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INTERNAL REVENUE SERVICE NATIONAL OFFICE
SIGNIFICANT SERVICE CENTER ADVICE

MEMORANDUM FOR: ASSOCIATE AREA COUNSEL
(Small Business/Self-Employed)
Area 1 - Boston
CC:SB:1:BOS

FROM: Assistant Chief Counsel (Administrative Provisions & Judicial Practice) CC:PA:APJP

SUBJECT: Assessment/Collection Procedures For Employment Taxes Owed by the Sole Owner of a Single Member Limited Liability Company

This Significant Service Center Advice responds to your memorandum dated March 7, 2001. In accordance with I.R.C. § 6110(k)(3), this Significant Service Center Advice should not be cited as precedent.

The following assessment and collection issues are raised in the context of a single member limited liability company that chooses to separately calculate, report, and pay employment tax obligations with respect to its employees under its own name and employer identification number (EIN) in accordance with option 2 of Notice 99-6, 1999-3 I.R.B. 12.

ISSUES

1. Should an employment tax assessment made in the name and EIN of a single member limited liability company be changed to reflect the name of the company's sole owner? Alternatively, should a new employment tax assessment be made against the company's sole owner, and if so, is the company's sole owner required to have an EIN?

2. What procedures should the Service use to avoid making an assessment of employment taxes in the name and EIN of a single member limited liability company when the single member limited liability company is a disregarded entity?

3. If an employment tax assessment made in the name and EIN of a limited liability company is changed to reflect the name of the company's sole owner or a new employment tax assessment is made against the company's sole owner, must the Service notify the single member limited liability company or its sole owner as to the change?

4. Is the issuance of notice and demand to a single member limited liability company tantamount to the issuance of notice and demand to the company's sole owner?

5. Should the Service release a notice of federal tax lien (NFTL) previously filed against a single member limited liability company for delinquent employment taxes?

CONCLUSIONS

1. Pursuant to section 6203 and the regulations thereunder, the summary record of assessment, through supporting documents, must provide identification of the taxpayer. Certain errors are permissible in making an assessment so long as the taxpayer is sufficiently identified and the errors do not mislead or prejudice the taxpayer. Thus, regardless whether an assessment of a single member limited liability company includes the name and/or taxpayer identifying number of the sole owner, such an assessment is tantamount to an assessment of the sole owner. We recommend that the sole owner's name be added to the assessment; however, adding the sole owner's name is not an acknowledgment that the assessment against the single member limited liability company is imperfect or incomplete in a material aspect within the meaning of section 6204. Similarly, we recommend that the EIN of the sole owner be added to the assessment. Although there is no requirement that an assessment contain an EIN, the sole owner must have its own EIN because it is the employer. Moreover, the EIN of the sole owner will be separate and distinct from the single member limited liability company's EIN.

2. We intend to issue guidance at a later date to address this issue.

3. If the assessment is changed to reflect the sole owner's name and EIN, the Service is under no obligation to notify the sole owner or the limited liability company of this change. Note, however, that if the sole owner requests a copy of the record of assessment, the Service is obligated to provide a copy.

4. Section 6303 requires that the Service give notice and demand to the person liable for the unpaid tax within 60 days after making an assessment. The employer in the single member limited liability company context is the sole owner and is

therefore the person liable for the unpaid tax. Thus, the Service must give notice and demand to the sole owner within 60 days after making an assessment. To the extent notice and demand is given to the limited liability company, the requirement of section 6303 is met, as such notice and demand is tantamount to giving notice and demand to the sole owner.

5. Section 6323 and the regulations thereunder require only that the NFTL identify the taxpayer. Although the particular facts in each case may be slightly different, the guiding principle to be applied is that the NFTL must adequately identify the taxpayer so that a reasonable and diligent title search would lead to discovery of the NFTL against the sole owner. Thus, where there is a sufficient link between the name of the limited liability company and its sole owner, a NFTL filed against the limited liability company will be valid against its sole owner. In contrast, where no such link exists, the Service must refile a NFTL against the sole owner to protect the government's interest.

