



penalties under provisions of I.R.C. § 6663 for the years 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014, as set forth in the notice of deficiency, be in all respects approved.” Neither the notice of deficiency nor the Commissioner’s answer made any reference to an addition to tax under section 6651(f) (“If any failure to file any return is fraudulent”).

Both parties appeared at trial and put on their testimony. Both parties rested; the Commissioner declined to put on any rebuttal evidence; and the case was submitted (Tr. 1318-1319).

About two weeks later, on November 8, 2018, the Commissioner filed his motion (Doc. 40). The motion asks leave to plead, in the alternative to the fraud penalty of section 6663, an addition to tax under section 6651(f) for fraudulent failure to file. Rev. Durand opposed (Doc. 59).

### Discussion

The 75% fraud penalty of section 6663 “shall apply only in cases where a return of tax is filed”. Sec. 6664(b). Fraud penalties under section 6663 were determined by the IRS for all nine years at issue (2006 through 2014), were stated in the notice of deficiency, were disputed in the petition, were asserted and supported by detailed allegations in the answer, and are agreed to be at issue in this case.

To address fraud in a case in which a return of tax is not filed, section 6651(f) increases the addition to tax for failure to file from a maximum of 25% of the tax required to be shown, sec. 6651(a)(1), to a maximum of 75% of the tax required to be shown, sec. 6651(f). (The addition to tax of section 6651--whether the regular 25% of subsection (a)(1) or the increased 75% of subsection (f)--applies only where the return is not timely; and the Commissioner admits (see Doc. 20 at 5) that the 2014 return was timely; so the section 6651(f) penalty could not apply to 2014 in any event.)

These are two distinct 75% penalties--one for filing a fraudulent return, sec. 6663, and the other for fraudulently failing to file a return, sec. 6651(f). The Commissioner minimizes this distinction when he complains that Rev. Durand’s opposition “opaquely mentions ‘different time frames that are relevant to § 6651(f) compared to § 6663’ without explaining what ‘different time frames’ he means.” (Doc. 61 at 2.) However, we think Rev. Durand is correct in noting these

“different time frames”. As we explained in Mohamed v. Commissioner, T.C. Memo. 2013-255, \*20-\*21:

Section 6663(a) imposes a fraud penalty for a knowing misrepresentation of the truth in order to evade tax. The penalty is imposed only if a taxpayer files a return and only if, on that return, the taxpayer fraudulently (knowingly and with the intent to evade tax) shows less than (misrepresents) the amount of the tax due. In section 6651(f), the adjective “fraudulent” modifies the noun “failure” (“If any failure to file any return is fraudulent”). The offense involves a knowing concealment of a material fact in order to evade tax. The penalty is imposed only if the taxpayer fails to file his return when due (thus concealing a material fact (that he has income subject to tax)) and only if he does so knowing that he is concealing that material fact. The taxpayer must deliberately fail to file his return on the date due, knowing that, by doing so, he is concealing the fact that he has income subject to tax.

Section 6663 focuses on the time the return was filed. If Rev. Durand committed fraud in the filing of his returns, then of course that fraudulent misrepresentation first occurred in December 2014 when he started filing the returns at issue. That is the contention as to which Rev. Durand was on notice that he must present a case at trial.

However, if Rev. Durand committed fraud in failing to file his returns, then that fraudulent concealment began to occur in April 2007 when his 2006 return was due. Section 6651(f) focuses on the time when the return was due:

The delinquency addition [of section 6651(a)], whether increased [by section 6651(f) or not], is a time-sensitive addition \* \* \*. [Under section 6651(f),] the taxpayer’s fraudulent state of mind on the date prescribed to file the return must be determined, and \* \* \* the increased addition will continue to accrue for as many as five months\* \* \*. [Mohamed v. Commissioner, supra, \*21 n.6.]

The section 6651(f) penalty that the Commissioner now seeks to plead is different from the section 6663 penalty that the Commissioner did plead, and some of the facts that would be critical under section 6651(f) are different from the facts that would be relevant under section 6663. Rev. Durand did not have occasion to prepare and present proof as to those facts critical to the section 6651(f) penalty

that the Commissioner now seeks to add after the trial has been concluded. It is therefore

ORDERED that the Commissioner's motion (Doc. 40) is denied.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
December 18, 2018