

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **200444001**

Release Date: 10/29/04

CC:PA:CBS:B01:GThomas
GL-110742-04

UILC: 6321.01-00, 6201.00-00, 3111.00-00

date: July 08, 2004

to: ASSOCIATE AREA COUNSEL FOR PORTLAND, OREGON
(Small Business/Self-Employed)

from: CHIEF, COLLECTION BANKRUPTCY & SUMMONSES, BRANCH 1
(Procedure & Administration)

subject: COLLECTION OF ASSESSMENTS FROM FORFEITED CORPORATIONS

This Chief Counsel Advice responds to your request for assistance dated April 15, 2004. Specifically, you asked us to review your memorandum on the issues of whether assessments of an employer's payroll taxes are valid against a forfeited corporation when it was the only person listed as the employer on the payroll tax returns, and whether the Service can take enforced collection action against the assets of that corporation. This memorandum has been coordinated with the Administrative Provisions and Judicial Practice Division of the Office of Procedure & Administration. This advice may not be used or cited as precedent.

LEGEND

ST =

TP =

SH1 =

SH2 =

TR =

TY1 =

TY2 =

TY3 =

TY4 =

TY5 =

Y1 =

Y2 =

ISSUES

Whether assessments against TP, a forfeited corporation, are valid to use enforced collection against the assets of the TP.

CONCLUSIONS

The assessments are valid and enforced collection may be commenced against SH2 because under ST law SH2 is liable for the debts of TP and SH2 is the trustee/owner of TP's assets.

FACTS

SH1 was a shareholder in TP. TP is a forfeited corporation under the laws of ST because it failed to timely file reports and pay fees to maintain its corporate charter. At all relevant times, TP's charter has been forfeited. SH1 transferred real property to TP by warranty deed. The next day, SH1 transferred all of its shares to SH2 for a specific sum to be paid in installments. SH2 continued the operations of TP and fulfilled its obligations under the sale agreement in Y1. A year later in TY1, SH2 opened a bank account in the name of the business using the same employer identification number (EIN) listed on the payroll tax returns for TP and declaring that the account was for a corporation. About five years later in Y2, SH2 opened an account in the name of the business using the same EIN listed on the payroll tax returns for TP but declaring that the business was a sole proprietorship.

TP filed payroll tax returns for TY1, TY2, TY3, TY4, and TY5. The Service assessed these liabilities, provided notice and demand, and filed a Notice of Federal Tax Lien ("NFTL") against TP for these years in Y2. TP requested a Collection Due Process hearing after being notified of its rights.

Also in Y2, SH1 executed a quit claim deed conveying the real property of TP to TR, a trust. The deed states that SH1 is the last known director of TP, a defunct corporation. The deed was properly filed under local law.

TR lists SH2 as the trustor, trustee, and beneficiary. Subsequent to the filing of the quit claim deed, SH2, in its capacity as trustee, gave a mortgage from TR secured by TP's real property.

LAW AND ANALYSIS

Equitable Estoppel

In your memorandum, you conclude that TP is equitably estopped from denying its corporate existence for tax purposes because it held itself out as a corporation while it was pyramiding payroll tax liabilities and the Service relied on that representation in making its assessment against TP. Equitable estoppel applies when a taxpayer makes a representation of fact on which the Service relies to its detriment, and through such reliance and ignorance of the true facts, is prevented from avoiding such detriment before the expiration of the statute of limitations on its actions. See Sangers Home for Chronic Patients, Inc. v. Commissioner, 72 T.C. 105 (1979). Here, either the statute of limitations have not expired or the Service will be able to enforce the assessment against SH2 (as explained below). Therefore, equitable estoppel should not be used as a basis for collection in this case.

