

Office of Chief Counsel  
Internal Revenue Service

# Memorandum

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May 5, 2004

date:

to: \_\_\_\_\_, Local Taxpayer Advocate, Los Angeles  
Attn:

from: \_\_\_\_\_, General Attorney (Small Business/Self-Employed)

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subject: **Mode or Time of Collection**

This memorandum responds to your request for assistance dated \_\_\_\_\_. This memorandum should not be cited as precedent.

### DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

### QUESTIONS PRESENTED

Whether taxpayers,  
\_\_\_\_\_, are responsible for taxes and a civil penalty owed by their partnership, \_\_\_\_\_.

### SHORT ANSWER

It is Counsel's opinion that

are not responsible for taxes owed  
by their partnership, but are responsible for the civil penalty  
owed by their partnership, .

FACTS

(“taxpayers”) were general partners of a California general partnership, (“partnership”). The partnership was created in and dissolved in . After the partnership was dissolved, there were unpaid 940 and 941 taxes, plus various penalties, related to late or incorrectly filed information returns.

In , taxpayers entered into an installment agreement to pay all outstanding liabilities of the partnership. Taxpayers defaulted on the installment agreement in when they declared bankruptcy. Taxpayers entered into a second installment agreement in and subsequently defaulted on that in due to nonpayment. In total, taxpayers paid approximately \$ toward the tax liabilities. There is no evidence that taxpayers signed a collection statute extension agreement for either installment agreement.

In , taxpayers filed an Offer in Compromise (OIC) for doubt as to liability to satisfy all remaining partnership liabilities. The OIC was rejected in . Taxpayers appealed the rejection, but the OIC was again rejected in

Taxpayers now maintain that the collection statute expiration date (CSED) has passed for three of the four remaining unpaid liabilities. However, the CSED on IDRS was extended by days for the time the OIC was pending with the IRS.<sup>1</sup> The remaining partnership liabilities are:

Type of Tax	Period	Assessment Date	CSED per IDRS
941			
941			
940			
Civil Penalty			

<sup>1</sup> Although, as discussed herein, it appears the CSED for each of the partnership tax liabilities has expired, it should be noted that the CSEDs reflected per IDRS in this case would not be accurate even if it was determined that the CSEDs for the partnership tax liabilities were suspended while the partners’ OIC was pending.

Thus, the main question to be answered is whether an OIC filed by a general partner for his derivative liability for a partnership tax liability suspends the CSED regarding such liability. Additionally, if the CSED expires as to the partnership, does it also expire as to the general partner, even if the general partner filed an OIC?

#### DISCUSSION

The questions presented by the Local Taxpayer Advocate are: What are the correct CSEDs for the partnership liabilities? If the CSED has expired for the partnership, has it also expired as to the general partners? Can the IRS collect the civil penalty from the general partners?

In U.S. v. Galletti, 2004 WL 555273 (March 23, 2004), the Supreme Court asserted that "it is *the tax* that is assessed, not the taxpayer." [emphasis in original] Galletti, at 6. Further, the Supreme Court noted that, "once a tax has been properly assessed, nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer's debt. The consequences of the assessment - in this case the extension of the statute of limitations for collection of the debt - attach to the tax debt without reference to the special circumstances of the secondarily liable parties." Id.

Similarly, courts have held that suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers. See United States v. Wright, 57 F.3d 561, 564 (7<sup>th</sup> Cir. 1995). The Code establishes rules for suing taxpayers; it does not set up separate periods for persons secondarily liable. Its structure presumes that there is only one period per tax debt, no matter how many different persons may be liable on the debt. Id.

Although the Code creates a single employment tax liability for which a partnership acting as employer is liable, the Service can collect the unpaid liability from individual general partners based on state laws making general partners derivatively liable for partnership debts. See Remington v. U.S., 210 F.3d 281, 283 (5<sup>th</sup> Cir. 2000). California partnership law, consistent with the common law rule and the laws of most jurisdictions, states that general partners are jointly and severally liable for the debts and obligations of the partnership. See Cal. Corp. Code §16306.

However, while the partners among themselves are jointly and severally liable for the partnership's employment tax liability, the partnership's liability is not joint and several with that of the partners.

A derivative liability is an incident of the partnership liability, not the ordinary liability of one who obligates himself as an individual. Thus, the filing of a petition in bankruptcy by a partner acting individually will not affect the statute of limitations on assessment and collection of the partnership tax liability. Similarly, the filing of an OIC by an individual partner for partnership employment taxes will not affect the statute of limitations on collection of the partnership employment tax liability.

In the present case, the filing of the OIC by the general partners did not affect the CSED of the partnership tax liabilities since the liability of the general partners merely is incident to the liability of the partnership. Thus, the CSED has expired for the partnership taxes and the Service cannot collect the liability from either the partnership or the general partners (due to their derivative liability for the employment taxes). Pursuant to Galletti, with regard to the civil penalty, because the CSED has not yet expired, the civil penalty is able to be collected from the general partners since they are derivatively liable for the assessments against the partnership.

#### CONCLUSION

Based on the foregoing, it is Counsel's opinion that an OIC filed by general partners for their derivative liability for a partnership tax liability does not suspend the CSED as to the partnership tax liability. Additionally, when the CSED expired as to the partnership, it also expired as to the general partners, even though the general partners filed an OIC. Regarding the civil penalty for which the CSED has not expired in this case, the general partners are derivatively liable for the assessment.

At this time, we are closing our file in this matter. If you have any questions, please contact Attorney

JAMES A. NELSON  
Area Counsel  
(SB/SE:Area 8)

By: \_\_\_\_\_

General Attorney  
(Small Business/Self-Employed)