

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:CBS:B02:WFCConroy
POSTN-134830-04

date: AUG 02 2004

to: Michael P. McDermitt
National Program Director for the Offer In Compromise Program
from: Michael L. Gompertz *Michael L. Gompertz*
Senior Technician Reviewer
CC:PA:CBS:2


subject: Collecting the Section 6672 Trust Fund Recovery Penalty Following Acceptance of an Offer in Compromise with the Employer for the Related Trust Fund Taxes

You have asked our office to address the following issue:

Issue

Whether compromising an employer's trust fund liabilities under I.R.C. section 7122 limits the Service's ability to collect the related section 6672 Trust Fund Recovery Penalty ("TFRP") from responsible persons.¹

Conclusion

If the Service enters into an offer in compromise with an employer for a portion of the trust fund tax liability, the Service may still collect the remainder of the trust fund taxes from a responsible person pursuant to section 6672.  *UP*

Background


Federal income taxes and social security taxes withheld by an employer from employees' wages are commonly referred to as trust fund taxes because they are held in trust for the United States under section 7501. If an employer fails to collect and pay over trust fund taxes, each person responsible for the failure who willfully fails to collect the tax or willfully attempts to evade or defeat the tax or payment thereof is subject to a penalty under section 6672 equal to the entire amount of the trust fund taxes not accounted for and paid over. It is the Service's policy to collect the unpaid trust fund liability only once. Policy P-5-60, IRM 1.2.1.5.14.

¹ Although your inquiry was prompted by a specific case that has already been resolved, we are issuing this memorandum because this issue is likely to arise in future cases.

PMTA: 80674

I.R.C. section 7122 permits the Secretary of the Treasury or his delegate to compromise any civil or criminal case arising under the internal revenue laws before the case is referred to the Department of Justice for prosecution or defense. Treas. Reg. section 301.7122-1(e)(5) provides that "compromise with one taxpayer does not extinguish the liability of, nor prevent the IRS from taking action to collect from, any person not named in the offer who is also liable for the tax to which the compromise relates."

Currently, the Service requires that the amount offered by an employer to compromise its trust fund tax liability must include, in addition to what can be collected directly from the employer, an amount equal to what can be collected from all responsible persons under section 6672. Offer in Compromise Handbook, IRM 5.8.4.13.2(2). That requirement is based on a concern that accepting an employer's offer to compromise the trust fund tax might put the Service in a position of no longer being able to collect on any related TFRP assessments.

. In any event, the legal question remains the same: If the Service enters into a compromise with the employer for trust fund taxes, is the Service thereby precluded from collecting the related TFRPs from responsible persons?

Discussion

Several circuit courts have concluded that the TFRP liability imposed on responsible persons pursuant to section 6672 is "separate and distinct" from the trust fund tax liability owed by the employer. See, e.g., Monday v. United States, 421 F.2d 1210, 1218 (7th Cir.), cert. denied, 400 U.S. 821 (1970); Hockstein v. United States, 900 F.2d 543, 549 (2d Cir. 1990), Muck v United States, 3 F.3d 1378, 1382 (10th Cir. 1993).

Thus, because the two liabilities are separate and distinct, the Service has a strong argument that the compromise of a trust fund tax liability owed by an employer has no effect on the ability of the Service to collect a related TFRP from a responsible person. See Spivak v. United States, 370 F.2d 612, 616 (2d Cir.), cert. denied, 387 U.S. 906 (1967), where the Second Circuit concluded that a compromise of trust fund taxes by the Department of Justice in the employer's bankruptcy case did not preclude the Service from collecting the TFRP from responsible persons. The court stated that the "compromise of [a] claim against the bankrupt estate of the corporation cannot serve to release the responsible persons from their direct liability under [section 6672]". See also Bradley v. United States, 936 F.2d 707, 710 (2d Cir. 1991) (recognizing that "liability under section 6672(a) is not derived from, or dependent upon, an employer's outstanding tax obligation").

Other circuit courts have reached similar conclusions. See Muck v. United States, 3 F.3d 1378, 1382 (10th Cir. 1993) (holding that "[t]he existence of an agreement between the IRS and [the corporate taxpayer] . . . cannot shield plaintiff from liability under 6672"); Teel v. United States, 529 F.2d 903, 906 (9th Cir. 1976) (noting that "[a] proceeding under Sec. 6672 deals with a totally independent liability from that of the corporation"); Monday v. United States, 421 F.2d 1210, 1218 (7th Cir. 1970) (noting that "the separate nature of the tax liabilities imposed upon the [plaintiffs] precludes their assertion of any satisfaction of the Company's liability for withholding taxes as a satisfaction of their individual liability under Section 6672"). See also Skouras v. United States, 854 F. Supp. 962, 975 (S.D.N.Y. 1993) aff'd per curiam, 26 F.3d 13 (2d Cir. 1994) (acknowledging that "the IRS's compromise of a claim against a bankrupt corporation does not release responsible corporate officers from their direct liability or shield them from a 100% penalty under § 6672"); Farrington v. United States, 920 F. Supp. 12, 14 (D. N.H. 1996) (recognizing that "compromise of a claim against a bankrupt corporation does not serve to release the responsible persons from their direct liability under [section 6672]").

Accordingly, because the trust fund tax assessment and the TFRP assessment are separate and distinct liabilities, the Service should be able to enter into an offer in compromise with an employer for a portion of the trust fund tax liability and later collect the remaining unpaid TFRP from a responsible person pursuant to section 6672. Moreover, even if the two liabilities were not considered separate and distinct, the regulations under section 7122 provide that a compromise of one taxpayer's liability does not extinguish the liability of another taxpayer not named in the offer in compromise, or prevent the Service from taking collection action against that taxpayer. Treas. Reg. section 301.7122-1(e)(5).



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