

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Deputy Area Counsel, Great Lakes and Gulf Coast Area
(Tax Exempt and Governmental Entities)
CC:TEGE:GLGC:DAL

from: Peter J. Devlin
Chief, Branch 3
(Collection, Bankruptcy and Summonses)
CC:PA:CBS:B03

subject: Application of employer's I.R.C. 6501(c) unlimited assessment period to I.R.C. 6672 liability of responsible person.

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether a responsible person liable under section 6672 is always subject to the same assessment period under section 6501 as applies to the return of the employer, even when unlimited periods under section 6501(c) apply to the employer's return.

CONCLUSION

A responsible person liable under section 6672 is subject to the same assessment period under section 6501 as applies to the employer's return, even when unlimited periods under section 6501(c) apply to the employer's return.

FACTS

In respect of employment taxes, the Service asserted the fraud penalty under section 6663 against an employer for employment tax liability. The Service also asserted that the statute of limitations on assessments with regard to the employment tax liability is open indefinitely under section 6501(c). The Service requested guidance as to whether a responsible person liable under section 6672 is always subject to the same assessment period under section 6501 as applies to the return of the employer, including the unlimited periods under section 6501(c), even when the Service cannot prove fraud on the part of the responsible person.

LAW AND ANALYSIS

Section 6501(a) provides that, except as otherwise provided, tax must be assessed within three years after the return was filed, whether or not such return was filed on or after the date prescribed. I.R.C. § 6501(a). Specific exceptions to this time limitation on assessment are listed in various subsections of section 6501, as well as in additional provisions within section 6503. Section 6501(c)(1) states, “[i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.” In addition, section 6501(c)(2) provides that “[i]n case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.” I.R.C. § 6501(c)(2). Moreover, if a return is required and not filed, the tax may be assessed at any time. I.R.C. § 6501(c)(3).

Section 6672(a), also commonly known as the trust fund recovery penalty, imposes a 100 percent penalty against a responsible person “required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment.” I.R.C. § 6672(a); see also, Wood v. United States, 808 F.2d 411, 414-15 (5th Cir. 1987). Various courts have held that the assessment of the section 6672 penalty is subject to the period of limitations on assessment provided in section 6501(a) and the Service acquiesced to this position in 1996. Lauckner v. United States, 68 F.3d 69, 70 (3d Cir. 1995), aff’g 1994 WL 837464 (D.N.J. 1994), acq., A.O.D. 1996-06, 1996-2 C.B. 1; United States v. Jones, 60 F.3d 584, 589 (5th Cir. 1994); Stallard v. United States, 12 F.3d 489, 493 (5th Cir. 1994). Thus, the filing of the employer’s quarterly employment tax return starts the running of the three-year limitations period with respect to the responsible person’s section 6672 liability. See Jones, 60 F.3d at 589.

Where the statute of limitations on assessment is open indefinitely as to the employer’s employment tax liability under section 6501(c)(1), (2) or (3), we believe that the responsible person is likewise subject to the same unlimited period of limitations for assessment of the trust fund recovery penalty under section 6672. The same

justification as to why section 6672 assessments are subject to the general three-year limitations period in section 6501(a) applies to why section 6672 assessments are subject to the exceptions found in section 6501(c). The section 6672 penalty does not create a liability that is "separate and distinct" from the underlying employment tax liability. Lauckner, 1994 WL 837464 at *4. "[T]he low standard of conduct necessary to trigger responsible person liability was developed with the understanding that section 6672 did not impose a separate liability based solely on the responsible person's conduct, but was instead a device to secure the collection of revenue rightfully due from the employer." Id. at *9. In other words, the penalty imposed on the responsible person is simply an enforcement mechanism for collecting the employment tax liability imposed on the employer and is based on the employment tax return. See id. Accordingly, if the statute of limitations on assessment for the employment tax liability is still open because of fraud, a willful attempt to evade tax, or the failure to file an employment tax return, the statute for the section 6672 penalty that is based on the same employment tax return should remain open as well.

The district court in Lauckner specifically considered the applicability of section 6501(c)(2) with respect to the assessment of the section 6672 penalty. Lauckner, 1994 WL 837464 at *9. While the court ultimately found that the Government had failed to make any factual allegations that would bring its counterclaim within section 6501(c)(2), its consideration of the issue lends support to the position that the employer and responsible person are subject to the same assessment period under section 6501 even where the exceptions under section 6501(c) apply. See id.

Moreover, the rationale underlying these exceptions to the period of limitations on assessment apply with the same force to the responsible person as it does to the employer. The failure to file a return, the filing of a false or fraudulent return and/or the willful attempt to evade or defeat tax place the Service at a special disadvantage in discovering and ascertaining the correct tax liability. See, e.g., Badaracco v. Commissioner, 464 U.S. 386, 398 (1984) (finding that fraud cases are more difficult to investigate than cases marked for routine tax audits). For example, in fraud and willful attempt to evade or defeat tax cases, "there is a distinct possibility that the taxpayer's underlying records will have been falsified or even destroyed." Id. The exceptions found in section 6501(c)(1), (2), and (3), therefore, provide the Service with an unlimited time to assess tax to compensate for the burden imposed on the Service in ascertaining the correct tax liability and establishing the facts necessary to prove its case in such situations. Otherwise, the Government's interest would not be protected. Furthermore, the focus of the exceptions at issue under section 6501(c) is in connection with whether the filing (or non-filing) of the return satisfied the exception, not who was responsible for the filing (or non-filing). For instance, the Board of Tax Appeals found that the predecessor to section 6501(c)(1) is "an impersonal provision applying to the situation arising from a fraudulent return." See Weinstein v. Commissioner, 33 B.T.A. 105, 107 (1935). Given this underlying purpose, it does not matter whether the failure to file, false or fraudulent filing, or willful attempt is that of the employer or that of the responsible person.

In light of the foregoing, we conclude that a responsible person is subject to the same assessment period under section 6501 as applies to the employer's return, even where the exceptions under section 6501(c) apply to the employer's return.

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