Office of Chief Counsel
Internal Revenue Service
Memorandum

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subject: Considerations of the Assets of a Domestic Partner in the State of California Under I.R.C. Section 7122

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

ISSUE

Can the Internal Revenue Service consider the assets of a taxpayer's registered domestic partner in the State of California when determining the reasonable collection potential of a taxpayer's Offer In Compromise ("OIC") under I.R.C. section 7122?

CONCLUSIONS

Yes. The IRS can consider the assets of a taxpayer's registered domestic partner in the State of California when determining the reasonable collection potential of a taxpayer's OIC under IRC section 7122.

FACTS

California is a community property state. The taxpayer, a registered domestic partner in the State of California pursuant to California Family Code section 297-297.5, has submitted an OIC to the IRS pursuant to Code section 7122. The taxpayer's registered domestic partner possesses assets or income that would significantly increase the reasonable collection potential of the OIC, and the IRS revenue officer would like to include such assets/income in the computation of the reasonable collection potential.

LAW AND ANALYSIS

IRC section 7122 authorizes the Secretary to compromise a taxpayer's federal income tax liability. An OIC is an agreement between a taxpayer and the IRS that settles the taxpayer's tax liabilities for less than the full amount owed. The IRS is vested with discretion to accept or reject an OIC. *Keller v. Commissioner,* 568 F.3d 710, 718 (9th Cir. 2009) (IRS did not abuse its discretion in rejecting OIC). Absent special circumstances, the IRS will reject an OIC if it believes that the liability can be paid in full as a lump sum or through a payment agreement. In addition, in most cases the IRS will not accept an OIC unless the amount offered by the taxpayer is equal to or greater than the reasonable collection potential. The reasonable collection potential is how the IRS measures the taxpayer's ability to pay and includes the value that can be realized from the taxpayer's assets, such as real property, automobiles, bank accounts, and other property. The reasonable collection potential also includes anticipated future income, less certain amounts allowed for basic living expenses.

The IRS has recognized that in community property states, the assets of both owners of community property (the owner submitting the offer and the non-offering owner) should be considered in the offer. I.R.M. 25.18.4.10 provides that if under applicable state law, all or part of the non-offering owner's share of community property and community property income would be available to satisfy the tax liability at issue, these items should be considered in the offer in compromise. Thus, we must look to applicable California State law to determine the property rights of the domestic partners.

California registered domestic partners share an equal interest and liability in community property in the State of California. Chapter 297 of the California Family Code pertaining to domestic partnerships provides, in relevant part:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

C.A. Fam. § 297.5(a). Accordingly, registered domestic partners in California are afforded all the rights provided under C.A. Fam. § 760, which states that:

> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

C.A. Fam. § 910(a) further provides:

> (a) Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.

Based on the California state law provisions noted above, we conclude that the IRS can consider the assets of the taxpayer's registered domestic partner in the State of California when determining whether to accept the taxpayer's OIC under section 7122. State law determines whether there is a property interest, *see United States v. Craft*, 535 U.S. 274, 278 (2002) ("[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach…"), and California state law provides that both domestic partners have an equal interest and liability in the community property.

Please call Glenn Melcher or Jason Bremer at (202) 622-3620 if you have any further questions.