating the delay). Under Code Sec. 6700, a promoter must pay the lesser of $1,000 or the promoter's collected fees, with respect to each plan or arrangement activity. Initially, a conflict emerged in the courts over what constituted an "activity,"[12] but in 1989, Congress clarified that each individual sale of one interest is a separately punishable activity.[13] Thus, if a promoter sells 10 limited-partner interests in one partnership, his maximum penalty is $10,000 ($1,000 for each sale), not $1,000.[14]

Recent IRS Guidance

The IRS hasn't released much guidance on Code Sec. 6700 in that provision's 22 years of life. It has never promulgated any regulations, nor issued any significant administrative guidance clearing up the statute's ambiguities. That changed this past January, however, with Chief Counsel Advice (CCA) 200402008, which broadly interprets several aspects of Code Sec. 6700.[15]

Specifically, CCA 200402008 addresses a scenario where an LLC promotes tax shelters by making cold calls to individuals with large capital gains and offering to sell them a capital-loss-generating product. The CCA makes two main interpretive points:

1. It defines the scope of the $1,000 maximum penalty on a per-person as well as a per-sale basis, so that if several persons are involved in the sale of one shelter unit, or one person is involved in the sale of several units, multiple penalties might apply.
2. It defines the statutory terms "organizes" and "participates in the sale of" broadly for purposes of determining the type of activities that are subject to Code Sec. 6700.

Duplicative Penalties. CCA 200402008 first concludes that the $1,000 penalty can be applied separately against individuals associated with the entity selling the shelter (*e.g.*, employees, LLC members, partners, *etc.*) as well as the entity itself. For example, if Jones & Smith LLP sells only one shelter to one client, the IRS can assess three separate Code Sec. 6700 penalties: one each against Jones, Smith and Jones & Smith LLP (assuming both Jones and Smith participated). That's $3,000 for one sale. Projecting this out, the potential penalties multiply quickly. A firm selling five investment units in a particular shelter to 20 investors each, with five employees involved in each sale, for instance, creates $500,000 (5 x 20 x 5 x $1,000) in potential Code Sec. 6700 penalties.[16] This conclusion is based on the statute's use of the term "any person," which the IRS interprets broadly to mean that every person who, directly or indirectly, participates in the organization or sale of the shelter is potentially liable for the penalty.[17]

Two district courts have considered this issue, and reached conflicting decisions. One court concluded that it was an unauthorized double penalty, and the other court found that the statute permits multiple assessments.[18] CCA 200402008 didn't add to the discussion. It simply sided with the latter decision.

Potential Targets. The CCA also addresses the type of activities that may subject individuals to Code Sec. 6700 liability. According to the CCA, virtually anyone associated with an organization promoting a tax shelter is potentially liable for the penalty. It defines "organizing" activities by reference to the Code Sec. 6111 shelter-registration regulations, which require anyone involved in discovering, creating, initiating or executing the transaction to register.[19] It defines "sale" participation activities to reach anyone directly or indirectly involved in contacting or advising prospective purchasers, even if that person's communication is relayed to the purchaser by a third party. This includes telemarketers and advertising agents (*e.g.*, direct mail), among others. It also includes those persons who merely instruct or advise salespeople. Thus, for example, an accounting firm partner who gives selling tips to his colleague—and has no other contact with the shelter—may be subject to Code Sec. 6700 if he should have known his colleague would make false statements about the product. Similarly, a lawyer giving oral advice to a sales person on the tax consequences of the transaction is potentially liable for the penalty.

In short, when Congress was targeting early 1980s tax shelters, it drafted a broad Code Sec. 6700 statute that potentially reaches individuals involved in today's tax shelter activities. And if the IRS has its way, Code Sec. 6700 will be applied to almost anyone associated, directly or indirectly, with promoting or selling the shelter.

II. False Statement Requirement

A False Opinion

One of the first interpretive questions under Code Sec. 6700 considered by the courts was the scope of the term "false" in the

context of legal opinions. Can an erroneous legal opinion on the likely tax consequences of a transaction constitute a false statement? For example, is it a false statement if I predict that the New York Yankees are going to win the World Series this year, and they don't? What if I thoroughly researched the Yankees and interviewed a number of baseball experts, who all agree that the Yankees were a virtual certainty to win the World Series? Does that make my prediction that the Yankees will win the World Series "true"? Such is the world of Code Sec. 6700.

