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3
4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 JEFFREY ALAN RISCHE,

7 Plaintiff,

8 v.

9 UNITED STATES OF AMERICA,

10 Defendant.

CASE NO. 2:20-cv-00033-BAT

**ORDER GRANTING UNITED
STATES OF AMERICA'S CROSS
MOTION FOR SUMMARY
JUDGMENT**

11 Before the Court are the parties' cross motions for summary judgment on Plaintiff's
12 remaining claims regarding § 6702 penalties assessed by the IRS on Plaintiff's 2009, 2010, and
13 2011 tax returns, and Plaintiff's demand for a refund of his 2017 federal income tax. Dkt. 27 and
14 Dkt. 30. Plaintiff's claims regarding other tax years were previously dismissed for lack of
15 jurisdiction. Dkt. 20. Based on the parties' briefs and summary judgment evidence, the Court
16 denies Plaintiff's motion (Dkt. 27); grants the Government's motion (Dkt. 30) and dismisses
17 Plaintiff's claims with prejudice.

18 UNDISPUTED FACTS

19 During the tax years at issue, Plaintiff worked for Lightspeed Design, Inc., a technology
20 company in Bellevue, Washington. Dkt. 30-1, Declaration of Matthew Uhalde, Exhibit 1,
21 Plaintiff's Response to Defendant's First Set of Interrogatories, at ¶ 3; Exhibit 2, Plaintiff's
22 Response to Defendant's First Set of Requests for Admission, at ¶ 7. For each tax year,
23 Lightspeed issued a Form W-2 reporting (1) Plaintiff's total wages, tips, and other compensation;

1 and (2) the amount of federal taxes withheld from his paychecks. *Id.*, Uhalde Decl. Exhibit 2,
2 Plaintiff's Response to Defendant's First Set of Requests for Admission, at ¶ 9. The following
3 table summarizes the information on Plaintiff's Forms W-2:

Tax Year	Wages, Tips, and other Compensation	Federal Income Tax Withheld	Social Security Tax Withheld	Medicare Tax Withheld	Total Federal Taxes Withheld
2009 ¹	\$62,770.99	\$8,420.00	\$3,891.80	\$910.18	\$13,221.98
2010 ²	\$62,346.50	\$8,615.00	\$3,865.48	\$904.02	\$13,384.50
2011 ³	\$65,000.00	\$9,477.00	\$2,780.00	\$942.50	\$13,199.50
2017 ⁴	\$111,019.00	\$22,855.00	\$6,883.00	\$1,609.00	\$31,347.00

11 On January 10, 2013, Plaintiff mailed the IRS amended income tax returns (Forms
12 1040X) and substitute W-2s (Forms 4852) for tax years 2009–2011. Dkt. 30-1, Uhalde Decl. Ex.
13 3–5. Plaintiff admits that these exhibits are authentic copies of his W-2s. *Id.*, Uhalde Decl.
14 Exhibit 2, Plaintiff's Response to Defendant's First Set of Requests for Admission, at ¶¶ 1–4.

15 The Forms 1040X reported \$0 in taxable income for all three tax years. The Forms 4852
16 reported \$0 in wages for all three years while also reporting federal tax withholding as shown in
17

18 ¹ Dkt. 30-1, Uhalde Decl. Exhibit 2, Plaintiff's Response to Defendant's First Set of Requests for
19 Admission, at ¶ 10; Exhibit 3.

20 ² Dkt. 30-1, Uhalde Decl. Exhibit 2, Plaintiff's Response to Defendant's First Set of Requests for
21 Admission, at ¶ 12; Exhibit 4.

22 ³ Dkt. 30-1, Uhalde Decl. Exhibit 2, Plaintiff's Response to Defendant's First Set of Requests for
23 Admission, at ¶ 14; Exhibit 5.

⁴ A copy of Plaintiff's 2017 Form W-2 is not available, but the information taken from the W-2
is available on the IRS Wage and Income Transcript for 2017. Dkt. 30-2, Declaration of Rosary
Tanner, IRS Acting Advisory Group Manager, Ex. 5. Plaintiff admits that the W-2 reported
\$111,019 in box 1, "wages, tips, other compensation." Dkt. 30-1, Uhalde Decl. Exhibit 2,
Plaintiff's Response to Defendant's First Set of Requests for Admission, at ¶ 16.

1 the table above. By reporting tax paid through withholding while allegedly earning \$0, Plaintiff
2 sought a full refund of his withheld federal taxes for those years.

3 Plaintiff mailed the IRS a second set of documents two months later. Dkt. 30-1, Uhalde
4 Decl. Ex. 6. This was apparently in response to an IRS Letter 3176 warning Plaintiff that his
5 2011 Form 1040X asserted a frivolous tax position. Included with Plaintiff's second mailing was
6 a letter opposing the IRS notice, along with a new Form 1040X for 2011, signed and dated
7 March 25, 2013. This new Form 1040X again reported \$0 in taxable income in 2011. The IRS
8 processed it as purporting to be a second tax return for 2011.

