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**From:**

**Sent:** Wednesday, November 16, 2011 8:14 AM

**To:**

**Cc:**

**Subject:** RE: Appeals question re: third party liability

Hello , this is in response to your 11/7/2011 question about the personal liability of the executor of the estate:

Your question was whether the executor is personally liable for the estate's liabilities if the estate's assets have been depleted by being distributed to the beneficiaries.

The executor will be personally liable only to the extent of payments that he has made to persons other than the government since the time that he was notified of the government's claim for the penalties, and then, only to the extent that there is not enough money in the foreign trust from which the government may collect.

A fiduciary of an estate without enough property to pay all claims of the estate must pay the federal tax claim before other claims. 31 U.S.C. § 3713. If the fiduciary pays other creditors prior to paying the government, the fiduciary may be held personally liable to the extent of the payments that he turned over to creditors other than the United States. 31 U.S.C. § 3713(b); *United States v. Coppola*, 85 F.3d 1015, 1020 (2nd Cir. 1996); IRM 5.5.3.9 (03-26-2010) Fiduciary or Transferee Liability. The executor is only liable if he had notice of the claim of the government before making a distribution to another creditor. *Little v. Commissioner*, 113 T.C. 474 (1999) ("[I]t has long been held that a fiduciary is liable only if it had notice of the claim of the United States before making the distribution." (citing *Want v. Commissioner*, 280 F.2d 777, 783 (2d Cir. 1960))). Section 6901(a)(1)(B) provides that the government may collect the tax liabilities from the liable fiduciary in the same manner as it could have from the taxpayer.

Here, the entire estate passed outside of probate. The only asset in the estate was the foreign trust. The executor filed the estate tax form and paid the estate tax out of the foreign trust on . The penalties were not assessed against the estate until and . The estate is liable for the penalties against the decedent for the decedent's failure to file the information returns. If there is still money in the foreign trust, the estate is not insolvent and the penalties should come out of that money.

The executor, however, will only be personally liable for the penalties if subsequent to the assessment of the penalties, the executor paid off other creditors instead of paying the IRS, and there is not enough money left in the estate to pay the penalties. Unless we discover additional facts showing that there was not enough money in the estate to pay off all creditors, and the executor chose to pay other creditors instead of the government, the

executor will not be personally liable for the penalties against the decedent. Based on the facts that you have shared with me thus far, we do not know of the executor making any payments out of the estate since . Once we have more information about what has occurred with the foreign trust since , we will know whether the executor is personally liable for the penalties. The letter from the attorney claims that the executor did not have control over the foreign trust; however, you indicated that the executor must have control over the foreign trust because the estate tax payments came out of the trust. If someone other than the executor made payments from the foreign trust to creditors other than the government, the executor may not be personally liable. If the executor received money from the foreign trust as a beneficiary, he may be personally liable for the penalties under section 6901 as a transferee. In addition, if any of the money from the estate (i.e., from the foreign trust) is/was transferred to a person from whom the Service may collect (e.g., a US beneficiary), other than the executor, then such person may also be liable as a transferee and may be assessed under section 6901.

Please let me know if we can help with anything else.

Thanks,