Both the IRS and the courts have easily concluded that an incorrect opinion regarding the tax consequences of a transaction is a false statement.

A.F. Campbell[20] is a significant case on this issue. In that case, Allen Campbell, an attorney who also functioned as the organizer and marketer of the limited partnership tax shelter, advised his client/investors that they could treat as part of their tax basis in their partnership interests (and deduct in the year of purchase) the face amount of long-term purchase-money notes. These notes were denominated in the rapidly depreciating Brazilian currency. In the face of evidence that, without an exchange-rate-correction mechanism the notes were virtually worthless, the Fifth Circuit agreed with the district court's finding that Mr. Campbell's tax opinion constituted a false statement.[21] Mr. Campbell argued that his statement was not false because it was merely an opinion—as it turned out, an incorrect prediction of future events—and the IRS or a court could have agreed with him on the tax consequences of the transaction.

The *Campbell* court dismissed this argument and held that opinions can indeed be false. Their reasoning: Congress said so. "Congress determined that statements concerning availability of tax benefits could be reduced to questions of fact and thereby adjudged false by enacting Code Sec. 6700(a)(2)(A) and proscribing such statements."[22] Mr. Campbell deserved better; a Congress-said-so response places tax practitioners in an impossible position when rendering opinions. It certainly is not self-evident that an incorrect opinion is a "false" opinion, particularly when one considers the juxtaposition of "false" and "fraudulent" in Code Sec. 6700.

Perhaps in recognition of this, the IRS initially only assessed Code Sec. 6700 penalties against tax practitioners giving clearly fraudulent advice. The IRS generally didn't pursue lawyers giving opinions on questionable real-world business transactions. Instead, most of the early reported cases involve either tax protesters or tax-shelter promoters selling shelters with vastly overvalued assets. The tax opinions given in these instances often were so blatantly wrong that no one even worried about the "false opinion" problem. The IRS simply didn't target practitioners writing opinion letters covering arguably open questions of tax law. This trend might be changing, however, as the IRS increasingly targets tax-oriented transactions that are not clearly fraudulent, but that it deems abusive.

IRS Guidance

The IRS hasn't published any meaningful guidance on what the term "false or fraudulent statement" means—with the exception of saying it doesn't really mean fraudulent—since Code Sec. 6700's arrival in 1982. And like the Fifth Circuit, the IRS believes that opinions can be false simply because Congress said so; it never challenges this self-fulfilling prophesy. In CCA 200402008, for example, the IRS assumes opinion letters can be false, stating matter-of-factly that "statements directly addressing the availability of tax benefits" can be false statements.[23]

Promoter and Protester Cases

Judging from the reported cases, the IRS generally has invoked the Code Sec. 6700 penalty in a restrained manner. It has pursued low-hanging fruit, prosecuting egregious cases involving either shelter promoters or tax protesters. And this makes sense. Congress enacted Code Sec. 6700 to deter tax shelter activity, not to penalize transactional tax lawyers for being wrong on an opinion.[24]

Promoters. The first promoter cases involved exactly this target, plainly abusive leasing tax shelters. In these cases, determining the falsity of the promoter's statements was usually quite simple, because the opinions addressed the tax benefits associated with substantially overvalued assets. These shelters typically involved limited partnerships leasing either nonexistent or overvalued assets and taking large tax credits and deductions in the lease's early years. They didn't depend on technical loopholes like today's shelters; instead, they relied on the asset's overvaluation to generate inflated credits and deductions.[25]

And in most of these cases, the false-statement issue is less pronounced because the IRS didn't need it. The IRS could rely on the overvaluation provision (the other Code Sec. 6700(a)(2) prong) to impose the penalty.

The cases often technically hold that the promoter made a false statement in advising clients, but the false opinion is based on an underlying factual misstatement (the asset overvaluation), rather than a faulty tax analysis. In other words, the promoters were not penalized for inaccurately analyzing the facts presented to them, but rather for falsifying the facts, and then giving an incorrect tax opinion based on these false facts.

Music Masters[26] is a good example. It involved a leasing tax shelter where investors purchased leasehold units in master recordings and took substantial deductions and credits. The genesis of the tax benefits, however, was the master recordings' inflated valuation. The IRS assessed a Code Sec. 6700 penalty against the promoter on the grounds that (1) he made a false statement about the tax benefits, and (2) he overvalued the master recordings.[27] The court found that the promoter made a false statement, but his error did not involve a murky area of the tax law.

Protesters. The IRS's other early Code Sec. 6700 targets were tax protesters, or more specifically, leaders of the tax-protester movement. In these cases, undercover IRS agents usually attend tax-protester meetings and collect materials published by the group's leaders. The materials invariably contain proclamations that you don't have to pay income taxes for frivolous reasons (*e.g.*, wages aren't income).[28] The IRS and the courts could then easily characterize the opinions expressed in these promotional materials as false statements.

As with the early shelter cases, the false-statement issue is almost an afterthought in these protester decisions. The promoters' opinions in the first instance, and the protesters' in the latter, are just part of the larger scams. The promoters and protesters might technically be giving tax advice, but most would agree that the issues do not involve debatable positions.

False Opinion Cases

On a few occasions, the IRS has asserted that substantive tax opinions constitute false statements, albeit in somewhat egregious situations. Nonetheless, this marks a departure from earlier cases and shows that Code Sec. 6700 can apply to incorrect tax opinions.

Campbell best illustrates a false tax opinion. Mr. Campbell was an attorney who was also the organizer and promoter of the alleged tax shelter. Mr. Campbell established a Brazilian company, Coral Sociedade Brasileira de Pequisas e Desenvolvemento Limitada ("Coral"), in 1982 with a "stated purpose" of testing artificial antibodies, produced entirely by a related company in the United Kingdom, to be used in medical research. The enterprise showed negligible commercial promise. Nevertheless, Mr. Campbell sold interests in Coral to various U.S. investors for $600,000. Each of the investors paid $75,000 in U.S. dollars and issued a long-term $525,000 promissory note that was to be repaid not in dollars, but in the equivalent Brazilian currency. Mr. Campbell advised investors that they could deduct the entire $600,000 in the first year. The hook for this tax shelter was that the notes would not cost the investors $525,000 to repay if the Brazilian currency declined (it was in a free fall at the time). The notes bore 10-percent interest, but they had no monetary-correction factor—*i.e.*, inflation was substantially reducing the investors' true economic liability.[29]

The district court determined that Mr. Campbell made two separate false statements in selling Coral interests. First, it found that his statement that Coral's "center of gravity" was in Brazil was wrong.[30] Second, the district court held that his statement that investors would receive the promised tax benefits was false because the transaction was "devoid of economic substance."[31] This aspect of the *Campbell* opinion shows that the "false" statement requirement of Code Sec. 6700 can be satisfied by incorrect tax advice rendered on a complex transaction.

H.F.K. Kersting[32] also demonstrates that the IRS may go after economic-substance opinions under Code Sec. 6700. Mr. Kersting created and sold numerous tax shelters to clients throughout the 1970s and 1980s. In the typical transaction, an investor would borrow money at 18-percent interest to buy stock in a new corporation. The investor would then take out a second, nine-percent loan to pay the interest on the first loan. At year-end, the corporation would issue a "nontaxable dividend" to the investor to pay off the face value of the second loan, and the investor would deduct the interest on both loans.[33] The IRS found this transaction to be a sham that lacked economic substance, and the courts agreed, finding that Mr. Kersting's opinions were false under Code Sec. 6700.[34]

Estate Preservation Services[35] is similar to *Campbell* and *Kersting* in that the false statement was made with respect to substantive tax issues. In *Estate Preservation*, a CPA named Robert Henkell sold so-called Estate Preservation Trusts (EPTs). Mr. Henkell advised purchasers that they could contribute their personal residences to their EPT and deduct the associated costs, such as depreciation and

utilities.[36] Mr. Henkell also advised taxpayers that they could contribute depreciated assets to the trust tax-free and receive a stepped-up basis in such assets.[37] The Ninth Circuit concluded that these statements regarding EPT's tax benefits were false and imposed the Code Sec. 6700 penalty.[38] This is obviously bad tax advice. Deducting personal expenses violates Code Sec. 162, and stepping up your basis in gifted assets directly contradicts Code Sec. 1015. In this sense, *Estate Preservation* didn't advance the false-statement ball. But it does further evidence that Code Sec. 6700 penalties may be imposed on substantive tax opinions.

