

**Office of Chief Counsel
Internal Revenue Service**

Memorandum

Release Number: **20171801F**

Release Date: 5/5/2017

POSTU-102783-17

UILC: 6603.00-00; 7452.00-00; 81.11.00-00

date: February 27, 2017

to: LB&I Territory Manger

from:

Associate Area Counsel
(Large Business & International)

subject:

Request for Transfer of Deposits from Subsequent Transferees to Initial Transferee

This memorandum responds to your request for assistance dated January 23, 2017.
This advice may not be used or cited as precedent.

ISSUES

1. May a person making a deposit under I.R.C. § 6603 for a potential transferee liability direct the Service to apply all or a portion of its deposit against the liability of another person liable for the same underlying liability?
2. If a person making a deposit is permitted to apply all or a portion of the deposit to the liability of another person liable, under these facts, may an attorney-in-fact for a person making a deposit under I.R.C. § 6603 direct the Service to transfer the deposit to pay another person's tax liability?

CONCLUSIONS

1. While a person making a deposit may direct the Service to use the deposit as payment of other of his liabilities, Rev. Proc. 2005-18 does not authorize a person to direct the Service to apply a deposit to pay another person's liability.
2. As presented, the Forms 2848, Power-of-Attorney and Declaration of Representative, for the involved depositors do not permit the attorney-in-fact to direct the transfer of the deposit to pay another's tax liability.

FACTS

LAW AND ANALYSIS

1. I.R.C. § 6603 was enacted by section 842(a) of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, effective for deposits made after October 22, 2004. As relevant here, it permits a taxpayer to make a cash deposit with the Service which may be used by the Service to pay certain types of tax (including income tax) that have not been assessed at the time of the deposit. Section 6603(a). To the

extent that such deposit is used to pay tax, for purposes of section 6601 (relating to interest on underpayments), the tax shall be treated as paid when the deposit is made. Section 6603(b).

Several additional rules from the statute apply here. Generally, the Service shall return to the taxpayer any amount of the deposit (to the extent not used for a payment of tax) which the taxpayer requests in writing. Section 6603(c). As relates here, a deposit which is returned to a taxpayer shall be treated as a payment of tax for any period to the extent (and only to the extent) attributable to a disputable tax for such period. A disputable tax means the amount of tax specified at the time of the deposit as the taxpayer's reasonable estimate of the maximum amount of any tax attributable to disputable items. Section 6603(d)(2)(A). For amounts returned to a taxpayer, the rate of interest on any overpayment shall be the Federal short-term rate determined under section 6621(b), compounded daily. Section 6603(d)(4). Except where the taxpayer directs otherwise, deposits shall be treated as used for the payment of tax in the order deposited. Section 6603(e).

Section 6603(a) provides that a taxpayer making a cash deposit with the Service shall do so in such manner as prescribed by the Secretary. Rev. Proc. 2005-18, 2005-13 I.R.B. 798, sets out procedures for taxpayers to make, withdraw, or identify deposits to suspend the running of interest on potential underpayments as section 6603 permits.

Section 4 of the Revenue Procedure sets out procedures for making deposits under section 6603, and describes the treatment of other remittances. Thereunder, subsection 4.02, entitled *Treatment of deposits made during an examination upon the completion of such examination by the Service*, includes language giving flexibility to a taxpayer regarding a deposit where it has other liabilities. Para. (3) thereunder states:

A taxpayer may elect to have a deposit that exceeds the amount of tax ultimately determined to be due applied against another assessed or unassessed liability. For example, a taxpayer under examination for several different years may request that a deposit made for one type of tax in one year be applied to another type of tax in another year. The request must be in writing and must be directed to the same office where the original deposit was made.

Also of note is section 6.01 of the procedure. It states:

A deposit made pursuant to section 6603 is not subject to a claim for credit or refund as an overpayment until the deposit is applied by the Service as payment of an assessed tax of the taxpayer. A taxpayer may request the return of all or part of a deposit at any time before the Service has used the deposit for payment of a tax.

(Emphasis added.)

The liability of a transferee is derivative of the transferor's liability. Yet while multiple transferees may be severally liable for the same liability of a transferor, it does not follow that the liability of the several transferees is the same liability. While it arises from the same taxpayer that may have made transfers in fraud of its creditors, it does not necessarily follow that the liability of one transferee is interchangeable with the liability of another. The bases for the liability quite often arise from different transactions between the transferor and the transferees.

More concerning is that the guidance issued to date to administer this provision does not authorize one depositor designating its deposit to be applied to another taxpayer's liability. The Revenue Procedure, at section 4.02(3), provides an example whereby one depositor can request that a deposit for one type of tax in one year be used to satisfy an underpayment of another type of tax for another year. Likewise, at section 6.01, it notes that the deposit is not subject to a claim for credit or refund until it is applied by the Service as payment of an assessed tax of the taxpayer.

2. We note our concern over the acceptance of the representations of an attorney-in-fact to transfer funds from one taxpayer to another. The Form 2848 executed by the potential transferees from which the transfers are sought identify the acts for which the representatives are authorized as those identified in ¶ 3 of that form, identifying the matter as "Income Tax (Transferee Liability)" arising from Tax Form 1120 for the Tax Period ended . Paragraph 5.b of that form, *Specific acts not authorized*, states:

My representative(s) is (are) not authorized to endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the representative(s) or any firm or other entity with whom the representative(s) is (are) associated) issued by the government in respect of a federal tax liability.

No mention is made of the permission of the representative to transfer 6603 deposits made by the transferee as one of their powers conveyed by the Form 2848. In the absence of this specific power, we believe that there is not sufficient authority conveyed in the powers-of-attorney for the Service to follow the representative's instructions to transfer a deposit to another's liability.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[REDACTED]

[REDACTED]

[REDACTED]

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (720) 956-4039 if you have any further questions.

EWAN D. PURKISS
Area Counsel
(Communications, Technology & Media:
Oakland)

By: _____
William R. Davis, Jr.
Associate Area Counsel (Denver)
(Large Business & International)

Attachments (6)

cc: