



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR DISTRICT COUNSEL, PACIFIC-NORTHWEST DISTRICT
SEATTLE

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy and Summonses)

SUBJECT: Offers-in-Compromise - Forms 656 and Conjunction
Language

This memorandum responds to your memorandum electronically mailed July 28, 2000, asking questions about the number of offers that should be accepted from spouses who seek to compromise joint and separate liabilities. This document is not to be cited as precedent.

ISSUE

When spouses owe both joint and separate liabilities and submit separate offers at the same time, should the Service require that the offers include a clause stating that the offers are submitted in conjunction with each other, and that failure to pay the entire amount of both offers will result in a default of both offers?

CONCLUSION

When spouses owe both joint and separate liabilities and submit separate offers at the same time, the Service should not require that the offers include a clause stating that the offers are submitted in conjunction with each other, and that failure to pay the entire amount of both offers will result in a default of both offers.

DISCUSSION

In your memorandum you raise questions regarding offers in compromise from spouses who wish to compromise joint and separate tax liabilities. You state that in these situations it is sometimes necessary for the spouses to submit one, two, or three Form 656 offers in compromise. You noted manual provisions that specify how many forms should be filed. The IRM provides that if the taxpayer is solely responsible for one liability and jointly responsible for another, and both joint parties are submitting the offer, two offers must be submitted; one for the separate liability

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and one for the joint liability. IRM 5.8.1.5.c.¹ You stated that you understood such provisions to be general in nature, and are not intended to cover every taxpayer in every situation. You have advised the Service to require the number of Forms 656 as are appropriate in their judgment under the circumstances of each case and in light of the IRM. The Service has asked, for purposes of consistency and clarity, for more specific guidance in this regard. You ask us if such guidance is possible, and if so, what should that guidance be.

Similarly, you were concerned that when more than one offer is required, the amount offered on each Form 656 may not reflect the reasonable collection potential of the offeror(s), because the amount the couple offers to compromise all their liabilities is divided among the offers. This would be the case where the couple submits a joint offer for joint liabilities, and separate offer(s) for separate liabilities, as directed by IRM 5.8.1.5.c. You also state that in this situation there is a potential that taxpayers could selectively default on one offer (e.g., an old or small liability) and satisfy another (e.g., a new or large liability).² Thus, taxpayers could escape certain liabilities without paying the full amount the Service would otherwise require in a compromise.

To minimize this potential problem, and so that each offer reflects reasonable collection potential, your office has advised that the following language be added to each Form 656:

This offer is submitted in conjunction with an offer submitted by [the other taxpayer] dated [date] in the amount of [\$x]. The sum of these offers in [\$y]. Failure to pay the entire amount of [\$y] will result in a default of both offers.

Finally, you raised concerns arising from community property law. In some community property states, the income of one spouse may sometimes be used to satisfy the liabilities of the other. Also, in some community property states the entire amount of community property (rather than just the spouse's share) may be used to satisfy joint liabilities. Thus, were the couple to submit multiple offers, the sum of the acceptable amounts of the offers would exceed the amount the couple could pay.

We have advised the Service against the use of conjunction clauses. When such clauses are used, the Service makes one spouse's compromise dependant upon the other spouse's payment from separate assets and/or income. This is plainly inconsistent with section 3462(d)(2) of the IRS Restructuring and Reform Act of 1998. That section instructed the Service to notify taxpayers of their right to the

¹ See also IRM 5.8.3.3(6) and (8), directing the Service to seek corrected offers if a joint offer is submitted for both joint liability and separate liability.

² Similarly, one liability could be dischargeable in bankruptcy, and the other not.

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continued benefits of a compromise when the other party to the compromise has breached the agreement. Further, there is effectively no difference between two offers with conjunction clauses, and one joint offer that compromises both joint and separate liabilities. The Service does not usually require spouses to submit joint offers, even when only joint liabilities are at issue. See IRM 5.8.1.5.a (if there is a joint liability *and both parties wish to make the offer*, both names must be shown), IRM 5.8.1.7(1) (taxpayers who are jointly liable for the same tax liabilities *may submit* a joint offer) (emphasis added).

A better solution that could be used in cases where selective default could be a problem, IRM 5.8.1.5.c notwithstanding, would be to require separate offers from each spouse in compromise of all of his or her liabilities. Service procedures already allow a spouse to make a separate offer compromising both joint and separate liabilities when only that spouse is submitting an offer, and effectively require separate offers in situations where the Service has decided not to consider joint offers. See IRM 5.8.1.5.b, IRM 5.8.1.7(2).³ When separate offers are made for separate liabilities, the Service determines each spouse's share in the value of jointly owned property. See IRM 5.8.5.3.6, IRM 5.8.5.3.9(3), and IRM 5.4.5.4. There is a presumption that the value of the spouse's interest in joint or tenancy by the entirety property is 50%, though the Service will use a different allocation if taxpayers can demonstrate otherwise. Id. When determining one spouse's income, the Service will generally not consider the other spouse's income except where state law allows, such as community property states. IRM 5.8.5.6. Household expenses are allocated based on the spouse's percentage of household income, unless the taxpayer can demonstrate a different allocation is appropriate. Id. This calculation could be used when spouses are making separate offers in compromise of joint and/or separate liabilities at the same time. Of course, the sum of the couple's separate offers should equal the total amount collectible from the couple.

When both spouses seek to compromise tax liabilities at the same time in community property states, the acceptable amount of each offer can be calculated in much the same way. The Service could start with the presumption that each is entitled to 50% of community property, but allow the taxpayers the opportunity to show that there should be some other division of assets and income under community property law and the facts of the case. For example, there could be a

³ IRM 5.8.1.5.b. directs that if only one spouse is seeking to compromise both joint and separate liabilities, he or she should submit one offer. IRM 5.8.1.7(2) states that a joint offer will not be considered when taxpayers are no longer maintaining a marital relationship, one taxpayer is asserting that he or she is not liable for all or some portion of the tax liability, the taxpayers are attempting to allocate responsibility for portions of the tax or payment of the compromise amount, or the taxpayers have elected separate or proportionate liability subsequent to the filing of their joint return.

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pre-nuptial agreement that changes the property rights of the spouses. The sum of the offers should again total the reasonable collection potential of the couple. The Service's rights under community property law are adequately protected in most cases. If one spouse defaults the Service can still, in its discretion, exercise its right to collect that spouse's taxes from the other spouse's assets and income under community property law. A provision could be added to the respective offers clarifying this point.

By accepting separate offers from each of the spouses that reflect the assets and income of each, neither spouse will get the benefit of a compromise of any tax liability until they have paid an amount the Service has determined to be collectible from that spouse. This would seem to us to resolve the problem of selective default.

We should also address your concern that when the Service considers two offers from the same taxpayer, as when there is one offer for joint liabilities and one offer for separate liabilities, neither offer reflects the reasonable collection potential of that spouse. Policy Statement P-5-100 states that the Service will accept an offer when it is unlikely that the tax liability can be collected in full, and the amount offered "reasonably reflects collection potential." If the Service were to consider the other spouse's income and share in community property in both offers, the sum of separate offers from the spouses in community property states would also exceed the couple's ability to pay. In these situations the same assets and income could be collected in satisfaction of liabilities underlying both offers, and, therefore, could be considered in each offer. However, the Service can only collect the same assets and income once. Thus, we think that where both the offers together reflect all the assets and income that can reasonably be collected from the taxpayers, each offer reasonably reflects collection potential.

If you have any questions, contact the attorney assigned to this matter at (202) 622-3620.