III. Intent Requirement

The second and more difficult (from the IRS's standpoint) evidentiary hurdle of Code Sec. 6700 is the requirement that the promoter "knew or had reason to know" that the statement was false. To assess a Code Sec. 6700 penalty against a tax practitioner opining on a transaction, the IRS must not only show that the opinion was wrong (*e.g.*, the transaction did not generate the promised capital loss), but that the lawyer knew or *had reason to know* it was wrong. While most of the courts have interpreted the "knowledge requirement" not to require the IRS to prove that the author of the opinion actually had "scienter," or knowledge that the statement was false when made—so long as the lawyer's background and involvement in the transaction establish that he should have known that the statement was false—one court has imposed the stricter "scienter" requirement. As with all factual elements of Code Sec. 6700, the IRS has the burden of proof on this issue.[39]

The "reason to know" language was added by the Conference Committee to the Senate version of Code Sec. 6700, to "clarif[y] that the Secretary may rely on objective evidence of the knowledge of a promoter or salesperson (for example) to prove that he deliberately furnished a false or fraudulent statement." The Committee report goes on to provide an example of the application of this standard: "A salesman would ordinarily be deemed to have knowledge of the facts revealed in the sales materials which are furnished to him by the promoter." The report cautions that "[t]he 'reason to know standard' is not, however, intended by the conferees to be used to impute knowledge to a person beyond the level of comprehension required by his role in the transaction. Thus, this standard does not carry with it a duty of inquiry concerning the transaction."[40]

Case Law. The courts have considered the "reason to know" standard in several cases, once again involving egregious tax shelter transactions in which the lawyer rendering the tax opinion was also heavily involved in the creation and marketing of the arrangement. However, giving credence to the old adage that bad cases make bad law, the opinions in these cases employ broad language, which arguably goes beyond the conference committee's original intent. Specifically, the cases tend to characterize the "reason to know" standard as simply "should someone with this person's education and experience have known that the statement was false?" If the answer is yes, the author may be liable under Code Sec. 6700, even if he can establish that he didn't "deliberately" misstate the tax consequences of the transaction.

Campbell illustrates this point. The lower court in *Campbell* did not find that Mr. Campbell actually knew the transaction would not be respected on economic substance grounds. It only determined that he knew or should have known the transaction he was selling and opining on was invalid "because it was totally devoid of economic substance."[41] On appeal, Mr. Campbell argued that he wasn't liable for the penalty since he didn't actually know the transaction lacked economic substance. The Fifth Circuit rejected this argument, holding that the lower court's "knew or should have known" finding was sufficient to sustain the penalty.[42] In essence, the Fifth Circuit applied an objective test and asked whether a tax practitioner with Mr. Campbell's background and heavy involvement in the transaction (in a planning and marketing capacity) would have reasonably known of the transaction's deficiencies.

The Ninth Circuit also adopted this standard in upholding a Code Sec. 6700 penalty against Mr. Henkell in *Estate Preservation*. Mr. Henkell sold taxpayers trusts that allegedly allowed them to deduct personal living expenses, among other things. The lower court found that someone with Mr. Henkell's experience and education would have reason to know that these trusts would fail to provide the promised tax benefits.[43] The Ninth Circuit affirmed application of the penalty

in Mr. Henkell's case based on this finding, and it summarized the reason-to-know standard as "what a reasonable person in the [defendant's] ... subjective position would have discovered."[44] Specifically, the court looked at three factors to determine whether Mr. Henkell should have known of the false statement:

1. The extent of his reliance on knowledgeable professionals
2. His sophistication and education level
3. His familiarity with tax matters[45]

Generally, the shelter-promoter cases employ this objective standard to determine whether a person had reason to know the questioned statement was false. The protester cases, on the other hand, often skip this point because the statements are so blatantly false that the government can prove actual knowledge. In *Savoie*, for example, the court held that Mr. Savoie knew his protester schemes were false and didn't need to use any objective measures: "Savoie was unquestionably aware of the fraudulence of his advice about the allowability of deductions under his Schedule C and W-4 plans, because it consisted exclusively of half truths."[46]

In contrast, in *D.J. Weir,*[47] the district court held that the government must prove a specific fraudulent intent to assess a Code Sec. 6700 penalty. The court found that Mr. Weir furnished a false statement with respect to a tax shelter he was selling, but it declined to enforce the Code Sec. 6700 penalty because he did not deliberately defraud his customers when he sold the shelters. "He lacked the 'intent' to misstate the tax consequences."[48] The court held that the false-statement prong of Code Sec. 6700(a)(2) "requires, *inter alia*, a specific fraudulent intent as an essential element for the assessment of the penalty."[49] *Weir* did state that while the shelter appeared too good to be true, it had a "semi-logical basis in the tax laws,"[50] so maybe the reason-to-know analysis employed by the other courts would not have produced a different result. But on balance, it's hard to square *Weir* with the other cases on this intent issue.