Section 6325 provides that a federal tax lien can be released in limited circumstances, with the consequence that the underlying tax liability is extinguished. In cases where the NFTL filed against the limited liability company is not valid against the sole owner because the identification of the taxpayer requirement of Treas. Reg. § 301.6323(f)-1(d)(2) is not met, nonetheless, the NFTL should not be released. Note, however, that section 6323(j) allows the Service to withdraw a NFTL if it fails to comply with administrative procedures (e.g., NFTL fails to identify the taxpayer). Thus, the Service should withdraw the NFTL in those situations and then refile a NFTL against the sole owner, as the sole owner is ultimately liable for the unpaid employment tax liability.

FACTS

A single member limited liability company is an unincorporated entity of one or more persons having limited liability and is formed under state law. As a general rule, a limited liability company must register with the secretary of state in the state where it is doing business, indicating its member(s). For all federal tax purposes, a single member limited liability company's default tax classification is that of a disregarded entity and as a result, its activities are treated in the same manner as a sole proprietorship, branch, or division of its sole owner. See Treas. Reg. § 301.7701-2(a).

As a general rule, a single member limited liability company that is disregarded has no tax filing obligations, as all its activities are reported by the company's sole owner. As an exception to the general rule, Notice 99-6, 1999-3 I.R.B. 12, permits a single member limited liability company to separately calculate, report, and pay its

employment tax obligations with respect to its employees under its own name and EIN. The Notice makes clear that the owner of a single member limited liability company that is treated as a disregarded entity for federal tax purposes is the employer for purposes of employment tax liability. Consequently, "the owner retains ultimate responsibility for the employment tax obligations incurred with respect to employees of the disregarded entity." Id. Thus, as a disregarded entity, a single member limited liability company cannot be the employer for employment tax purposes regardless of the fact that it files employment tax returns.

The Service's current practice is to assess employment taxes in the name and EIN of the single member limited liability company, without regard to whether the limited liability company being assessed is a disregarded entity. Consequently, a limited liability company that is a disregarded entity is often assessed for the employment tax liabilities that are the ultimate responsibility of the company's sole owner. After making an assessment against a single member limited liability company for employment tax liabilities owed by the company's sole owner, the Service issues notice and demand. If the taxes are not paid within the time specified, the Service may file a NFTL against the single member limited liability company for the delinquent employment tax liabilities.

LAW AND ANALYSIS FOR ISSUES 1 and 2

Section 6201 of the Internal Revenue Code provides the authority for assessment. Until an assessment of tax has been made, the Service is not entitled to collect a tax administratively. The lien provisions of the Code depend on the making of a demand for payment, and there cannot be a demand for payment if there is no assessment. See I.R.C. §§ 6303(a) and 6321.

Generally speaking, an assessment is the formal recording of a taxpayer's tax liability. Section 6203 provides that "[t]he assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." The regulations on Procedure and Administration further provide as follows:

> [t]he assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide the identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. . . . The date of the assessment is the date the summary record is signed by an assessment officer.

Treas. Reg. § 301.6203-1 (emphasis added). Moreover, "[t]he 'assessment,' essentially a bookkeeping notation, is made when the Secretary or his delegate establishes an account against the taxpayer on the tax rolls." Laing v. United States, 423 U.S. 161, 170 n.13 (1976). Thus, to make a valid assessment, the Service must record the assessment on a signed summary record of assessment and create a supporting record which includes the four elements referred to in the regulation.

Although a single member limited liability company is allowed to separately calculate, report, and pay its employment tax obligations with respect to its employees under its own name and employer identification number, the owner of a single member limited liability company is the employer and the person subject to tax (i.e., the taxpayer). See I.R.C. §§ 3401; 7701(a)(1), (14). As a result, the Service should assess the liability for the entire amount of unpaid employment taxes incurred by a single member limited liability company against the company's sole owner. This would require that the Service record the liability of the sole owner in accordance with section 6203 and the regulations thereunder. In particular, the sole owner must be identified.

