Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:[redacted]:POSTF-108978-02
[redacted]

date: FEB 22 2002

to: [redacted], Revenue Agent, EG [redacted]

from: LMSB Practice Group, [redacted]

subject: [redacted], L.P.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the recipient and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum responds to your request for advice concerning determining the aggregate amount invested for purposes of calculating the penalty under I.R.C. section 6707(a)(2).

ISSUE

Whether the determination of the aggregate amount invested for purposes of calculating the penalty under I.R.C. section 6707(a)(2) is limited to those amounts actually received by the tax shelter organizer against whom the penalty is being imposed.

CONCLUSION

20085

The aggregate amount invested for purposes of computing the I.R.C. section 6707(a)(2) penalty is the aggregate amount received, by whomever, from the actual sale of interests in the investment and includes all cash, the fair market value of all property contributed, and the principal amount of all indebtedness received in exchange for interests in the investment. For purposes of calculating the penalty, it is irrelevant whether these amounts were ever received by the organizer against whom the penalty is being imposed.

FACTS

You are conducting a promoter penalty investigation. You have inquired whether a promoter may be liable for a penalty under I.R.C. section 6707(a)(2), which is calculated on the aggregate amount invested, when the organizer itself may not have received any of the aggregate amount invested because the investors paid their investments directly to a third party.

ANALYSIS

I.R.C. section 6707, Failure to Furnish Information Regarding Tax Shelters, imposes a penalty upon any person who is required to register a tax shelter under section 6111(a) if the person either fails to timely register the shelter, or if the person files false or incomplete information with respect to such registration. I.R.C. § 6707(a)(1).

The amount of the penalty is generally the greater of one percent of the aggregate amount invested in such tax shelter, or $500. I.R.C. § 6707(a)(2).

Sections 6111 and 6707 were amended by the Taxpayer Relief Act of 1997 to add confidential corporate tax shelters to the definition of a tax shelter, and a special rule was added in section 6707(a)(3) to provide a slightly different penalty for such shelters. Failure to register a confidential corporate tax shelter generally subjects the person who failed to register the shelter to a penalty which is the greater of 50 percent of the fees paid to all promoters of the tax shelter with respect to offerings made before the date such shelter is registered, or $10,000. There is no requirement in section 6707(a)(3) that the fees have been received by the person against whom the penalty is being imposed, rather the penalty is a percentage of fees paid to <u>all</u> promoters of the shelter.

Section 6707 also provides for three other penalties which will not be discussed here, <u>i.e.</u>, section 6707(a)(3)(B) where no promoter is a U.S. person (which is imposed in addition to the

penalty imposed on any other person for failing to register the shelter), section 6707(b)(1) for failure by the organizer to provide the investor with the tax shelter registration number, and section 6707(b)(2) for failure of an investor to include the tax shelter registration number on a return. None of these penalties is related to any amount received by the person against whom the penalty is being imposed.

Treas. Reg. section 301.6707-1T sets forth questions and answers regarding the penalty set forth in section 6707(a)(2), and provides guidance concerning the computation of the aggregate amount invested. Treas. Reg. section 301.6707-1T Q&A-1 provides that the aggregate amount invested in the tax shelter is computed in the manner prescribed in Treas. Reg. section 301.6111-1T Q&A-21, except that the amount to be received from the sale of an interest is taken into account to determine the amount of the penalty only if the interest is sold to an investor. Treas. Reg. section 301.6111-1T Q&A-21, which provides guidance concerning the definition of a substantial investment, reads as follows:

> An investment is a substantial investment if the aggregate amount that may be offered for sale to all investors exceeds $250,000 and 5 or more investors are expected. The aggregate amount offered for sale is the aggregate amount to be received from the sale of interests in the investment and includes all cash, the fair market value of all property contributed, and the principal amount of all indebtedness received in exchange for interests in the investment, regardless of whether the proceeds of the indebtedness are included in the investment base under A-14 of this section.

The regulations under section 6707(a)(2) do not require that the aggregate amount invested be received by the organizer, merely that the aggregate amount invested must be received, by whomever, in exchange for the actual sale of the interest in the investment. From the plain language of the statute, it is clear that the penalty is based on the aggregate amount invested in the tax shelter, which may have very little relation to amounts received by the party subject to the penalty.

Further support that the aggregate amount of the investment upon which the section 6707(a)(2) penalty is calculated is not dependent upon whether the organizer actually receives such amounts can be found in the definition of a tax shelter organizer. Several different kinds of involvement with a tax shelter can result in a person being a tax shelter organizer and thus responsible for the penalty. The Code itself provides that the term tax shelter organizer means the person principally

responsible for organizing the tax shelter; however, if the shelter was not timely registered by the person principally responsible, any person who participated in the organization of the tax shelter may be the tax shelter organizer; and, if neither a person principally responsible nor a person who participated in the organization of the tax shelter has timely registered it, then any person participating in the sale or management of the investment at a time when the tax shelter was not registered may be the tax shelter organizer. I.R.C. § 6111(e)(1). To interpret section 6707(a)(2) as requiring that an organizer have received the investment funds would be incongruous with section 6111's broad definition of tax shelter organizer which encompasses categories of persons who clearly might not have received any of the invested funds.

The section 6707(a)(2) penalty differs distinctly from the penalty contained in I.R.C. section 6700, Promoting Abusive Tax Shelters. Section 6700 imposes a penalty equal to $1,000 with respect to each tax shelter arrangement, or, if less, 100% of that person's gross income from promoting the tax shelter. Had Congress intended the section 6707(a)(2) penalty to be based on amounts received by the organizer it could have worded section 6707(a)(2) similarly to section 6700, but Congress did not do so.

If you have any questions, please direct them to the undersigned at [redacted].

[redacted]
Associate Area Counsel (LMSB)

By: _____
[redacted]
Attorney (LMSB)