Duty of Consistency

You also conclude that TP has a duty of consistency to continue to be treated as a corporation because it held itself out to the Service as a corporation while pyramiding its payroll tax liabilities. The duty of consistency, also known as quasi-estoppel, applies when: (1) the taxpayer has made a representation for tax purposes in one year; (2) the Service has acquiesced in the fact for that year; and (3) the taxpayer desires to change the representation, previously made, in a later year after the statute of limitations on assessments bars the adjustment for the initial year. See Hollen v. Commissioner, T.C. Memo. 2000-99. The purpose of the duty of consistency is to prevent a taxpayer, who makes an error or omission in a return for an earlier year, from taking a contrary position in a return to avoid paying federal taxes in a later year. As with equitable estoppel, the duty of consistency only applies when the government encounters detriment. In TP's case, either the statute of limitations have not expired or the Service will be able to enforce the assessment against SH2 (as explained below). Therefore, the duty of consistency should not be used as a basis for collection in this case.

Assessments Valid Against TP and SH2

You also conclude that if TP is not estopped from claiming that it is not a corporation, the assessment against the TP is valid against the TP, in the form of a sole proprietorship, and SH2, as director of the forfeited corporation. State law determines

the nature of a property right; federal law determines the appropriate tax treatment when such property rights are transferred. Autin v. Commissioner, 109 F.3d 231, 233 (5th Cir. 1997). You have indicated that, under ST law, TP's corporate charter has been forfeited, and for purposes of debts incurred while in forfeiture, that ST does not recognize de facto corporate existence but rather corporate directors are liable for these debts. You have also indicated that federal law treats an owner of an entity without a corporate charter as a sole proprietorship. Cesa Cartage, Inc. v. Commissioner, T.C. Memo. 1989-76.

Although your conclusions in the memorandum are correct, your reliance on United States v. Galletti should be limited to the proposition that once a tax is properly assessed, nothing requires the Service to separately assess the same tax against an individual or entity who is not the actual taxpayer but is, by reason of state law, liable for the payment of taxpayer's debts. 124 S. Ct. 1548, 1554 (2004). The holding of Galletti is distinguished from TP's case because that case involved the secondary liability of general partners for the debts of a general partnership under state law. Here, SH2, the owner and director of the corporation, is not secondarily liable but is solely liable for the entity's debts because TP is merely a trade name of SH2.

TP is a sole proprietorship, not a corporation, for all of the tax years involved. The owner of a sole proprietorship is liable for its debts. The assessment was made using TP's name and EIN, and TP, although now holding itself out as a sole proprietorship, is using the same EIN. For purposes of section 6203, a valid assessment must identify the taxpayer. Treas. Reg. § 301.6203-1. The taxpayer is the same entity as it was when the assessment was made, and thus, the assessment is valid against TP and SH2, TP's sole owner. ■ See Marvel v. United States, 719 F.2d 1507, 1513-14 (10th Cir. 1983) (holding that an assessment made in the taxpayer's trade name rather than the taxpayers' individual names properly identified the individuals as the taxpayers for purposes of section 6203). See also Galletti, *supra*.

Collection Against TP's Property

Before SH1 executed a quit claim deed transferring the title to TP's real property to TR, the tax lien under section 6321 attached to such property.¹ The section 6321 lien also attached to the property of SH2, as the owner of the sole proprietorship. As noted in your memorandum, under ST law, the director of the forfeited corporation is the trustee of that forfeited corporation's assets. ■■■■■².

¹ A quit claim deed does not prove that SH1 had any ownership interest in TP's property. However, to protect the government's interest, SH1 should be considered a nominee of TP until information is obtained that the original agreement was not rescinded by SH1 and SH2 for mutual mistake. ■■■■■

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

TR is not a purchaser, mechanic's lienor, holder of a security interest or judgment lien creditor and as a result does not have priority over the filed federal tax lien on TP's property under section 6323. However, the mortgagee who obtained a security interest over TP's property has priority over the federal tax lien presuming the mortgage has been recorded

[REDACTED]

[REDACTED]³

[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 [REDACTED] if you have any further questions.

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