Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **200838027**
Release Date: 9/19/2008

:
POSTN-124416-08

UILC: 6672.00-00

date: August 19, 2008

to: Tax Policy Analyst for Payment Compliance
(SB/SE Campus Compliance Services)

from: Chief, Branch 4
(Procedure & Administration)

---

subject: Designation of Payments for TFRP

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

Whether in a trust fund recovery penalty (TFRP) case it is a legal requirement that the Service credit a "related responsible person" with a corporation's posted designated payment of TFRP interest if the non-trust fund portion of the employment taxes has not been satisfied.

CONCLUSIONS

Although few courts have determined whether it is a "legal" requirement that the Service give credit to related responsible persons when a designated payment is made to the underlying trust fund liability or interest, because it has long been the Service's policy to collect the liability, including interest, just once, we believe for the following reasons that courts would not be inclined to allow the Service to collect the TFRP, including interest, more than once, i.e., the Service would have to give credit to related responsible persons for trust fund payments made by the employer.

FACTS

A corporation fails to pay its employment taxes for a certain period. Two persons are determined to be responsible persons with respect to the trust fund portion of the corporation's unpaid employment taxes. The corporation pays off the principal of the trust fund portion of the underlying employment taxes (accrued interest still is outstanding). The corporation then makes a voluntary payment on its employment tax liability, instructing the Service to apply the payment to the interest due on the trust fund portion of the liability. The corporation has not paid the non-trust fund portion of its employment tax liability.

LAW AND ANALYSIS

Section 6672 of the Internal Revenue Code imposes personal liability on any person required to collect, truthfully account for, and pay over withheld income and social security taxes who willfully fails to do so. The amount of the liability is equal to the amount of the tax not collected and paid over, and though described as an assessable Apenalty,@ courts treat the trust fund recovery penalty as a Atax.@ United States v. Sotelo, 436 U.S. 268, 275 (1978) (TFRP not treated as a Apenalty@ for purposes of the Bankruptcy Act).

Each "responsible person" is severally liable for the entire unpaid trust fund tax liability, including interest and penalties; however, according to Service policy, the Service collects the liability only once, whether from one or more of the business's responsible persons, or from the business and one or more or its responsible persons. Policy Statement 5-14, IRM 1.2.14.1.3. "The full unpaid trust fund amount will be paid only once in a particular case. . . ." IRM 5.7.3.1(8). "If, after the assertion of the TFRP, the corporation pays the delinquent tax, the TFRP assessment will be abated. IRM §§ 5.17.7.1.9(2), citing Policy Statement 5.14.

In Sotelo, the Supreme Court recognized the government's policy of collecting a trust fund liability only once. Sotelo, n. 12, at 280. In recognizing the policy, the Court cited and quoted a U.S. Comptroller General Opinion, which, while noting that the Service asserts the TFRP only when all other means of securing the payment of the liability have been exhausted, states that the amount of the liability "will be collected only once. After the tax liability is satisfied, no collection action is taken on the remaining 100-percent (TFRP) penalties. They are eventually abated." Opinion B-137762 (May 3, 1977), reprinted in 9 CCH 1977 Stand. Fed. Tax Rep. ¶ 6614, p. 71,438.

The nature of the penalty imposed, which is an assessment equal to the amount of the liability not paid, shows "that section 6672 is simply a means for ensuring that the tax is paid. . . ." Botta v. Scanlon, 314 F.2d 392, 393 (2d Cir. 1963). And, although nothing in the language of section 6672 explicitly prevents the government from collecting and retaining from each responsible person full satisfaction of the liability, including interest and penalties, the Fifth Circuit has construed the statute to authorize the government to collect "only the same amount to which it was entitled by way of tax. Double recovery by the government is not necessary to fulfill section 6672's primary purpose-protection of government revenues." USLIFE v. Harbison, 784 F.2d 1238, 1243 (5th Cir. 1986), citing *Newsome v. United States,* 431 F.2d 742, 745 (5th Cir.1970) and Brown v. United States, 591 F.2d 1136, 1140 (5th Cir.1979).

Although many courts have referred to the Service's long time policy of collecting the trust fund taxes only once, including interest and penalties, few have had the occasion to determine whether the Service is "legally bound" to collect only once. Because of the Service's policy, the issue generally is not raised. However, the Fifth Circuit's determination in USLIFE as well as courts' general recognition that the purpose of the TFRP is simply to ensure that the withheld employment taxes are paid indicates that courts likely would hold that the Service is precluded from collecting more than the total amount of the liability. In addition, given the purpose of the TFRP, to make the government whole, there is no valid reason to treat interest payments differently than the payment of the underlying liability.

In your scenario, the corporate taxpayer makes a voluntary payment to the Service, designating that the payment be applied to interest owed on the trust fund liability although money still is owed on the corporation's non-trust fund liability. Because the payment is voluntary, the corporation has the right to designate its application. And according to Service policy, having been applied to the corporate trust fund liability interest, the payments must be credited to the responsible persons. (Interest on the trust fund recovery penalty begins accruing at the time the penalty is assessed against the responsible person; so the interest due from the responsible person and the corporate taxpayer liable for the underlying employment taxes may not be the same. IRM 5.7.4.2.1(9)) We believe that it is unlikely that a court would hold otherwise considering the case law and the Service's policy of crediting corporate trust fund payments to the responsible persons.

Please call (202) 622-3630 if you have any further questions.