

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Taxpayer Advocate Stop 1006-OKC
Arkansas-Oklahoma District
Attn: , Taxpayer Advocate Specialist

from: District Counsel,
Arkansas-Oklahoma District

subject: Taxpayer:
EIN:

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to the attorney-client and deliberative process privileges and, if prepared in contemplation of litigation, is subject to the attorney work product privilege. Accordingly, the Taxpayer Advocate recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be disclosed to Taxpayer Advocate personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the Taxpayer Advocate and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination in this case is to be made through the exercise of the independent judgment of the Taxpayer Advocate.

ADVISORY OPINION

This responds to your request for a written opinion regarding the request by for the refund of the payment of in Form 941 employment taxes relating to for (hereafter the taxes).

ISSUES

1. Whether is entitled to the refund of \$ for the taxes that she paid on on behalf of
2. Whether has a cause of action against the United States under I.R.C. § 7433 for the reckless, intentional or negligent disregard of certain provisions of the Internal Revenue Code in collecting the taxes.

CONCLUSIONS

It is doubtful that has standing to bring a suit for refund of the taxes because the corporation paid the taxes. The check was written on the corporate account and was signed by who was president of the corporation. had no personal liability for the taxes when the payment was made. Furthermore, even if had personally paid the taxes, she cannot get a refund because she did not file a timely claim for refund of the taxes.

is also barred from filing a damage suit against the United States because the cause of action had accrued at least by when the taxes were paid. Section 7433(d)(3) requires that a damage suit under section 7433 must be brought within two years from the date the cause of action accrues.

FACTS

, the husband of , owned a corporation known as (hereafter the corporation). The corporation provides

In was diagnosed as having stomach cancer. He died in . alleges that she operated her own business and had nothing to do with her husband's business until just before he died. She states that when her husband became very ill, she and a bookkeeper were put on the bank signature card for the corporate account because her husband could no longer sign checks. She says that she signed checks when her husband asked her to do so, but claims that the office manager took care of the filing of federal tax returns and the payment of federal taxes.

states that in a revenue officer appeared at the corporate office and demanded payment of approximately \$ for the taxes. states that she was called at home and was asked to come to the office. After arriving, asserts that the revenue officer told her that she was responsible for the taxes since she had allowed the

business to stay open and that if the taxes were not paid in seven days, the revenue officer would seize all of _____ property.

In a letter dated _____, to the revenue officer, C.P.A. _____ wrote that _____ was shocked to learn that the corporation had not paid the taxes and that she was willing to cooperate and to pay whatever the corporation owes. The C.P.A. asked the revenue officer to eliminate several penalties for reasonable cause.¹

_____ admits that she has been the sole owner of the corporation and the president of the corporation since the tax period _____. The file contains a copy of a Form 940 return for the corporation for _____ that was signed by _____ as president on _____, and an 1120S corporate tax return for _____ that was signed by _____ as president on _____. In a letter to the Service dated _____, _____, as president of the corporation, advised the Service that the corporation in _____ contracted with a leasing company to provide the corporation with its employees and to take care of the payroll and payroll taxes.

On _____, the corporation paid the Service _____ as final payment of the taxes. _____ claims that she mortgaged her personal residence to make this payment. The payment was made by a check on the corporate bank account and was signed by _____. The corporation's current C.P.A. says that the payment of the taxes was not treated as a loan from _____ to the corporation.

_____ asserts that she was not responsible for the taxes and that she should not have been coerced into paying them. She claims that the revenue officer's threat to seize all of her property scared her into paying the taxes. She contends that the corporation is not making any money and that she may be forced into bankruptcy.

DISCUSSION

Issue 1

It appears that _____ does not have standing to claim a refund of the taxes. The United States has waived sovereign immunity to be sued for the recovery of a tax that has been erroneously or illegally assessed or collected. 28 U.S.C.

¹ The transcripts indicate that the failure-to-deposit and failure-to-pay penalties for _____ were later abated.

§ 1346(a)(1) (1993). Since waivers of sovereign immunity are strictly construed, the courts have generally limited refund actions to persons against whom a tax has been assessed, i.e. a taxpayer. United States v. Williams, 115 S. Ct. 1611, 1619 (1995). "Taxpayer" is defined in the Internal Revenue Code as a person "subject to any internal revenue tax." Section 7701(a)(14). In Williams the Court expanded this definition to include a person who was not liable for the tax, but who paid the tax because her property had been subjected to a federal tax lien for the tax. 115 S. Ct. at 1618.

It does not appear that _____ has standing to bring a refund suit. The taxes at issue were assessed against the corporation, not _____. The taxes were in fact paid by the corporation as _____ made the payment with a corporate check. There is no evidence in the file to show that she was paying the taxes under protest in her individual capacity. Since she was owner and president of the corporation, it is arguable that she paid the taxes because she wished to continue the business, which she has done for over three years since the payment of the taxes. The C.P.A. who was assisting _____ at the time apparently advised her to pay the taxes. That she may have mortgaged her own property to pay the taxes does not make the taxes her personal liabilities.

