

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LIDLAW'S HARLEY DAVIDSON SALES,)	
INC.,)	
)	
Petitioner,)	
)	
v.)	Docket No. 14616-14 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Now pending before the Court is respondent’s motion for partial summary judgment, which the parties have briefed. We will order the parties to schedule a telephone conference with the Court, to discuss the statute of limitations (“SOL”) for the assessment of the section 6707A penalties.

Four years seem to be at issue--i.e., petitioner’s taxable years ending May 31, 2005, 2006, 2007, and 2008. It appears that, for each of those four years, petitioner was required to file a Form 8886 disclosure pursuant to 26 C.F.R. § 1.6011-4(d). For the first three years (for which returns had apparently already been filed), the disclosures were apparently due 90 days after the Internal Revenue Service (“IRS”) issued Notice 2007-83 in October 2007--i.e., were due in January 2008. For the year ending in May 2008, the disclosure was due with petitioner’s return for that year. Petitioner did not file the four Forms 8886 until December 2010. (ECF 59, Stip. 1 at 4, 5.)

Respondent shows (ECF 60 at 25) that a penalty assessment on 9/16/2013 was timely as to petitioner’s 2008 year (by the operation of section 6501 and Forms 872), but as far as we can tell he makes no such showing as to an assessment of penalty for 2005, 2006, or 2007. For 2006 and 2007 (but not for 2005; see ECF 59, Stip. 1 at 5, ¶ 26), the SOL was extended to 12/31/2012 (see

ECF 59, Stip. at 6, ¶ 30)--but was not extended to the assessment date of 9/16/2013.

Rather, it seems that an aggregate penalty was computed ostensibly for 2008, pursuant to 6707A(b)(1), by reference to tax benefits that petitioner had supposedly received in 2005, 2006, and 2007 (with zero benefits received in 2008). (See ECF 59, Ex. 21-J at LA000255). However, 26 C.F.R. § 1.6011-4(e)(1) requires a disclosure for each year; and section 6707A(a) seems to impose a penalty as to “any return or statement” that fails to make the required disclosure; and section 6707A(b)(1) requires that the penalty be measured as a percentage of “the decrease of tax shown on the [singular] return”. A simple reading of this text would suggest that the section 6707A penalty must be imposed year by year, by reference to the tax benefit claimed on the return for each year. If that is correct, then the IRS’s 9/16/2013 assessment in this case would seem to disregard the statute of limitations for 2005, 2006, and 2007 (which barred assessment) and to wrongly impose for 2008 the penalty attributable in fact to those earlier years.

The foregoing is not a holding but is a tentative hypothesis as to which we invite correction by counsel for the parties.

Petitioner addresses the general three-year limitation of section 6501(a) but seems not to explicitly address section 6501(c)(10)--the special SOL provision as to this penalty, which is apparently effective for the three earliest years at issue. Petitioner should be prepared to show that its analysis takes section 6501(c)(10) into account. It is

ORDERED that no later than January 8, 2018, counsel for the parties shall jointly place a telephone call to the Chambers Administrator of the undersigned Judge (202-521-0850) for the purpose of scheduling a telephone conference to take place the week of January 8-12, 2018, during which the Court will discuss this case with counsel.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
January 2, 2018