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October 22, 1998

MEMORANDUM FOR DISTRICT COUNSEL,

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

This Field Service Advice responds to your memorandum dated September 22, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

X =
Y =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Date 1, Year 9 =
Year 10 =
Date 2, Year 18 =
$a =
$b =
$c =

ISSUE:

Whether interest on a personal representative's liability accrues until the date of the Notice of Fiduciary Liability is issued or the time the liability is paid.

CONCLUSION:

Interest accrues on a personal representative's liability until the date the liability is paid.

FACTS:

Y ("decedent") died intestate on Date 1, Year 9. At the time of his death, the decedent was a resident of Philadelphia County, Pennsylvania. At the time of Y's death, the decedent had outstanding federal income tax liabilities totaling $c (excluding accrued interest) for the Years 1 through 6. In Year 10, X, the personal representative for the estate of Y, made a number of distributions to creditors other than the Service in violation of 31 U.S.C. § 3713(b). The notice of fiduciary liability indicates that X is liable pursuant to 31 U.S.C. § 3713(b) in the amount of $a, plus interest as provided by law. However, the distributions that the respondent contends that the petitioner is liable for pursuant to 31 U.S.C. § 3713(b) total $b, which is less than $a. Thus, the respondent contends that X is liable for $b, plus interest as provided by law. After administering Y's estate, X died on Date 2, Year 18.

LAW AND ANALYSIS

Section 2002 of the Internal Revenue Code provides that estate taxes shall be paid by the executor. I.R.C. § 2002. Section 3713 of Title 31 allows the Service to assess executors for unpaid taxes relating to an estate. 31 U.S.C. § 3713. This section provides that the claims of the United States are to be paid first "when . . . the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." 31 U.S.C. § 3713(a)(1)(B). A representative of an estate paying any part of a debt of the estate before paying a claim of the Government "is liable to the extent of the payment for unpaid claims of the Government." 31 U.S.C. § 3713(b). This fiduciary liability is subject to the assessment and collection procedures of I.R.C. § 6901.

Section 6901(a) of the Internal Revenue Code provides that liability of a fiduciary under 31 U.S.C. § 3713(b) is to be treated in the same manner as the taxes with respect to which the liability was incurred.[1] To that end, I.R.C. § 6601 imposes interest on any tax assessed under the Internal Revenue Code until the tax is paid. I.R.C. § 6601(a). Interest on taxes is treated as tax. It is to be assessed, collected and paid in the same manner as taxes. I.R.C. § 6601(e)(1).

Since a 31 U.S.C. § 3713(b) liability is to be treated like all other tax liabilities, the fiduciary is liable for statutory interest on the unpaid liability until paid.[2] In Singleton v. Commissioner, T.C. Memo. 1996-249, 71 T.C.M. (CCH) 3127 (1996), the court held that the fiduciary was liable for unpaid estate taxes with interest accrued thereon only until the date the Service mailed the notice of liability to the fiduciary. In arguing the contrary, the Service relied on Baptiste v. Commissioner, 100 T.C. 252 (1993), aff'd, 29 F.3d 1533 (11th Cir. 1994), aff'd in part and rev'd in part, 29 F.3d 433 (8th Cir. 1994). Baptiste involved two transferees who were found liable under I.R.C. § 6324(a)(2) for unpaid estate tax up to the value of the property transferred.

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[1] Section 6901(a) provides:

> (a) Method of Collection.-The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) Income, Estate, and Gift Taxes. -
>
> . . .
>
> (B) Fiduciaries. - The liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

I.R.C. § 6212 in conjunction with I.R.C. § 6901 is authority for issuing the notice of fiduciary liability.

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[2] See also Bank of the West v. Commissioner, 93 T.C. 462 (1989). In Bank of the West, the court stated that liabilities under 31 U.S.C. § 3713(b) include additions to tax as well as the taxes themselves. Bank of the West, 93 T.C. at 471. The court noted that no issue was raised as to statutory interest. Id. 93 T.C. at 463. Consequently, the court assessed all interest associated with the unpaid tax and penalties against the petitioner.

The Tax Court held that the transferees' liability for interest accrued on the unpaid estate tax was not limited to the value of the property transferred from the estate to the transferee. The court stated that I.R.C. § 6324(a)(2) imposes a direct personal and primary obligation on a transferee. Thus, the limitation imposed by I.R.C. § 6324(a)(2) on a transferee's liability for amounts owed by a transferor, does not limit the amount of interest that accrues on a transferee's personal liability. The Eleventh Circuit affirmed as to one transferee. The Eighth Circuit disagreed and held that interest accrued is limited to the value of the property transferred as to the other transferee.

In declining to extend Baptiste to Singleton, the court stated that the liability imposed under 31 U.S.C. § 3713(b) is different from that of a transferee, pointing out that an executor does not have the benefit of enjoying the funds:

> A transferee has the benefit of enjoying the transferred property; such is not the case with an executor. To require an executor (here, petitioner) to be subject to interest on funds he did not have the benefit of enjoying would constitute a punitive act for which there is no legal authority.

Singleton, 71 T.C.M. at 3128. The Code, however, does not distinguish between the liability of an executor under I.R.C. § 2002 and the liability of a transferee under I.R.C. § 6324(a)(2). Both are liable for all additional interest accrued under § 6601 as allowed by I.R.C. § 6901.

If there is a basis for any distinction between a fiduciary and a transferee, such a distinction would require a fiduciary having a greater responsibility and liability than a transferee. Section 6324(a)(2) limits a transferee's liability to an amount not to exceed the value of the property received. Fiduciaries, on the other hand, are usually held responsible for the acts which they have taken in respect to the property under their control. As defined in Treas. Reg. § 301.7701-6, a fiduciary is entrusted with the property of another and the fiduciary's acts must be such as to merit the confidence of all who deal with them. Under 31 U.S.C. § 3713(b) the fiduciary is liable to the extent of debts paid out in preference to the debts owed to the federal government. However, as stated above, for purposes of interest this is a distinction without a difference.

The court also fails to note that it is the Government that has been deprived of the benefit of funds it would have had but for the actions of the executor. The purpose of interest is to compensate the government for the delay in the payment of tax. Avon Products, Inc. v. United States, 588 F.2d 342, 343 (2d Cir. 1978) ("interest is not a penalty but is intended only to compensate the Government for delay in payment of a tax"); Vick v. Phinney, 414 F.2d 444, 448 (5th Cir. 1969) (" . . . interest is assessed in order to compensate a creditor, here the government, for the period during which it was deprived of the use of the money, not merely because the party liable is presumed to have used the funds to advantage during the period of delayed payment").

In this case, the total amount of the distributions $b, is less than the tax, penalties and accrued interest owed by the estate of Y. The amount of the distributions cap X's liability for Y's estate tax, penalties, and interest on the estate tax. It does not prevent interest from accruing on X's separate and personal 31 U.S.C. § 3713(b) liability. As stated above, X's fiduciary liability is to be treated in the same manner as the tax to which it relates. Since the estate tax is subject to interest until paid, X's fiduciary liability is also subject to interest until paid.

If you have any further questions, please call (202) 622-7950.

Deborah A. Butler
Assistant Chief Counsel
(Field Service)

By: ______________________________
PAMELA WILSON FULLER
Acting Senior Technician Reviewer
Procedural Branch