In regard to Issue 1, it is our position that an assessment in the name and EIN of the single member limited liability company is, in substance, an assessment of the company's sole owner. This is consistent with the notion that "notices containing technical defects are valid where the taxpayer has not been prejudiced or misled by the error and is afforded a meaningful opportunity to litigate his claims." Planned Investments, Inc. v. United States, 881 F.2d 340, 344 (6th Cir. 1989) (citing Marvel v. United States, 719 F.2d 1507 (10th Cir. 1983); Allan v. United States, 386 F.Supp. 499 (N.D. Tex. 1975), aff'd without published opinion, 514 F.2d 1070 (5th Cir. 1975)). Given a single member limited liability company's status as a disregarded entity for all federal tax purposes and the close relationship between a single member limited liability company and its sole owner, any reference in an assessment to a single member limited liability company as the taxpayer is tantamount to an identification of the company's sole owner as the taxpayer. In substance, a single member limited liability company is a trade name by which the company's sole owner conducts business, as in Marvel v. United States, supra.

Regardless whether an assessment of a single member limited liability company contains the name and/or taxpayer identification number of the sole owner, such an assessment is valid against the sole owner. We recommend that if the name of the company's sole owner is available, the name should be added to the assessment. Adding the sole owner's name to an assessment should not be viewed as a supplemental assessment under section 6204. Section 6204 is applicable only if the original assessment is imperfect or incomplete in a material aspect. The

addition of the sole owner's name to the assessment does not mean that the assessment against the single member limited liability company is imperfect or incomplete in a material respect. In addition, it is not necessary to add sole owner's social security number (SSN) or EIN to the assessment. See Moore v. United States, 93-2 U.S.T.C. (CCH) ¶ 50,495 (E.D. Cal. 1993) (Service not required to identify a taxpayer by SSN when making an assessment); United States v. Indianapolis Baptist Temple, 61 F. Supp.2d 836 (S.D. Ind. 1999) (EIN does not have to be used in making an assessment). Note, however, that a sole owner of a single member limited liability company with employees is required to have an EIN. See IRM 3.13.2.12.2.13(11).

With regard to Issue 2, we intend to issue guidance at a later date.

LAW AND ANALYSIS FOR ISSUES 3, 4, and 5

Within 60 days after the making of an assessment, section 6303 requires that the Secretary give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. In the employment tax context, the taxpayer is the employer. Section 3401(d) defines employer as "the person for whom an individual performs or performed any service, of whatever nature." Thus, in the case of a single member limited liability company, the person liable for the unpaid tax is the sole owner. Accordingly, after assessing the sole owner[1] of a single member limited liability company, the Service must give notice and demand to the sole owner. Given a single member limited liability company's status as a disregarded entity for all federal tax purposes and its close relationship to the sole owner, notice and demand given to the single member limited liability company is tantamount to giving notice and demand to the sole owner. This conclusion is consistent with the longstanding position of the Service in the partnership context, where numerous courts have held that notice and demand given to the partnership constitutes notice and demand to the general partners. Adams v. United States, 328 F. Supp. 228 (D. Neb. 1971); American Surety Co. v. Sundberg, 61-2 U.S.T.C. (CCH) ¶ 9574 (Wash. S.C. 1961); Farrow, Schildhause & Wilson v. Kings Professional Basketball Club, 88-1 U.S.T.C. (CCH) ¶ 9333 (E.D. Cal. 1988). See also Remington v. United States, 210 F.3d 281 (5th Cir. 2000) (holding that the Service can collect from a partner based on tax liens for the partnership's employment taxes).

[1] As discussed above under Issues 1 and 2, an assessment of a single member limited liability company is tantamount to an assessment of the sole owner.