9 On all four Forms 1040X, Plaintiff explained that the reason he had no taxable income
10 those years was because he worked in the private sector, and he cited to the definition of "wages"
11 in 26 U.S.C. §§ 3401(a) and 3121(a). On August 12, 2013, the IRS charged Plaintiff four \$5,000
12 penalties under 28 U.S.C. § 6702—one for each of his 2009–2011 tax returns, including the
13 second return for 2011. Dkt. 30-2, Tanner Decl., Ex. 1–3 (IRS Account Transcripts for 2009–
14 2011). These \$20,000 in penalties are the first of two taxes that Plaintiff wants refunded in this
15 suit.

16 On April 15, 2018, Plaintiff mailed the IRS a letter with the subject "Administrative
17 Claim for Refund." (Dkt. 15-1; Ex. 3 to Rische Declaration; Dkt. 15-1 pp. 22-30; Rische Decl. ¶
18 11). The IRS has not independently located copies of Plaintiff's letters from its records.
19 However, the Government does not dispute the authenticity of the copies that Plaintiff produced
20 in this case. The Government also does not contest that Plaintiff mailed the letters on the dates he
21 claims. Dkt. 30, p. 4 n.11. The purported refund claim listed the § 6702 penalties for 2009-2011.
22 Plaintiff stated he was entitled to the refund because "The NFTL was filed prematurely or
23 wrongfully because I am not liable for civil penalties because nothing that I submitted to the IRS

1 is frivolous” and “the filing and recording of the documents listed above [liens and levy notices]
2 was premature and otherwise not in accordance with administrative procedures of the Secretary
3 or of the law.” Plaintiff also alleged that the IRS double collected and denied him his collection
4 due process (“CDP”) hearing requests.

5 On May 1, 2018, Plaintiff sent another letter to the IRS requesting expedited service for
6 his April 5, 2018 “Administrative Claim for Refund.” Dkt. 15-1; Ex. 4 to Rische Declaration,
7 Dkt. 15-1 pp. 32-34. This letter discussed economic hardship caused by IRS levies but added no
8 new claims. On August 26, 2019, Plaintiff sent a letter to the IRS with the subject
9 “Administrative Claim for Refund.” Dkt. 15-1; Ex. 12 to Rische Declaration, Dkt. 15-1, pp. 53-
10 57. In this letter, Plaintiff challenged the § 6702 penalties for 2009-2011, stating: “[t]he law does
11 not allow for double penalties,” and the “law does not allow continued collection after full
12 satisfaction of a liability, or collection after the request for a Collection Due Process [“CDP”]
13 hearing.” *Id.* at 53. Plaintiff also stated, “I deny liability for each and every asserted civil
14 penalty.” The IRS has not issued refunds to Plaintiff for the \$20,000 in § 6702 penalties for
15 2009-2011. Dkt. 30-2, Tanner Decl., Ex. 1–3.

16 The second sum Plaintiff wants refunded is the \$22,855 in federal income taxes withheld
17 from his paychecks in 2017.⁵ As reflected in the table above, Plaintiff admits to receiving
18 \$111,019 as compensation from Lightspeed Design for this year. However, Plaintiff filed a 2017
19 federal income tax return (Form 1040EZ) reporting \$0 in wages, salaries, and tips and \$0 in
20 taxable income. Dkt. 30-1, Uhalde Decl., Ex. 9. He also listed his occupation as “Private sector
21

22 ⁵ Plaintiff requested a refund of *all* federal tax, including social security and Medicare, but as is
23 later discussed, a Form 1040 is not the method to file a refund claim for these non-income taxes.
Thus, Plaintiff has not filed an administrative claim for these non-income taxes, and they are not
at issue here.

1 worker,” and attached a Form 4852 to “correct” his W-2, citing the definitions from §§ 3121 and
2 3401. *Id.* The IRS did not refund Plaintiff’s income tax withholdings. *Id.*, Tanner Decl. Ex. 4.

3 SUMMARY JUDGMENT STANDARD

4 A party is entitled to summary judgment if it shows “that there is no genuine dispute as to
5 any material fact” and that it “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

6 As a moving party, the Government bears the initial responsibility of informing the Court of the
7 basis for the motion and identifying the evidence that demonstrates the absence of a genuine
8 dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the
9 moving party has met this initial responsibility, the burden shifts to the party opposing summary
10 judgment to establish that there is a genuine dispute over a material fact. *See, e.g., Matsushita*
11 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986); *US Local 343 United Ass’n*
12 *of Journeyman Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, AFL-CIO v.*
13 *Nor-Cal Plumbing Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994).

14 The opposing party cannot meet its burden simply by offering conclusory statements
15 unsupported by factual data or by showing that there is some metaphysical doubt as to the
16 material facts. *See, Matsushita*, 475 U.S. at 586-87. The opposing party also may not rely on the
17 allegations or denials in pleadings to establish a genuine issue of fact but must come forward
18 with an affirmative showing of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
19 (1986).

