ID: CCA-102393-08

Number: **200851102**

Office:

Release Date: 12/19/2008

UILC: 6203.00-00; 6020.00-00; 6323.00-00; 6331.00-00; 6330.00-00

From:
Sent: Thursday, October 23, 2008 9:38 AM
To:
Cc:
Subject: Response to LLC Questions

Below is our response to the LLC questions. My reviewer concurs in the response. Thank you.

In the scenario we want to address, an LLC was established in a community property state. Forms 941 were filed using the name and EIN of the LLC. While some FTDs have been made, there are outstanding balances for some periods. The LLC appears to be a pyramiding in-business taxpayer. H and W taxpayers filed an extension for their individual income tax returns, but they have not filed any income tax returns indicating how they wish to treat the LLC for federal tax purposes since the LLC began operations.

The LLC was established under the laws of a community property state. The annual reports filed with the state indicate that the members of the LLC are H and W, and they are listed as "governing people" on their business license.

ROs have tried without success to contact H and W at the address on the module for the LLC, which is the personal residence of H and W. In the absence of any response, there is no way to determine whether H and W plan to treat the LLC as a partnership or a disregarded entity.

Under Rev. Proc. 2002-69, if the LLC and H and W, as community property owners, treat the entity as a partnership and file a partnership return, the Service will accept the position that the entity is a partnership for federal tax purposes. If the LLC and H and W, as community property owners, treat the entity as disregarded, the Service will accept that treatment for federal tax purposes. There are outstanding employment taxes, yet the taxpayers are neither treating the entity as a disregarded entity nor a partnership.

Questions:

1. The LLC is owned by husband and wife as community property. Rev. Proc 2002-69 does not contain a default for treatment of the entity if no income tax return has been filed. If the entity has not filed an income tax return, how should the Service treat this entity for the purposes of collection of employment taxes? Since they did not "treat the entity as a partnership for federal tax purposes and file the appropriate partnership returns" should we treat them as a disregarded entity?

The election under Rev. Proc. 2002-69 is optional. If no election is made, then the classification of the LLC defaults to the "check the box" regulations, Treas. Reg. § 301.7701-3. Under these regulations, if there are two owners of the business, it is automatically by default a partnership. If there is one owner of the business, it is automatically by default a disregarded entity.

The election and default rules under Rev. Proc. 2002-69 supersede the governing documents. Therefore, while both husband and wife appear as responsible individuals on the governing documents, which would imply a partnership, they can elect to have their business considered a disregarded entity. Since no returns have been filed and the husband and wife have not made an election under Rev. Proc. 2002-69, the business would be considered a partnership because both husband and wife own the business.

2. If an LLC reports employment taxes on wages paid prior to 1/1/2009 in the name and EIN of the LLC and the LLC is disregarded, is the assessment in the name of the LLC a valid assessment against the husband *and* wife?

Yes, the assessment in the name and EIN of the disregarded LLC is, in substance, an assessment of the owner's liability. Counsel has opined in prior advice that when an LLC is wholly owned by husband and wife as community property (with both spouses being members of the LLC) and treats itself as a disregarded entity, the community (i.e., both the husband *and* the wife) is liable for employment taxes. [See the last bullet in IRM 5.1.21.3.7.1(1)] Therefore, an assessment in the name of the disregarded LLC is a valid assessment against both husband and wife if both are members of the disregarded LLC. Preferably, both names of the husband and wife should be added to the assessment.

If so, can the credit reports of both spouses be requested without a summons (similar to provisions which allow credit reports for both spouses to be requested for joint income tax liabilities or the credit reports of multiple partners to be requested for partnership liabilities for which all partners are directly liable)?

No, the Service may only pull the credit report of the spouse that carries on the business. Since the Form 941 is filed under the EIN (and not SSN), the only person whose credit report could be pulled due to the narrow language in the FCRA would be the person who carries the business – not the spouse. Section 1681b(a)(3)(A) of the FCRA states that a credit report may be pulled in connection with the "review or collection of an account of, the consumer[.]" The account of the consumer with a disregarded LLC is the disregarded LLC. Although the "community" is the owner of the disregarded LLC, the spouses should not be equal partners (if they were, they should be filing a partnership return, but as stated in Rev. Proc. 2002-69, the Service will not question the election). Decide which spouse carries on the business, and it is that spouse's credit report that may be pulled.

3. In this scenario in a community property state, only one spouse is a member of the LLC. The other spouse has only a community property interest in the LLC. Employment taxes on wages paid prior to 1/1/09 were assessed in the name and EIN of the LLC (under Notice 99-6). Would

it be permissible to request the credit bureau report for only the liable spouse without a summons?

Yes, the Service may pull the credit report for the liable spouse without a summons.

Could the credit report for the non-liable spouse be requested with a summons, if necessary?

Yes, legally the credit report for the non-liable spouse may be requested with a summons.

4. If the LLC has a liability which exceeds the amount of federal tax deposits that have been made, according to IRM 5.1.21.6.5, when the LLC is the taxpayer, the IRC 6020(b) assessment would be proposed against the LLC. When the owner is the taxpayer, the IRC 6020(b) action would be proposed against the LLC. Against which entity would the IRC 6020(b) assessment be properly proposed?

For employment tax periods prior to January 1, 2009: If H and W have not elected to have their LLC be treated as a disregarded entity, it is a partnership. Because the LLC is considered a partnership, the 6020(b) assessment should be proposed against the LLC.

If H and W had elected to have the LLC treated as disregarded, then the real taxpayer for a disregarded LLC is the member (in this case, the community). The assessment for a disregarded LLC can be assessed against H and W.

5. Prior Counsel advice has indicated that if the CDP notice contains both the name of the LLC and the name of the owner, it is valid as long as it was mailed to the last known address of the taxpayer. Since the LLC and H and W share the same address, it would appear the L-1058 would be valid, regardless of which entity is the liable taxpayer. In the event that the taxpayer fails to respond to the Letter 1058, IRM 5.1.21.6.6 and IRM 5.1.21.6.7 state that the taxpayer must be properly identified on the NFTL or levy. Should the Notice of Federal Tax Lien be filed in the name of the LLC or the names of the husband and wife?

We are waiting to consult with another attorney about this question and will answer this in a separate e-mail.

6. Presumably, if the LLC is determined to be the liable taxpayer, the levy would include the EIN of the LLC, and be valid against LLC assets. If H and W are determined to be the liable taxpayers, the levy would include the EIN assigned to them, as well as their SSN(s). Should any Notices of Levy contain the EIN of the LLC or the EIN/SSN(s) of the husband and wife?

There is no legal requirement that an EIN or an SSN must be on the Notice of Levy. Whether the EIN or SSN should be used is a business decision of the Service.

7. Further questions are generated by the fact that there are no restrictions to prevent an LLC and the H and W who own it as community property from filing amended returns and retroactively changing the way they treat the entity for federal tax purposes (other than the requirement that any change in reporting position will be treated for federal tax purposes as a conversion of the entity). If they had treated the entity as a partnership, and the Service took enforced collection action against the LLC, would they be entitled to a claim for refund if they subsequently filed returns treating the entity as a disregarded entity?

In the time between when the Service assesses and when the Service levies, this should be resolved. There are numerous opportunities before the Service enforces collection action when the taxpayers could assert their desire to be considered a disregarded entity. Therefore, this should not become an issue. If it does become an issue, contact local counsel.