

Office of Chief Counsel
Internal Revenue Service
Memorandum

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UILC: 6672.03-00, 6302.00-00, 6656.00-00

date: September 07, 2005

to: ROBERT D. HEITMEYER
Associate Area Counsel, CC:SB:4:DET

from: Peter J. Devlin, Chief, Branch 3
Collection, Bankruptcy & Summonses CC:PA:CBS:Br3

subject:

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

LEGEND

The Bank
Taxpayer
LLC #1
LLC #2

ISSUES

1. Whether the Bank is liable for the amount of federal tax deposits or the failure to deposit penalty when one of its employees stamped certain federal tax deposit coupons "Paid" but did not process the checks.
2. Whether the Bank is liable for the amount of trust fund taxes included in the checks which it failed to process.

CONCLUSIONS

1. The Bank is not liable for the amount of federal tax deposits or the failure to deposit penalty because it is not the employer.

2. [REDACTED]

FACTS

The pertinent facts are summarized as follows: the Taxpayer is the single member of two disregarded limited liability companies, LLC # 1 and LLC # 2. Taxpayer reports federal employment tax liabilities under the EIN of LLC # 1. These employment tax liabilities were not deposited. Taxpayer convinced an employee of the Bank to date stamp the federal tax deposit receipts, but hold the checks. Taxpayer presented these receipts to the revenue officer to convince the officer that he was in compliance.

LAW AND ANALYSIS

Issue 1.

Section 6302 and the regulations thereunder provide the rules that define the time and manner for depositing taxes required to be collected. Chapters 21 and 24 of the Code require employers to withhold income taxes and taxes under the Federal Insurance Contributions Act (FICA) from their employees' wages and to pay their share of FICA taxes. The regulations under section 6302 with respect to these employment taxes provide that *employers* must deposit these taxes. Treas. Reg. § 31.6302-1(a), (c). Therefore, as the Bank is not the employer with respect to the taxes at issue, the Bank cannot be liable for the amount of federal tax deposits due.

Section 6656 provides that if any person is required by the Code or regulations to deposit any tax in a government depository that is authorized under I.R.C. § 6302(c) to receive the deposit, and fails to deposit the tax within the time prescribed therefore, a penalty shall be imposed on such person unless the failure is shown to be due to reasonable cause and not due to willful neglect. I.R.C. § 6656(a). Your incoming memorandum to this office focuses on the wording "failure by any person to deposit" in the first sentence of section 6656(a) and the definition of "person" provided in the Code. Your memorandum, however, does not address the language in the parenthetical immediately following that phrase, which reads "(as required by this title or by regulations of the Secretary under this title)." As discussed above, employers are the ones required to make deposits of the withheld income tax and taxes under FICA. Treas. Reg. § 31.6302-1(a), (c). Thus, with respect to the taxes at issue, a person has to be an employer to be liable for the failure to deposit penalty under section 6656. Consequently, the Bank cannot be liable for any penalty under section 6656 for failure to deposit the taxes at issue.

Issue 2

In pertinent part, I.R.C. § 6672 provides that any person who is required to collect, truthfully account for, and pay over any tax imposed by this title and who willfully fails to collect or account for and pay over such tax shall be liable for a penalty equal to the

total amount not collected or accounted for and paid over. [REDACTED]

[REDACTED]

During our work on this matter, we consulted with the Office of the General Counsel for the Financial Management Services (FMS) agency, a separate organization within the Department of the Treasury. From that office, we learned that a [REDACTED] cause of action for the Government may arise under contract law and the banking regulations promulgated under Title 31. FMS enters into agency agreements with depository banks, such as the Bank. These banks are obligated by those agreements and by 31 C.F.R. Part 203, Subpart C, to remit withheld taxes on the day after the bank receives them. The Bank has breached its duty as the Government's agent. For this reason, we are forwarding this case (your incoming memorandum and this memorandum) to the General Legal Services Division (GLS), Public Contracts and Technology Law Branch, and we will ask GLS to evaluate the Government's cause of action and potential remedies under the applicable banking laws and governing agency agreements.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

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