20 If the opposing party cannot produce sufficient evidence to demonstrate that a triable
21 issue of fact exists, and the moving party is entitled to judgment as a matter of law, summary
22 judgment is appropriate. *Id.*

1 DISCUSSION

2 Plaintiff does not deny that he worked at Lightspeed during 2009, 2010, 2011, and 2017,
3 and that Lightspeed paid him the amount of money reported on his Forms W-2 for those years
4 “for his work that he did for the company.” Plaintiff also does not deny that he submitted the
5 returns to the IRS that reported \$0 in taxable income while showing federal income tax
6 withholding based on his contention that he did not earn taxable income because he is a private-
7 sector worker. Plaintiff contends however, that the IRS wrongfully assessed the § 6702 penalties
8 because it did not satisfy the statutory elements; the second document he submitted for the 2011
9 tax year was a duplicate and not subject to penalty; he is not a “person” subject to taxation; the
10 IRS garnished his wages without providing a CDP hearing; and the IRS failed to comply with 26
11 U.S.C. § 6751(b)(1) by making assessments without proof of approval. As to his demand for a
12 refund of his 2017 federal income tax, Plaintiff contends the Government has the burden of proof
13 and the IRS was required to have previously challenged his tax returns before collecting tax.

14 A. Demand for Refund of § 6702 Penalties

15 1. Legal Standard

16 “A person shall pay a penalty of \$5,000” if three elements are satisfied: (1) the person
17 filed a document that purports to be a tax return, (2) the document either contains information
18 that on its face indicates the self-assessment is substantially incorrect or omits information on
19 which the substantial correctness of the self-assessment may be judged, and (3) the document
20 takes a position that the IRS has identified as frivolous or reflects a desire to delay or impede tax
21 administration. 26 U.S.C. § 6702(a).

22 In a tax refund suit, the burden is generally on the taxpayer to show entitlement to a
23 refund. *Washington Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017). Section

1 6703(a) narrowly shifts this burden with regard to § 6702 penalties, and it places the burden on
2 the government only to establish “that the plaintiff’s conduct renders them liable for a civil
3 penalty,” which here would mean the burden to show Plaintiff submitted a return that meets the
4 three elements above. *See In re Tax Refund Litig.*, 766 F. Supp. 1248, 1254 (E.D.N.Y. 1991),
5 *aff’d in part, rev’d in part sub nom. on other grounds, In re MDL-731 Tax Refund Litig. of*
6 *Organizers & Promoters of Inv. Plans Involving Book Properties Leasing*, 989 F.2d 1290 (2d
7 Cir. 1993); *see also Schlach v. United States*, No. 2:18-CV-00053-SMJ, 2019 WL 1338402, at
8 *3 (E.D. Wash. Mar. 25, 2019) (“The United States bears the burden of proving all three
9 elements”).

10 2. Three Elements of § 6702

11 a. Plaintiff Filed Documents That Purported to Be Tax Returns

12 Three of the documents subject to penalty were the 2009–2011 tax returns, each
13 consisting of a Form 1040X and attachments, that Plaintiff mailed to the IRS on January 10,
14 2013. Dkt. 30-1, Uhalde Decl., Ex. 3—5. Plaintiff does not dispute that these were tax returns
15 that he filed with the IRS. Moreover, “[s]ection 6702 requires only that the document filed
16 *purport* to be a tax return, not that it actually be a tax return.” *Bradley v. United States*, 817 F.2d
17 1400, 1403 (9th Cir. 1987). Thus, all three documents satisfy the first element of § 6702(a).

18 As to the second Form 1040X for tax year 2011, Plaintiff included this document with a
19 letter that he mailed to the IRS on March 25, 2013. Dkt. 30-1, Uhalde Decl., Ex. 6. The two-
20 page, single-spaced letter made no mention of the Form 1040X, except to list it as one of several
21 attachments, with the descriptor “Reference copy of a previously-submitted tax return
22 concerning the period 2011.” Plaintiff contends that the Form 1040X was merely a copy of a
23 previous tax return and thus did not purport to be a tax return.

1 Under Ninth Circuit precedent however, virtually any Form 1040 mailed to the IRS
2 satisfies the standard of purporting to be a tax return. *See, e.g., Olson v. United States*, 760 F.2d
3 1003, 1004-05, (9th Cir. 1985) (unsigned Form 1040 with the words “not a return” written on it
4 along with a cover letter held to be a purported tax return under § 6702(a)); *see also, Bradley*,
5 817 F.2d at 1403 (anti-war message scribbled on almost entirely blank Form 1040 with letter
6 cautioning the IRS that the form was not to be treated as a tax return held to be a purported tax
7 return under § 6702(a)).

8 Additionally, the second Form 1040X for the tax year 2011 that Plaintiff sent to the IRS
9 in March 2013, was filled out completely, signed, and dated. In the attached affidavit, Plaintiff
10 stated “the tax return I completed and submitted concerning the year 2011 (“newly signed copy
11 attached). . . .” By this statement, Plaintiff has indicated that the return is not a mere photocopy or
12 identical submission of Plaintiff’s 2011 tax return. Plaintiff’s reference to the Form 1040 as a
13 “reference copy at the end of his accompanying letter” does not change this analysis as the
14 second Form 1040 bears a new signature date. Plaintiff’s letter also makes clear that he mailed
15 the second Form 1040 to the IRS to obtain a refund for 2011.

16 Plaintiff’s reliance on *Kestin v. Comm’r of Internal Revenue*, 153 T.C. 14 (2019) is
17 inapposite as the taxpayer in that case submitted a photocopy of an earlier Form 1040 with a
18 large stamp reading “photocopy – do not process.” Here, Plaintiff’s “reference copy” was not a
19 copy but a new Form 1040 signed and dated March 25, 2013. Plaintiff’s second submission is
20 not labeled a photocopy and it is only substantially identical to his first submission. *See Grunsted*
21 *v. Comm’r*, 136 T.C. 455, 456 (2011) (Tax Court upheld separate penalties for each return for the
22 same year where the taxpayer submitted what purported to be a return, received a letter from the
23 IRS saying the first return contained frivolous positions, and the taxpayer then submitted a new

1 version of the return and letter). Similarly, separate § 6702 penalties for each return for the same
2 year are appropriate here.

