



OFFICE OF
CHIEF COUNSEL

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

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MEMORANDUM FOR DISTRICT COUNSEL, KANSAS-MISSOURI DISTRICT

FROM: Kathryn A. Zuba
Chief, Branch 2 (General Litigation)

SUBJECT: Nominee - Offer in Compromise

This responds to your request dated October 19, 1998. This document is not to be cited as precedent.

LEGEND:

Taxpayer X
Taxpayer Y
Taxpayer Z
City A
Year 1
Date A
Date B
Date C
Amount A
Amount B
Amount C
Amount D
Amount E

By memorandum dated October 19, 1998, you requested our review of advice which you issued on that date to the Chief, Special Procedures Branch, Kansas-Missouri District. The SPB requested advice on two issues: first, whether a nominee may submit an offer in compromise based on doubt as to collectibility on behalf of the taxpayer against whom the assessment was made; and, second, whether nominee liens, in general, may be compromised. In your advice memorandum, you concluded that the nominee could not compromise the liability on behalf of the taxpayer and that nominee liens, generally, are not subject to compromise. We have reviewed your memorandum and, in general, agree with your conclusions.

ISSUES:

- (1) Whether a nominee may file an offer in compromise on behalf of the taxpayer liable for the assessment.
- (2) Whether nominee liens may be compromised under I.R.C. § 7122.

CONCLUSIONS:

- (1) Absent authority to enter into a binding contract on behalf of the taxpayer against whom the assessment was made, a nominee may not compromise the tax liability giving rise to the lien.
- (2) Section 7122 of the Internal Revenue Code authorizes the Service to compromise tax liabilities. A nominee lien can be extinguished only by satisfying the underlying liability, whether by full payment or by compromise agreement executed by an individual with authority to do so.

FACTS:

On Date B the Internal Revenue Service filed a proof of claim in the Probate Court for City A against the Estate of Taxpayer X for a total of Amount A. The claim included income taxes for Year 1 totaling Amount B, plus additions to tax and interest, and Amount C, plus additions to tax and interest. Taxpayer Y was appointed personal representative of the estate. A probate court filing of Date A listed probate assets of the estate totaling Amount D.

In the time since becoming personal representative, Taxpayer Y liquidated substantially all of the estate's property and invested the proceeds in other ventures, ostensibly to increase the value of the estate. In an interview with the IRS on Date C, Taxpayer Y was unable to identify the specific investments made and was described by the Revenue Officer as evasive. A statement later submitted to the IRS by Taxpayer Y's attorney showed that funds totaling Amount E had been

disbursed, that the initial filing with the probate court had apparently been false, and that individuals to whom bequests had been made had not been paid.

The Service has asserted a nominee lien against assets held by Taxpayers Y and Z, alleging that the Estate of Taxpayer X is the actual owner of the assets and that they are subject to the federal tax lien against the estate. Taxpayers Y and Z have attempted to free the assets from the lien by submitting an offer in compromise of the underlying tax liability. The offer was submitted by Taxpayers Y and Z as nominees and not by Taxpayer Y in his capacity as personal representative of the estate.

DISCUSSION:

When a person liable to pay tax to the United States fails to do so upon notice and demand, the amount of the tax, together with interest and penalties, becomes a lien in favor of the United States on all real and personal property belonging to the taxpayer. I.R.C. § 6321. This lien reaches every interest in property belonging to the taxpayer. United States v. National Bank of Commerce, 472 U.S. 713, 719-20 (1985). The Supreme Court has held that the lien created by section 6321 extends beyond the taxpayer, reaching property belonging to the taxpayer but held by his alter ego or nominee. G.M. Leasing Corp. v. United States, 429 U.S. 338, 350-51 (1977). Thus, a federal tax lien may be foreclosed against property which is titled to another, but which is actually the property of the taxpayer. Courts have consistently ignored the fact that property is in a third party's name and allowed the Service to pursue such property to satisfy tax liens against the true owner. E.g., G.M. Leasing, 429 U.S. at 350-51; United States v. Miller Bros. Constr. Co., 505 F.2d 1031, 1036 (10th Cir. 1974). In this case, the Service has asserted that property in the hands of Taxpayers Y and Z is held by them as nominees of the taxpayer, the Estate of Taxpayer X. The facts which you have supplied support this contention, and it appears to be undisputed by Taxpayers Y and Z.

Taxpayers Y and Z have submitted an offer to compromise the tax liability of the estate in an effort to remove the federal tax lien. Section 7122 authorizes the Secretary to compromise a taxpayer's liability. I.R.C. § 7122(a). An agreement to compromise is a contract between the Government and the taxpayer, subject to rules applicable to contracts. See United States v. Lane, 303 F.2d 1, 4 (5th Cir. 1962); Walker v. Alamo Foods Co., 16 F.2d 694, 696-97 (5th Cir.), cert. denied, 274 U.S. 741 (1927). This contract relates to the entire liability of the taxpayer and conclusively settles all questions of liability therefor. Treas. Reg. § 301.7122-1(c).

Although the property held by Taxpayers Y and Z is subject to the federal tax lien, they are not the taxpayers against whom the tax liability was assessed. As such, they cannot compromise the underlying tax liability unless they have the authority to enter into a binding contract on behalf of the taxpayer. Possession of the property,

in and of itself, will not give the power to bind the estate to a contract with the Government.

You note that Taxpayer Y is the personal representative of the estate, and that he may be able to use this authority to submit an offer on behalf of the estate. We see no problem with your reasoning, and agree that, as personal representative, he may be able to enter into a contract to resolve the liability of the estate.

As an alternative theory, your memorandum of February 28, 1998, advised that the Service should assert transferee liability against Taxpayer Y under I.R.C. § 6901. Your memorandum of October 19, 1998, again raised this possibility, but noted that the statute of limitations had lapsed. As you stated, a transferee may compromise his own liability. See Rev. Rul. 72-436, 1972-2 C.B. 643. However, because the liability of the transferee is personal, such an offer would be evaluated by weighing the individual liability of the transferee against the Service's ability to collect from that transferee.

The second issue delineated in your memorandum was whether nominee liens are subject to section 7122. You reason that the statute, regulations, and procedures do not contemplate such a compromise. Further, you note that the nominee is not personally liable, and therefore has nothing to compromise.

The federal tax lien arises pursuant to section 6321 upon assessment, notice and demand, and failure to pay. The lien is a mechanism that permits the collection of the tax. As discussed above, section 7122 provides for the compromise of that tax. The compromise of the liability extinguishes all federal tax liens against the taxpayers' property upon full performance of the contract. In contrast, section 6325 provides for the discharge of property subject to a lien for which the underlying tax liability has not been satisfied.

In this case, a valid, binding contract to compromise the estate's liabilities would eliminate the lien on the property held by Taxpayers Y and Z. As nominees, Taxpayers Y and Z cannot enter into such a contract. Should Taxpayer Y, in his capacity as personal representative of the estate, successfully reach a compromise agreement with the Government, the lien against the estate's property, wherever held, would be extinguished.

If you have any further questions, please call the General Litigation attorney who handled this case at 202-622-3620.