In regard to Issue 3, we note that there is no legal requirement under section 6203 or the regulations thereunder to notify the taxpayer of an assessment or any change made to a prior assessment. Section 6303 requires notice and demand after making the assessment and serves to ensure that a taxpayer knows an assessment has been made for a particular tax. Thus, there is no requirement to notify the sole owner or the limited liability company that an assessment has been made in the sole owner's name and EIN. Moreover, the Service has previously provided guidance on the effect of allowing a single member limited liability company to calculate, report, and pay the employment taxes. In this regard, Notice 99-6 makes clear that even when a single member limited liability company chooses to separately calculate, report, and pay all employment tax obligations, "the owner retains ultimate responsibility for the employment tax obligations incurred with respect to employees of the disregarded entity." Thus, although we recommend that if the name of the sole owner is available, the name should be added to the assessment, the Service is under no obligation to send any type of notification to the limited liability company and the sole owner of this change. The notice and demand given to the limited liability company is sufficient notification of the fact that an assessment has been made. Of course, if the sole owner requests a copy of the record of assessment, it must be provided. See Treas. Reg. § 301.6203-1.

Failure to pay the tax after demand for payment creates a lien in favor of the United States, which arises at the time the assessment is made. I.R.C. §§ 6321 and 6322. The lien applies only to persons liable for the tax whose tax liability has been properly assessed. The lien created by section 6321 is referred to as the "assessment lien" because it arises after the assessment, and the notice and demand for payment of the assessment. The assessment lien shall not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until a NFTL that meets the requirements of section 6323(f) has been filed. I.R.C. § 6323(a). The government is protected against other creditors of the person liable for the tax by filing a NFTL in the proper state or local office pursuant to section 6323(f). If the NFTL is not properly filed, then third parties such as purchasers and holders of security interests may have priority over the government pursuant to section 6323(a).

Section 6323(f)(3) specifies that the form and content of the NFTL shall be prescribed by the Secretary. The regulations on Procedure and Administration further provide that the notice shall be filed on Form 668, entitled "Notice of Federal Tax Lien Under Internal Revenue Laws." Treas. Reg. § 301.6323(f)-1(d)(1). A NFTL "must identify the taxpayer, the tax liability giving the rise to the lien, and the date the assessment arose." Treas. Reg. § 301.6323(f)-1(d)(2).

Although the regulations under section 6323 include certain requirements for a valid NFTL, court cases interpreting section 6323 indicate that certain mistakes in the NFTL are permissible without the NFTL thereby being considered invalid. For example, the Court of Appeals for the Eighth Circuit has indicated that a NFTL filed against a husband and the business he operated with his wife was valid against the wife, even though the wife was not named in the NFTL. Tony Thornton Auction Service, Inc. v. United States, 791 F.2d 635 (8th Cir. 1986). In Tony Thornton, supra, Joe and Mary Davis operated a restaurant under the trade name "Davis Family Restaurant." After Joe and Mary Davis failed to pay substantial employment taxes, the Service made assessments and filed NFTLs against "Joe W. Davis and either 'Daviss Restaurant' or 'Davis's Restaurant'." 791 F.2d at 636. The NFTLs did not list Mary Davis as a taxpayer, nor did the NFTLs identify the business as a partnership. In an ensuing interpleader action, a judgment lien creditor argued that the NFTLs were not valid against Mary Davis because she was not listed on the NFTLs. The Eighth Circuit rejected the judgment lien creditor's argument and held that the Service had substantially complied with the identification requirement by listing her husband's name and the trade name of the business. In this regard, the Eight Circuit elaborated on the identification requirement as follows:

> [t]he essential purpose of the filing of the lien is to give constructive notice of its existence. The test is not absolute perfection in compliance with the statutory requirement for filing the tax lien, but whether there is substantial compliance sufficient to give constructive notice and to alert one of the government's claim.

Tony Thornton, 791 F.2d at 639 (citing United States v. Sirico, 247 F.Supp. 421, 422 (S.D.N.Y. 1965)). Thus, the Eight Circuit concluded that a reasonable and diligent title searcher would have revealed the existence of the NFTLs filed under the names "Joe W. Davis" and either "Daviss Restaurant" or "Davis's Restaurant" and would have determined that Mary Davis was a partner in the Davis Family Restaurant. We note that under state law, Mary Davis was jointly and severally liable for the unpaid employment taxes of the Davis Family Restaurant, a partnership in which she was a partner.