3 Plaintiff also contends that the new Form 1040 did not purport to be a tax return because
4 he did not attach a copy of his W-2. However, the newly signed Form 1040, which reported \$0 in
5 taxable income with Plaintiff's explanation that private-sector income is not taxable, contained
6 sufficient misinformation to trigger a penalty. Moreover, the fact that Plaintiff mailed the form to
7 the IRS and not to the "IRS Processing Center" does not change the conclusion that the new
8 Form 1040 purported to be a tax return. As the Government correctly notes, if there were no
9 penalty because two returns were sent to two different locations, tax defiers could send frivolous
10 returns all over the country and the IRS would have no recourse to penalize such abusive
11 conduct. Such a result would be absurd.

12 Based on the foregoing, the Court concludes that the first element of § 6702(a) is
13 satisfied.

14 b. Self-Assessment is Substantially Incorrect

15 On Line 1 of each Form 1040X, Plaintiff sought to amend his adjusted gross
16 income from the amounts reported on his W-2s to a "correct amount" of \$0. In Part III, Plaintiff
17 provided the following explanation for this change:

18 In [2009–2011] I worked in the private-sector and had no "income, profit, or
19 wages" as defined in the IRC and sections 3401(a) and 3121(a). The private sector
20 company for whom I worked filed an erroneous W-2 information return. This
21 private sector company characterized payments as "income, profits, or wages." I
22 am rebutting their claim, stating that I was a private-sector worker [non-federal
23 worker] working for a private-sector company (non-federal entity) as defined in
3401(c)(d). I did not then, nor do I now, hold any federally-privileged position.

22 Plaintiff also attached to each 1040X an IRS Form 4852 Substitute for Form W-2 on which he
23 listed Lightspeed Design, Inc. as his "employer" or "payer" and reported \$0 in wages, tips or

1 other compensation. In Box 10 of the Forms 4852, Plaintiff explained that Lightspeed Design’s
2 W-2s were incorrect because they allegedly did not follow the definition of “wages” from IRC
3 §§ 3401(a) and 3121(a).

4 In other words, Plaintiff self-assessed having a gross income of \$0 based on the theory
5 that money earned from a private-sector company does not contribute to a person’s gross
6 income. Because that argument is frivolous, the self-assessment was incorrect on its face. *See,*
7 *e.g., O’Brien v. Comm’r*, 104 T.C.M. 620 (holding that a return reporting \$0 in income when a
8 W-2 showed compensation “was substantially incorrect on its face” and “a return that reports
9 taxable income and tax of zero is frivolous in circumstances where a third-party payor has
10 reported on an information return that the taxpayer had income and that income tax was withheld
11 on that income”).

12 The Court need not waste much time with Plaintiff’s “theory” that only federal workers
13 are required to pay federal taxes. The Tax Code defines taxable income as “all income from
14 whatever source derived,” 26 U.S.C. § 61(a), and the Supreme Court defines taxable income as
15 “all “accessions to wealth, clearly realized, and over which the taxpayers have complete
16 dominion.” *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *Westpac Pac. Food v.*
17 *C.I.R.*, 451 F.3d 970, 975 (9th Cir. 2006) (citing *Glenshaw Glass* and stating that the definition
18 of “income” is “expansive”). Moreover, this Court and the Ninth Circuit previously rejected
19 Plaintiff’s claim that his income from a private company is exempt from federal taxation. *See*
20 *Rische v. United States*, 2017 WL 2215808 *3, No. C16-339RSL, (W.D. Wash. May 19, 2017),
21 *affirmed by Rische v. United States*, 723 F. App’x 561 (9th Cir. 2018); *see also* Plaintiff’s
22 Opening Brief filed in 2017 WL 5757683 at *53–55 (arguing that the District Court erred in
23 discrediting his tax theory).

1 Plaintiff's self-assessments – that income from a private company is not taxable – were
2 incorrect on their face. Accordingly, the second element of § 6702(a) is satisfied.

3 c. The IRS Gave Notice of Frivolousness

4 At the time Plaintiff filed his Forms 1040X, IRS Notice 2010-3324⁶ listed several
5 positions that the IRS has identified as frivolous for purposes of § 6703, including the positions
6 taken by Plaintiff here:

7 Section III(1)(e): A taxpayer has the option under the law . . . to
8 file a tax return reporting zero taxable income and zero tax liability even if the
9 taxpayer received taxable income during the taxable period for which the return is
10 filed, or similar arguments described as frivolous in Rev. Rul. 2004-34, 2004-1,
11 C.B. 619.

12 Section III(7): “Only certain types of taxpayers are subject to
13 income and employment taxes, such as employees of the Federal government,
14 corporations, nonresident aliens, or residents of the District of Columbia or the
15 Federal territories, or similar arguments.”

16 Courts have uniformly held that the language in Section III(7) covers the argument that
17 employees of private businesses are not subject to federal taxation and have consistently held
18 that returns making the argument satisfy the third element of § 6702. *See, e.g., Smith v. Comm'r*
19 *of Internal Revenue*, T.C.M. (RIA) 2021-029 (T.C. 2021); *United States v. Lovely*, 420 F. Supp.
20 3d 398, 407 (M.D.N.C. 2019); *Grunsted* 136 T.C. at 460; *O'Brien*, 104 T.C.M. 620.

21 Plaintiff argues that his Forms 1040X “contain no argument whatsoever.” However, the
22 explanation Plaintiff provided in Part III is clearly an argument or “position” and it is clearly
23 frivolous. Accordingly, the third element of § 6702(a) is satisfied.

Plaintiff makes additional meritless arguments against the frivolous return penalties.
Plaintiff contends that the notice entitling him to a CDP hearing was not sent to him by the

⁶ <https://www.irs.gov/pub/irs-drop/n-10-33.pdf> [<https://perma.cc/ZCY9-7LMG>]; accessed 6 Jul. 2021.

1 Secretary of the Treasury and there was no proof that the person who sent the notice had been
2 properly delegated to do so. Plaintiff received the notice, signed by a representative of the IRS.
3 The Secretary of the Treasury properly delegated his authority pursuant to statute and regulation
4 to IRS employees. See 26 U.S.C. § 7701(a)(11)(A); 26 U.S.C. § 7701(a)(12)(A)(i); Treas. Reg. §
5 301.7701-9 (26 C.F.R.); Delegation Order 193 (Rev.6). Plaintiff's argument is frivolous and
6 without merit. See *Hughes v. United States*, 953 F.2d 531, 536-539 (9th Cir. 1992); *Hoffman v.*
7 *United States*, 209 F. Supp. 2d 1089, 1094 (W.D. Wash. 2002).

8 Plaintiff also argues that the IRS is circumventing the frivolous penalty statute because
9 the IRS' penalty notice (CP 15) "misquotes" § 6702(a)(1)(A). Whereas the statute contains the
10 words "does not contain", Form CP15 contains the words "fails to include." This argument is
11 nonsensical as the terms "does not contain" and "fails to include" are essentially synonymous.
12 Moreover, the penalties against Plaintiff were based under subsection B (for presenting self-
13 assessments substantially incorrect on their face) and not subsection A.

14 3. Definition of "Person"

15 Plaintiff also argues that the IRS cannot charge him penalties under § 6702(a) because he
16 is a "human" and not a "person". This is a ridiculous argument. A "person" is defined as a
17 "human, individual"... "one (such as a human being...) that is recognized by law as the subject
18 of rights and duties." See "Person." Merriam-Webster.com Dictionary, Merriam-Webster,
19 <https://www.merriam-webster.com/dictionary/person>. Accessed 6 Jul. 2021. Nothing in Section
20 6671(b) states otherwise.

21 Section 6671(b) clarifies that "[t]he term 'person', as used in this subchapter, *includes* an
22 officer or employee of a corporation, or a member or employee of a partnership, who as such
23 officer, employee, or member is under a duty to perform the act in respect of which the violation

1 occurs.” *Id.* (emphasis added). Plaintiff also argues that this is an exclusive list and that he
2 therefore is not a person for purposes of § 6702(a). Plaintiff’s proposed reading is “too narrow a
3 reading of the section. While the term ‘person’ does include officer and employee, it certainly
4 does not exclude all others. Its scope is illustrated rather than qualified by the specified
5 examples.” *United States v. Graham*, 309 F.2d 210, 212 (9th Cir. 1962).

6 4. Garnishment

7 In his motion for summary judgment, Plaintiff argues that the IRS could not garnish his
8 wages to pay the § 6702 penalties without first granting his request for a CDP hearing and the
9 IRS’s failure to do so entitles him to a full refund of the garnished amounts. The Court has
10 already held that it lacks jurisdiction to consider this argument. *See* Dkt. 20, (Order, p. 11) (“The
11 Court cannot examine whether that denial complied with § 6330, because the Tax Court has
12 exclusive jurisdiction to review such a claim.”). Plaintiff cannot again raise this issue at the
13 summary judgment stage.

14 5. Jurisdiction – Refund Claim Based on 26 U.S.C. § 6751

15 For the first time, Plaintiff argues that the § 6702 penalty assessments against him are
16 invalid because the Government has not produced documents showing compliance with 26
17 U.S.C. § 6751(b)(1). That code section states, “No penalty under this title shall be assessed
18 unless the initial determination of such assessment is personally approved (in writing) by the
19 immediate supervisor of the individual making such determination.” Plaintiff now claims that
20 because the Government has not produced documents showing supervisor approval for the
21 penalties against him, the Court must grant him summary judgment and rule that the IRS
22 assessments are improper. The Court disagrees as this argument improperly varies from
23 Plaintiff’s purported refund claims and he cannot raise it now.

1 Under the variance doctrine, “a taxpayer is barred from raising in a refund suit grounds
2 for recovery which had not previously been set forth in its claim for a refund.” *Rodgers v. United*
3 *States*, 843 F.3d 181, 195 (5th Cir. 2016). “The IRS is entitled to take the refund claim at face
4 value and examine only the points to which it directs attention... If the claim on its face does not
5 call for investigation of a question, the taxpayer may not later raise that question in a refund
6 suit.” *Boyd v. United States*, 762 F.2d 1369, 1372 (9th Cir. 1985); *see also Lockheed Martin*
7 *Corp. v. US*, 210 F.3d 1366, 1371 (Fed. Cir. 2000) (prohibiting a taxpayer from changing its
8 claim after it filed refund suit because taxpayers “may not substantially vary at trial the factual
9 bases raised in the refund claims presented to the IRS”). The purpose of the variance requirement
10 is “to prevent surprise and to give the IRS adequate notice of the claim and its underlying facts
11 so that it can make an administrative investigation and determination regarding the claim.” *Boyd*,
12 762 F.2d at 1371. The variance doctrine derives from the regulation for refund claims, 26 C.F.R.
13 § 301.6402-2(b)(1), requiring a taxpayer to “set forth in detail each ground upon which a credit
14 or refund is claimed.” Although “crystal clarity and exact precision are not demanded, at a
15 minimum the taxpayer must identify in its refund claim the ‘essential requirements’ of each and
16 every refund demand.” *Charter Co. v. United States*, 971 F.2d 1576, 1580 (11th Cir. 1992).

17 Because a valid administrative claim for a refund is a jurisdictional requirement,
18 “[f]ederal courts have no jurisdiction to [entertain taxpayer allegations that impermissibly vary or
19 augment the grounds originally specified by the taxpayer in the administrative refund claim.”
20 *Charter Co.*, 971 F.2d at 1579. Courts applying the variance doctrine to refund claims based on §
21 6751(b) have held that taxpayers must raise that argument for a refund at the administrative
22 stage, and failure to do so means the court cannot hear the argument. 14A Mertens Law of Fed.
23 Income Tax’n, § 55:4 “Procedure for penalty assessments” (2021). *See also Ginsburg v. United*

1 *States*, No. 617CV1666ORL41DCI, 2019 WL 1576017, at *4 (M.D. Fla. Mar. 11, 2019)
2 (taxpayer’s motion denied and Government’s motion for summary judgment granted in part
3 because the taxpayer failed to raise § 6751 approval in his administrative refund claim).

4 Plaintiff’s reliance on *Chai v. Comm’r*, 851 F.3d 190 (2d Cir. 2017) does him no good
5 because *Chai* was a Tax Court case in which the taxpayer could raise the § 6751 issue, which
6 differs from a tax refund litigation in district courts. See Ginsburg, 2019 WL 1576017, at *3 n.11
7 and *Yates v. United States*, No. 19-CV-06384-VKD, 2020 WL 2615011, at *6 (N.D. Cal. May
8 22, 2020) – in both cases, the district court lacked jurisdiction. Here, it is undisputed that
9 Plaintiff did not raise compliance with § 6751(b) as a basis for refund of the § 6702 penalties in
10 any of his purported refund claims. In fact, it is not entirely clear that Plaintiff ever filed valid
11 administrative refund claims as his refund claims were set forth in a series of letters sent to the
12 IRS and not in IRS Forms 843. See 26 C.F.R. § 301.6402-2(c). Failure to file a proper
13 administrative claim for a § 6702 penalty deprives a court of jurisdiction over the claim. *Brown*
14 *v. United States*, 35 Fed. Cl. 258, 266 (1996), *aff’d*, 105 F.3d 621 (Fed. Cir. 1997). And, while it
15 is possible for taxpayers to submit what courts consider an “informal refund claim” if it contains
16 sufficient information, it must then later be perfected. *Hollie v. Comm’r*, 73 T.C. 1198, 1212
17 (1980). Because Plaintiff never filed Forms 843 to perfect his potential informal claims, it is
18 unclear if he has filed sufficient administrative refund claims to grant the Court jurisdiction over
19 even those arguments that were clearly articulated in Plaintiff’s letters.

20 Regardless, in the three letters that Plaintiff claims are his refund claims for 2009-2011,
21 there is no mention of § 6751(b) or *Chai* as a reason why he is not liable for the § 6702 penalties.
22 In his “refund claims,” Plaintiff asserts issues with his CDP hearing requests, alleged double
23 collection, the filing of liens “not in accordance with the administrative procedures of the

1 Secretary or of the law,” and that he disputed liability for the penalties. Plaintiff never raised
2 supervisor approval as a reason why he did not owe the penalties although there was nothing
3 preventing Plaintiff from raising such an argument in his purported administrative claims
4 because Section 6751 has been around since 1998, and the *Chai* opinion since 2017. *See Mellow*
5 *Partners v. Comm’r*, 890 F.3d 1070, 1080–81 (D.C. Cir. 2018) (refusing to hear a § 6751
6 argument on appeal because it was not raised earlier, and the taxpayer could easily have done so
7 in 2018).

8 Accordingly, Plaintiff’s attempt to raise the failure to comply with § 6751(b) claim in this
9 lawsuit is an improper variance and the Court lacks jurisdiction over any claim based on this
10 argument. *See Ginsburg*, 2019 WL 1576017, at *4; *Yates*, 2020 WL 2615011, at *6.

11 In sum, the Government need not show compliance with § 6751(b) under the variance
12 doctrine, and the Government has met its burden under § 6703 of showing the three factual
13 elements for the frivolous return penalties.