Finally, even if _____ has standing to bring a refund suit, she did not timely file a claim for refund of the taxes. A claim for refund must be made within three years of the filing of the return or within two years of the payment of the tax, whichever period expires later. Section 6511(a). The Form 941 returns for _____ were filed on _____, _____, respectively. The three-year period for filing claims for refunds of the taxes expired on _____, respectively. The two-year period for filing a claim for refund expired on _____, two years after the payment of the taxes on _____. _____ did not file a claim for refund of the taxes within the prescribed time limit. Thus, she has no right to a refund of the taxes. Sections 7422(a), 6511(a).

Issue 2

Section 7433(a) states that if in connection with the collection of a federal tax, any officer or employee recklessly, intentionally or negligently disregards any provision of the Internal Revenue Code, the taxpayer may bring a civil suit for damages against the United States in federal district court.

If the alleged threat to seize _____ personal property is true, the revenue officer appears to have disregarded certain provisions of the Internal Revenue Code.² The revenue officer did not have the power to seize all of _____ property because section 6334(a) exempts certain property from levy. The revenue officer did not have the right in _____ to seize any of _____ property to collect the taxes because the taxes had not been assessed against her. The Service may only seize property that is owned by the taxpayer or upon which there is a tax lien, i.e. the taxpayer owned the property when the tax lien attached, but has transferred the property to a third party. Section 6331(a). The tax lien arises upon the assessment of the tax against the taxpayer. Section 6321. Thus, the alleged threat to seize _____ property if the taxes were not paid disregarded sections 6334(a), 6321 and 6331(a). If the alleged threat were made recklessly, intentionally or negligently,

² If the allegation is true, the revenue officer may have committed a tort against _____. However, the United States cannot be sued for torts arising in respect of the assessment or collection of taxes. 28 U.S.C. § 2680(c) (1994). See Perkins v. United States, 55 F.3d 910, 916 (4th Cir. 1995) in which the Court held that there was not an implied waiver of sovereign immunity for especially egregious and willful violations of law by a revenue officer in collecting federal taxes. Furthermore, it appears that _____ cannot sue the revenue officer for damages for the alleged intimidating conduct of the revenue officer or for any alleged violations of the Internal Revenue Code by the revenue officer in collecting taxes because I.R.C. § 7433(a) is the exclusive remedy for the reckless, intentional or negligent disregard of the Internal Revenue Code and for any constitutional due process violations. Fishburn v. Brown, 125 F.3d 979, 982 (6th Cir. 1997); McMillen v. U.S. Dept. of Treasury, 960 F.2d 187, 190 (1st Cir. 1991); Parham v. Lamar, 1 F. Supp. 2d 1457, 1460 (M.D. Fla. 1998); Barron v. United States, 998 F. Supp. 117, 119-21 (D.N.H. 1998); Stephenson v. United States, 961 F. Supp. 221, 223 (W.D. Ark. 1996); Brown v. Johnson, 889 F. Supp. 355, 357 (W.D. Ark. 1995). See also Wages v. IRS, 915 F.2d 1230, 1235 (9th Cir. 1990), cert. denied, 111 S. Ct. 986 (1991); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1248 (10th Cir. 1989), in which the courts held that damage actions cannot be brought against IRS employees for their actions in collecting taxes because the taxpayers had the right to sue for refund and other statutory procedures to protect their rights.

would have the right to bring a damage suit against the United States under section 7433.³

However, it is too late for _____ to bring such a suit. Section 7433(d)(3) states that a suit must be brought within two years from the date the cause of action accrues. A cause of action accrues when a taxpayer has had a reasonable opportunity to discover all the elements of a possible cause of action. Treas. Reg. § 301.7433-1(g)(2). The alleged threat to seize all _____ property occurred in _____ and the taxes were paid on _____. A cause of action accrues under section 7433 when the taxpayer knows or should know the critical facts regarding the claim. Dziura v. United States, 168 F.3d 581, 583 (1st Cir. 1999). The critical facts should have been known by _____ at least by the time the taxes were paid on _____. Thus, a suit for damages against the United States under section 7433 in connection with the collection of the taxes must have been filed by _____. Section 7433(d)(3).

We are closing our case.

District Counsel

Attachment:
Taxpayer Advocate file

c: ARC(GL), MSR

³ Whether _____ has standing to bring such a suit is an issue because the taxes were not assessed against her. But see Southland Forming, Inc. v. United States, 98-1 U.S.T.C. ¶ 50,155 at 83,186 (S.D. Fla. 1998) in which the Court held that a corporation that the Service had determined to be an alter ego of the taxpayer had standing to bring a suit under section 7433.