As additional support for concluding that certain mistakes in a NFTL are permissible, we note that although a NFTL contains the nickname of the taxpayer, the NFTL may nonetheless be valid. Hannus v. United States, 60-2 U.S.T.C. (CCH) ¶ 9574 (W.D. Wash. 1958). The withholding taxes at issue in Hannus were assessed and the NFTL was filed against "Andy Johnston Construction Company – Andy Johnston, Owner." The NFTL was recorded under both the name "Andy Johnston Construction Company" and "Andy Johnston." The court noted that at the time the tax liability was incurred, assessed, and NFTL filed, Andrew Johnston was

known in the community as Andy Johnston and did business as the Andy Johnston Construction Company, a sole proprietorship. Moreover, Andrew Johnston filed federal tax returns under the name of Andy Johnston and the Andy Johnston Construction Company. The court concluded that the NFTL was sufficient to charge a prospective purchaser of the property with notice of the existence of a lien on the property, as the name Andy Johnston was the working and occupational name under which Andrew Johnston conducted business and a person of ordinary intelligence would recognize that "Andy" is derived from the name "Andrew." Id.

The guiding legal principle to be taken from cases such as Hannus and Tony Thornton is that the name on the NFTL must be sufficient to put a third party on notice of a lien outstanding against the taxpayer. See also IRM 5.17.2.3.5(6). Such a determination will depend on the facts and circumstances in each particular case. While a third party may not be certain that a limited liability company is a disregarded entity, the substantial compliance test does not require that the taxpayer be precisely identified. Instead, the substantial compliance test is met when the third party examining the public record is alerted to the possibility of the federal tax lien, and the third party must take additional steps to determine whether the federal tax lien encumbers the assets in question. See Tony Thornton, 791 F.2d at 639. See also Whiting-Turner/A.L. Johnson v. P.D.H. Development, Inc., 2000-1 U.S.T.C. (CCH) ¶ 50,342 (M.D. Ga. 2000) (holding that, where the Service filed a NFTL under a name substantially identical to the taxpayer's name, a reasonable title searcher must take additional steps to discover the identity of the taxpayer). Moreover, the Service has indicated that some errors, such as a wrong taxpayer identification number or tax period, will not invalidate the NFTL, while the use of an incorrect name may make the NFTL invalid. IRM 5.12.1.29.2(1); IRM 5.12.1.29.3.

For example, assume that a NFTL is filed in the name of J. Doe LLC, where the name of the limited liability company is similar to that of the sole owner. In that situation, the NFTL is valid against John Doe. The NFTL identifies the business as a limited liability company and provides a link to the taxpayer's name. It is reasonable to assume that J. Doe could be an individual having some link to the limited liability company. Thus, a third party could search the limited liability company records of the secretary of state to determine the identity of the sole owner. Also, state records might identify the business address of the limited liability company, and a reasonable and diligent title search would reveal the existence of the NFTL against John Doe filed under the name J. Doe LLC.

In contrast, however, if the name of the limited liability company is "Eagle LLC" and the name of the sole owner is John Jones, we would conclude that the NFTL listing "Eagle LLC" as the taxpayer fails to substantially comply with the notice

requirements of section 6323(f). A diligent title searcher would have no reason to believe a link existed between "Eagle LLC" and John Jones, and would not investigate any further. Thus, the NFTL filed against Eagle LLC would be invalid against John Jones. Once it is determined that the NFTL contains an error, the Service should refile the NFTL with the correct name of the taxpayer if the period of limitations is still open. Consequently, Service would then need to refile a NFTL against John Jones to protect the government's priority interest, as "[t]he sine qua non of § 6323 is notice to subsequent takers of the existence of the IRS lien." Davis v. United States, 705 F. Supp. 446, 453 (C.D. Ill. 1989). It is important to note that the Service generally cannot levy on the limited liability company's assets, as the sole owner is the person liable for the unpaid employment tax liabilities (i.e., the taxpayer).

A release of lien is only warranted in the following circumstances: (1) the liability for the amount assessed (with interest) has been fully satisfied or has become legally unenforceable; or (2) a bond is furnished to the Service guaranteeing payment of the amount assessed (with interest) within the period of limitations on collection. I.R.C. § 6325(a)(1), (2). We note that the release of a federal tax lien extinguishes the underlying assessment lien. I.R.C. § 6325(f)(1)(A). In situations where the Service refiles the NFTL against the sole owner, the NFTL filed against the single member limited liability company should not be released, as the Service does not seek to extinguish the underlying assessment lien.

In contrast, the Service may withdraw a NFTL without extinguishing the underlying assessment lien. Withdrawal of a NFTL is warranted if the Service determines that one of the following conditions is met: (1) the filing of the NFTL was premature or otherwise not in accordance with administrative procedures; (2) the taxpayer has entered into an installment agreement under I.R.C. § 6159, unless the agreement provides otherwise; (3) withdrawal of the NFTL will facilitate collection of the liability; or (4) withdrawal of the NFTL is in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States. I.R.C. § 6323(j)(1)(A)-(D); IRM 5.17.2.3.6(2)(a)-(d). In order to withdraw the NFTL, the Service must provide a copy of the withdrawal to the taxpayer. I.R.C. § 6323(j)(1). Thus, if the NFTL lists "Eagle LLC" as the taxpayer and the name of the sole owner is John Jones, the Service should withdraw the NFTL, as it fails to comply with the Service's administrative procedures. Consequently, the Service should refile the NFTL, reflecting John Jones as the taxpayer.

We note that some courts have rejected the substantial compliance test and instead require that the NFTL must give the taxpayer's correct name in order to meet the identification requirement. See, e.g., In re Focht, 99-1 U.S.T.C. ¶ 50,277 (W.D. Pa. 1999); Davis v. United States, 705 F. Supp. 446 (C.D. Ill. 1989); United States v.

Glen Upton, Inc., 378 F.Supp. 1028 (W.D. Mo. 1974). Courts following this approach would find that a NFTL filed against J. Doe LLC is invalid as to sole owner John Doe for failing to identify John Doe as the taxpayer.

Even if a court follows the substantial compliance test and finds that a NFTL filed against the limited liability company is valid against the sole owner, there is no guarantee that under the facts and circumstances of a particular case the court would conclude that a valid NFTL has been filed as to all of the sole owner's property. For example, in Hudgins, v. Internal Revenue Service, 132 B.R. 115 (E.D. Va. 1991), aff'd as modified and remanded, 967 F.2d 973 (4th Cir. 1992), Michael Hudgins incorporated his business as "Hudgins Masonry, Inc.," and filed corporate tax returns under that name. In 1984, however, the Commonwealth of Virginia terminated the corporate charter for failure to pay state fees. Notwithstanding the termination, Michael Hudgins still filed corporate tax returns as "Hudgins Masonry, Inc." In 1989, the Service filed a NFTL against "Hudgins Masonry, Inc." for delinquent employment taxes. In subsequent litigation, the question was whether the Service's NFTL was valid against Michael Hudgins in his individual capacity. In holding that the NFTL was valid as to the business assets of Michael Hudgins, the Court of Appeals for the Fourth Circuit acknowledged that "[a] purchaser of [Michael] Hudgins' business assets would certainly have known that Hudgins traded as 'Hudgins Masonry, Inc.,' and, finding a lien against 'Hudgins Masonry, Inc,' would have taken further steps to determine if the assets were encumbered." Hudgins, 967 F.2d at 977. The court, however, then proceeded to hold that the NFTL was invalid as to Michael Hudgins' non-business assets. Id. The court reasoned that a diligent title searcher would have concluded that a NFTL filed against a defunct corporation did not provide constructive notice as to Michael Hudgins' non-business assets. While we do not agree with the Fourth Circuit's approach in Hudgins of bifurcating assets into business and non-business property, it is binding precedent in the Fourth Circuit and other courts may choose to follow it.

If you have questions, please contact Susan L. Hartford at (202) 622-4940.

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