



OFFICE OF
CHIEF COUNSEL

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

MAR 23 1999

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WTA-N-103704-99

MEMORANDUM FOR W. VAL OVESON
NATIONAL TAXPAYER ADVOCATE C:TA
Attn: Sharese Stevens

FROM: Mary E. Oppenheimer
Assistant Chief Counsel CC:EBEO

SUBJECT: [REDACTED]

This is in response to your request for technical assistance clarifying whether the IRS may proceed against the above referenced taxpayer, [REDACTED], to collect the unpaid employee portion of the FICA tax due without first seeking payment from his employer who failed to exercise the duty to collect the tax .

Prior to giving our response, however, I would first like to thank you for taking the time to prepare a detailed fact sheet for our benefit outlining the rather lengthy history of this case. It was very useful to help us understand all of the circumstances involved.

A review of the specific facts submitted relevant to the assistance you requested reveals that an ongoing disagreement had occurred between representatives of the Internal Revenue Service and the taxpayer regarding the determination of his employment status for tax purposes. Eventually, however, an appeals officer conceded the issue in favor of the taxpayer and determined that the taxpayer should be treated as an employee, and not as an independent contractor, for taxable years [REDACTED], [REDACTED] and [REDACTED]. The appeals officer then advised taxpayer that as an employee, he was responsible to pay the employee share of the FICA tax for those years. Also, because this was a liability of the employee, the failure of the employer to withhold the employee share of the FICA tax would not relieve him of the obligation to pay the tax.

The taxpayer disagreed and repeatedly argued that the employer should pay the entire tax because employer liability was established by law and that the employer is liable for the payment of such tax whether or not it is collected from the employee. However, the taxpayer did not succeed in persuading the appeals office to change its position. The taxpayer was displeased and apparently believed that the issue was not receiving the proper administrative attention within the IRS.

PMTA : 00260

Ultimately, the taxpayer requested the assistance of Representative Patrick Kennedy who then contacted your office to assist in resolving the underlying legal issue.

Therefore, in response to your request for technical assistance, our analysis begins with an explanation of the FICA tax.

The FICA tax is composed of two different taxes: (1) the tax for old age, survivors, and disability insurance (OASDI) which is referred to as "social security tax" and (2) the hospital insurance tax, which is referred to as "Medicare tax". These taxes consist of matching taxes on employees and employers. The social security tax is imposed by Internal Revenue Code sections 3101(a) (the employee portion) and 3111(a) (the employer portion). The Medicare tax is imposed by sections 3101(b) (the employee portion) and 3111(b) (the employer portion).

Section 3102(a) provides that the employee portion of the FICA tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. However, employment tax regulations promulgated under section 3102 further indicate that if an employer does not collect the employee portion of FICA taxes, both the employer and employee are liable for the tax. For example, see section 31.3102-1(c) of the Employment Tax Regulations which provides that the employer is liable for the employee tax with respect to all wages paid by him to each of his employees whether or not it is collected from the employee. In addition, until collected from him, the employee is also liable for the employee tax with respect to all wages he receives.

Regulations promulgated under section 3101 further address the time when this liability is imposed on the employee. See section 31.3101-3 of the regulations which provides that the employee tax attaches at the time that the wages are received by the employee.

Consequently, it is unequivocal that sections 3101 and 3102 provide the statutory authority necessary to impose liability on an employee for the employee portion of the FICA tax. The question remaining is whether the Service may seek to collect this tax from the employee without first seeking payment from the employer who failed to collect the tax.

In Rev. Rul. 86-111, 1986-2 C.B. 176, the Service examined whether an employee is liable for unwithheld FICA taxes after the employer's liability for the taxes was determined under section 3509 (a provision reducing the liability of the employer if his failing to withhold the tax was not in intentional disregard of the requirement to deduct and withhold). When section 3509 applies to an employer, the employer's reduced liability for the employee's share of the FICA tax is equal to a percentage of the amount determined under section 3101. The Service concluded that any tax

liability of the employer determined under section 3509 does not affect the employee's liability. Accordingly, the Service held that the employee remains fully liable for the tax imposed by section 3101 and is, therefore, liable for the entire amount of the unwithheld FICA tax

In Navarro v. United States, 72 AFTR 2d (P-H) 93-5424 (W.D. Tex. 1993), the district court reviewed the same question which we are considering here-that is, whether the Service is required to seek payment of the employee portion of FICA taxes from the employer before it can seek payment from the employee. The facts in Navarro and the present situation are similar in that the Service treated the taxpayers initially as self employed before changing their status to employees. Similarly, the employers did not collect the employee portion of the FICA tax. The court relied on all of the above mentioned authority, and held not only that the ultimate responsibility for the employee portion of the FICA tax lies with the employee, but also that the Service is not required to first seek payment from the employer in collecting the tax.

Based on the foregoing authority regarding collection of the employee share of FICA tax, ~~we conclude that the employee tax attaches at the time that the wages~~ are received by the employee. Further, until collected, the employee is also liable for the employee tax with respect to all wages he received. Thus, although both the employer and the employee are liable for the employee's share of FICA taxes, and it is the intent of the statutory framework that the employer will collect it from the employee, the employee is ultimately liable for the FICA tax. There is no existing authority which requires the Service to first seek payment from the employer on the facts presented in this case. Accordingly, [REDACTED] became responsible for the employee share of the FICA tax at the moment he received his pay during the years in question, and the Service may proceed to collect this tax from him regardless of the fact that his employer did not withhold the tax.

I hope our response will be helpful to you in replying to Representative Kennedy's office. If you have any questions about this matter, please contact Elliot Rogers of my staff at (202) 622-3596.

Sincerely,

Mary E. Oppenheimer
Assistant Chief Counsel
(Employee Benefits and
Exempt Organizations)

By 
Jerry E. Holmes
Chief, Branch 2