The $64 questions remain unanswered. Consider the following situations where a reputable, mainstream law firm renders a tax opinion that turns out to be incorrect. Assume that neither the opinion writer nor the law firm was involved in organizing or marketing the arrangement to which the opinion relates, and that there are different views in the legal community regarding the soundness of the opinion. While the opinion may very well be "false," did the "author have reason to know" it was false if:

1. there was "substantial" legal authority for the opinion?
2. the factual underpinnings of the opinion known to the author at the time were adequate, but further inquiry would have called certain material facts into question?
3. the author innocently missed a key legal authority that would have caused him to reduce his level of confidence from "more likely than not" to "reasonable basis"?

Does the "reason-to-know" standard require the IRS to establish negligence, gross negligence, recklessness or deliberateness on the part of tax counsel to impose a Code Sec. 6700 penalty? Does the penalty apply every time tax counsel comes out on the wrong side of an abusive tax shelter? As a few recent court decisions have shown us, some transactions that the IRS calls abusive are perfectly legitimate.[51]

These and other questions of interpretation will likely have to await the development of actual court cases by the IRS.

IV. Conclusion

Code Sec. 6700 appears to be entering a new era. The IRS might try to move well beyond *Campbell, Kersting* and *Estate Preservation* in the next few years. It is under a significant amount of pressure to crack down on abusive tax shelters, and Congress hasn't really given it any new tools to use. The IRS is fighting today's war with yesterday's weapons, and one of yesterday's weapons is the Code Sec. 6700 promoter penalty. The IRS evidently likes Code Sec. 6700 because it alters a tax professional's calculus when deciding to issue an opinion and thus might deter a lawyer or accountant from blessing a questionable transaction.

The IRS has turned to Code Sec. 6700 in its recent efforts to stop potentially abusive shelters from making it to the marketplace by threatening penalties against the tax lawyers and accountants involved in these transactions. The interesting question is whether it will ultimately succeed in penalizing such practitioners under this provision. The IRS has certainly had success in pursuing these penalties in the past, but the targets were easier. With modern shelters, the IRS is going to have to prove that incorrect opinions can be false statements and that the practitioner had reason to know it was false when he signed it. That might be easy where the

transaction violates clear statutory provisions or relies on false facts or valuations. But in transactions that appear to produce favorable tax consequences and only fail because of technical foot faults or arguably conflicting or ambiguous legal authorities, the IRS may be facing an uphill battle.