14 B. Demand for Refund of 2017 Tax

15 1. *Lewis v. Reynolds*

16 In a tax refund suit, the question presented is whether a taxpayer has overpaid his tax.
17 *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932); *Sokolow v. United States*, 169 F.3d 663, 665 (9th
18 Cir. 1999). “[T]he taxpayer bears the burden of proving the amount he is entitled to recover.”
19 *United States v. Janis*, 428 U.S. 433, 440 (1976) (citing *Lewis*, 284 U.S. at 283). The Supreme
20 Court defines “overpayment” as “any payment in excess of that which is properly due.” *Jones v.*
21 *Liberty Glass Co.*, 332 U.S. 524, 531 (1947). The Government may “retain payments already
22 received when they do not exceed the amount which might have been properly assessed and
23 demanded.” *See Lewis*, 284 U.S. at 283; *Rische v. United States*, 2017 WL 2215808, *2.

1 Determining if a taxpayer overpaid his tax “involves a redetermination of the entire tax liability”
2 and “it is incumbent upon the claimant to show that the United States has money which belongs
3 to him.” *Lewis*, 284 U.S. at 283.

4 For the second time, Plaintiff argues that *Lewis* “has long ago been superseded by
5 statute.” See Dkt. 18, at 17-20 and Dkt. 28, p. 2 in Case No. 16-339. His reasoning is the same,
6 *i.e.*, that in 1999, the Ninth Circuit wrote, “Congress superseded *Lewis*, by statute.” *Sokolow*, 169
7 F.3d at 664. In *Sokolow*, however, the Ninth Circuit was simply acknowledging that Congress
8 partially superseded *Lewis* by statute on an issue that is not relevant to this case (*i.e.*, whether the
9 Government could keep a tax payment made after the statute of limitations for collecting the tax
10 had expired). *Sokolow*, 169 F.3d at 665 (“[u]nlike the previous law, which the Court had
11 construed in *Lewis*, the Revenue Act of 1928 declare[d] that any payment of a tax after
12 expiration of the period of limitations shall be considered an overpayment.”) But as this Court
13 already recognized, *Lewis* was not superseded where, as here, the Government received a tax
14 payment before the collection statute expired. See *Rische*, 2017 WL 2215808, at *2.

15 Taxpayers have the burden of showing that they overpaid their taxes in a refund suit.
16 *Stead v. United States*, 419 F.3d 944, 947 (9th Cir. 2005). The Supreme Court has defined
17 “overpayment” as “any payment in excess of that which is properly due.” *Jones v. Liberty Glass*
18 *Co.*, 332 U.S. 524, 531 (1947).⁷ To determine the tax liability to see if there was an
19 overpayment, the Supreme Court looked to amounts that had not been assessed by the IRS, and
20 that could not be assessed because of the statute of limitations. *Lewis*, 284 U.S. at 283
21 (“Although the statute of limitations may have barred the assessment and collection of any
22

23 ⁷ 26 U.S.C. § 6401 includes some items that are treated as overpayments, but it does not provide
a comprehensive list.

1 additional sum, it does not obliterate the right of the Government to retain payments already
2 received when they do not exceed the amount which might have been properly assessed and
3 demanded”).

4 Accordingly, in this refund suit, the issue is whether Plaintiff made an overpayment of
5 tax, which requires determining what his correct tax liability should be. Critically, this does not
6 require that the IRS already have disputed previously filed returns or assessed additional
7 amounts.

8 2. Previous Challenge

9 Plaintiff contends that because the IRS failed to assess a different tax liability, the IRS is
10 bound to honor the \$0 tax liability, which was reported by Plaintiff and recorded on his 2017
11 account transcript by the IRS. However, an IRS assessment is not a prerequisite for a tax
12 liability.

13 IRS assessments are bookkeeping procedures that allow the government to
14 administratively collect tax. *Laing v. United States*, 423 U.S. 161, 170 n.13 (1976); *see also* 26
15 U.S.C. §§ 6303 (requiring a notice and demand for tax after assessment), 6321 (a lien arises after
16 such notice and demand), and 6331 (allowing the IRS to levy after notice and demand following
17 assessment); *Moran v. United States*, 63 F.3d 663, 666 (7th Cir. 1995) (“an assessment is not a
18 prerequisite for a tax liability,” and assessments are neither “the beginning nor end of tax
19 liability”) (*partly overruled on other grounds by Malachinski v. C.I.R.*, 268 F.3d 497 (7th Cir.
20 2001)).

21 Under *Lewis v. Reynolds*, the Government need not have previously assessed taxes
22 (through a return reporting the amount, through an audit and notice of deficiency, or through a
23 substitute for return under 26 U.S.C. § 6020) to re-determine what a taxpayer’s correct tax

1 liability should be in a refund suit. The lack of assessment just means that the IRS cannot
2 administratively collect the tax, but even if the statute of limitations to assess and collect a tax
3 has expired, the Government may retain payments it already has received if they would have
4 been due given the accurate determination of a taxpayer's liability. *Lewis*, 284 U.S. at 283. Here
5 again, Plaintiff raised and lost this argument in his earlier lawsuit. *See Rische*, 2017 WL
6 2215808, at *2 (Even where the government can no longer assess an individual's income tax for
7 the years in question due to procedural bars (such as the statute of limitations, or the
8 government's failure to issue a notice of deficiency or a 26 U.S.C. § 6020(b) return), the
9 individual's tax liability must nonetheless be calculated to determine whether there was, in fact,
10 an overpayment.”)