ENDNOTES

[1] *Senators Scrutinize "Peddlers" of Abusive Tax Shelters,* 101 TAX NOTES 418 (Oct. 27, 2003).
[2] *Baucus Introduces Bill to End Abusive Tax Shelters,* 2003 TNT 227-28 (Nov. 24, 2003).
[3] All Code Sec. references are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.
[4] Act Sec. 320(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248).
[5] Staff of Joint Comm. on Tax'n, 97th Cong. 2d Sess., *General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982* ("Bluebook"), at 210–12 (Comm. Print 1982).
[6] Bluebook, at 210.
[7] *Id.,* at 212–14.
[8] *Id.,* at 210.
[9] Code Sec. 6700(a); Code Sec. 6700(b) defines "gross valuation overstatement."
[10] Bluebook, at 211.
[11] *See, e.g., Savoie,* DC La., 594 FSupp 678 (1984); *D. Kaun,* CA-7, 87-2 USTC ¶9487, 827 F2d 1144.
[12] *See, e.g., I. Bond,* CA-9, 89-1 USTC ¶9271, 872 F2d 898, 899–901 (holding that Code Sec. 6700's $1,000 minimum penalty is a yearly minimum, not a per-transaction minimum).
[13] H.R. REPT. NO. 247, 101st Cong., 1st Sess. (hereinafter, "1989 Act House Report"), at 1397.
[14] Also, prior to the 1989 change, the penalty amount was the greater of $1,000 or 20 percent of the promoter's income from the activity.
[15] *See also* FSA 200129001 (Mar. 20, 2001) (addressing Code Sec. 6700 application issues with respect to tax-exempt bond counsel).
[16] Note that Code Sec. 6700 penalties are essentially capped at collected fees—but such fees are often quite high.
[17] Code Sec. 6700(a).
[18] *Compare In re Tax Refund Litigation,* DC N.Y., 91-1 USTC ¶50,183, 766 FSupp 1248, 1257, *aff'd in part and rev'd in part,* CA-2, 93-1 USTC ¶50,173, 989 F2d 1290 (concluding that the IRS could not impose a Code Sec. 6700 penalty against both a partnership and its partners for the same conduct), *with Bailey Vaught Robertson & Co.,* DC Tex., 828 FSupp 442 (1993) (allowing a Code Sec. 6700 penalty against a partnership and each partner engaging in the prohibited conduct).
[19] Temporary Reg. §§301.6111-1T: A-27 and A-28.
[20] *A.F. Campbell,* CA-5, 90-1 USTC ¶50,215, 897 F2d 1317.
[21] *Id.,* 897 F2d, at 1322.
[22] *Id.,* at 1321.
[23] Presumably, the opinion's confidence level impacts this false-statement determination. Perhaps an opinion stating a transaction "should" generate certain tax benefits will be false, but could an opinion stating that the same benefits are "more likely than not" available be true?
[24] Bluebook, at 210–11.
[25] *See, e.g., Savoie, supra* note 11; *G.S. Buttorf,* CA-5, 85-1 USTC ¶9435, 761 F2d 1056.
[26] *Music Masters,* DC N.C., 85-2 USTC ¶9839, 621 FSupp 1046, *aff'd,* CA-4 (unpublished opinion), 816 F2d 674 (1987).
[27] *Id.,* 621 FSupp, at 1055–56.
[28] *See also R.R. Raymond,* CA-7, 2000-2 USTC ¶50,750, 228 F3d 804 (2000) (statements by U.S. Taxpayer's Party members disputing government's ability to tax citizens); *Buttorf, supra* note 25 (discussing phony "Constitutional Pure Equity Trust" scheme); *Kaun, supra* note 11, *aff'g,* DC Wisc., 86-1, USTC ¶9454, 633 FSupp 406 (describing "spurious or patently frivolous" statements that wages are not income, return filing is not required by law, individuals can revoke SSNs, *etc.*); *Schiff,* DC Nev., 2003-2 USTC ¶50,456, 269 FSupp2d 1262 (similar claims in taxpayer's book THE FEDERAL MAFIA); *Savoie, supra* note 11 (similar).
[29] *Campbell, supra* note 20, 897 F2d, at 1318–19.
[30] *Id.,* at 1320.
[31] *Campbell,* DC Tex., 88-2 USTC ¶9525, 704 FSupp 715, 724.
[32] *H.F.K. Kersting,* CA-9, 2000-1 USTC ¶50,287, 206 F3d 817.
[33] *Kersting,* DC Hawaii, 93-2 USTC ¶50,606, at 4–6.
[34] *Kersting, supra* note 32, 206 F3d, at 819–20.
[35] *Estate Preservation Services,* CA-9, 2000-1 USTC ¶50,203, 202 F3d 1093.
[36] *Id.,* 202 F3d, at 1101.
[37] *Id.,* at 1099–1100.
[38] *Id.,* at 1103.
[39] Code Sec. 6703(a).
[40] Bluebook, at 210–11.
[41] *Campbell, supra* note 31, 704 FSupp, at 724. Interestingly, the Fifth Circuit noted that no similar foreign-currency obligations had been disallowed—effectively admitting this was a case of first impression on that issue. *Campbell, supra* note 20, 897 F2d, at 1321.
[42] *Campbell, supra* note 20, 897 F2d, at 1321.
[43] *Estate Preservation Services,* DC Calif., 2000-1 USTC ¶50,202, 38 FSupp2d 846, 854.
[44] *Estate Preservation, supra* note 35, 202 F3d, at 1103 (quoting *Campbell, supra* note 20, 897 F2d, at 1321–22).
[45] *Id.*
[46] *Savoie, supra* note 11, at 681.
[47] *D.J. Weir,* DC Ala., 89-2 USTC ¶9431, 716 FSupp 574.
[48] *Id.,* 716 FSupp, at 580.
[49] *Id.,* at 577.
[50] *Id.,* at 580.
[51] *See, e.g., Compaq Computer Corp.,* CA-5, 2002-1 USTC ¶50,144, 277 F3d 778; *United Parcel Service of America, Inc.,* CA-11, 2001-2 USTC ¶50,475, 254 F3d 1014.

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