11 Accordingly, it is not relevant that Plaintiff falsely reported \$0 in income on his returns
12 and that the IRS transcribed that number onto his account transcript. It is also not relevant that
13 the IRS never audited Plaintiff's 2017 tax return or prepared returns pursuant to § 6020(b)—self-
14 reporting amounts on a return does not establish their correctness. Plaintiff has admitted to facts
15 that establish he received taxable income in 2017, and the Government can rely on those facts to
16 determine Plaintiff's correct tax liability in a refund suit.

17 3. Admitted Facts

18 Plaintiff admits that in 2017 Lightspeed paid him \$111,019 as compensation for his work.
19 This income is taxable. Plaintiff further admits that he could only claim the standard deduction
20 for these tax years. With this knowledge, it is possible to determine what Plaintiff's correct tax
21 liability is for 2017. The precise calculations to determine Plaintiff's tax liability, based on these
22 admitted facts, is set forth in the Declaration of tax computation specialist Santos Hernandez.
23 Dkt. 30-4, pp. 1-3. Given a gross income of \$111,019 in 2017 and allowing for the personal

1 exemption and standard deduction for that year, Plaintiff had taxable income of \$100,619, which
2 means he had an income tax liability of \$21,155.07. *Id.* Plaintiff had \$22,855.00 withheld as
3 income tax in 2017. Consequently, an extra \$1,699.93 was withheld. Thus, Plaintiff overpaid his
4 tax for 2017 by approximately \$1,699.93 and not the full \$22,855.00 he claims. The Government
5 concedes this amount and agrees that the IRS should schedule a \$1,699.93 overpayment for
6 Plaintiff's 2017 income tax, with any actual refund amount paid subject to 26 U.S.C. § 6402.
7 Dkt. 30, pp. 32-33.

8 4. Jurisdiction Over Social Security and Medicare Tax Claim

9 On line 7 of Plaintiff's Form 1040EZ, which says "Federal income tax withheld,"
10 Plaintiff reported the total amount of federal taxes—*i.e.*, income taxes plus Social Security and
11 Medicare taxes—withheld in 2017. However, the face of Form 1040EZ makes clear that the
12 form can only be used to claim an income tax refund. Refunds of Social Security and Medicare
13 taxes must be separately claimed on a Form 843. *See* IRS Publication 505, available at
14 <https://www.irs.gov/pub/irs-pdf/p505.pdf> ("If you had only one employer and he or she withheld
15 too much social security, Medicare, or tier 1 RRTA tax, ask the employer to refund the excess
16 amount to you. If the employer refuses to refund the overcollection, ask for a statement
17 indicating the amount of the overcollection to support your claim. File a claim for refund using
18 Form 843, Claim for Refund and Request for Abatement.").

19 It is undisputed that Plaintiff did not submit a Form 843 for tax year 2017 and
20 consequently, he did not make an administrative refund claim for those taxes, which is a
21 jurisdictional requirement for suits in federal district court. *See* 26 U.S.C. § 7422(a). Thus,
22 Plaintiff's refund claim for his 2017 taxes must be limited to income taxes. *See Klein v. United*
23 *States*, No. CV0902773MMAJWX, 2010 WL 11508792, at *13 (C.D. Cal. June 29, 2010)

1 (dismissing a refund suit because the taxpayer failed to file a Form 843 with the IRS).

2 CONCLUSION

3 Plaintiff raises many frivolous legal arguments but does not deny the material facts – *i.e.*,
4 he worked at Lightspeed during 2009, 2010, 2011, and 2017; Lightspeed paid him the amount of
5 money reported on his Forms W-2 for those years; these payments were “for his work that he did
6 for the company;” Plaintiff submitted the returns to the IRS that reported \$0 in taxable income
7 while showing federal income tax withholding; and, Plaintiff claimed that he did not earn taxable
8 income because he is a private-sector worker. Based on these admitted facts, there can be no
9 dispute that the IRS properly assessed \$20,000 in § 6702 penalties for Plaintiff’s 2009–2011 tax
10 filings. Nor can there be any dispute that Plaintiff is not entitled to his claimed income tax refund
11 for 2017.

12 Therefore, the Court **grants** the Government’s cross motion for summary judgment (Dkt.
13 30) and **denies** Plaintiff’s motion for summary judgment (Dkt. 27). The Court determines that (1)
14 the 26 U.S.C. § 6702 penalties for frivolous returns for 2009, 2010, and two for 2011, are proper
15 and Plaintiff’s claim for a refund of these penalties is **denied**; (2) Plaintiff’s claim for a refund of
16 all of his 2017 withholdings is **denied** as his taxable income for 2017 was \$100,619.00 and his
17 federal income tax liability was \$21,155.07. Therefore, Plaintiff overpaid his 2017 income tax by
18 only \$1,699.93, with any potential payment of the refund for this overpayment subject to 26
19 U.S.C. § 6402.

20 Dated this 8th day of July, 2021.

21
22 
23 _____
BRIAN A. TSUCHIDA
United States Magistrate Judge