



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DIANE ERICKSON
REVENUE AGENT EG:1647

FROM: Jerry E. Holmes
Chief, Branch 2 CC:EBEO:2

SUBJECT: Underreported Tips—Statute of Limitations

This Field Service Advice responds to your memorandum dated September 24, 1999, requesting our advice on the proper form to use to extend the limitations period on FICA tax. More specifically, you ask the following questions:

1. Is the Form SS-10 or 872 the proper form to use to extend the limitations period on FICA tax with respect to underreported tips?
2. If Form SS-10 is the proper form to use, with respect to a married couple that filed a joint return, assuming only one of the spouses is liable for FICA tax on underreported tips, must the Service obtain a Form SS-10 only from the tipped spouse, or must it obtain a Form SS-10 each spouse?

Conclusions:

1. Form SS-10 is the proper form to use to extend the statute of limitations with respect to FICA tax on underreported tips. However, Form 872 may be used if it specifies that it relates to FICA taxes.
2. The Service need only obtain a signed Form SS-10 from the tipped spouse.

Law and Analysis:

Section 3102(a) requires employers to deduct and pay over the employee portion of the FICA tax. However, section 3102(c)(1) provides a special rule applicable to tips. It states, in general, that the withholding requirement of subsection (a) is applicable only to such tips as are included in a written statement

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furnished to the employer pursuant to section 6053(a), and only to the extent that collection can be made by the employer by deducting the amount of the tax from wages paid to the employee (excluding tips). Section 3102(c)(4) provides, in relevant part, that if the tax imposed by section 3101 with respect to tips which constitute wages exceeds the portion of the tax which can be collected by the employer from the wages of the employee pursuant to paragraph (1) of this section, such excess shall be paid by the employee.

Section 31.6011(a)-1(d) of the Employment Tax Regulations provides that if an employee is paid wages in the form of tips, and any portion of the tax under section 3101 cannot be collected by the employer from the employee's wages (such as in the case of underreported tips), the employee shall make a return for the calendar year in respect of the employee tax not collected by the employer and the return shall be made on Form 1040.

Section 6501(a) of the Code provides that except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed. Section 6501(c)(3) provides that in the case of failure to file a return, the tax may be assessed at any time.

Section 6501(c)(4) of the Code provides that where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

If a taxpayer fails to file a return reporting FICA tax on underreported tip income, the running of the three-year assessment period for FICA tax on tip income will not start. Form 1040 is not a return for FICA tax. Form 4137, which is attached to the employee's Form 1040, must be used by the employee to report FICA tax on underreported tip income. Rev. Rul. 95-7, 1995-1 C.B. 185, Q&A 6. Form 4137, and not Form 1040, is the return which starts the running of the three-year assessment period for FICA tax on tip income. Rev. Rul. 79-39, 1979-1 C.B. 435. We note that if a taxpayer in good faith uses an incorrect form, but supplies all the information to the Service that would have been supplied had the taxpayer used the correct form, the assessment period may begin to run. See Denman v. Motter, 44 F.2d 648 (10th Cir. 1930); and Police Association of Massachusetts v. Commissioner, T.C. Memo. 1996-407; See also GermantownTrust Co. v. Commissioner, 309 U.S. 304 (1940).

Form 872 is the form which is normally used to extend the period of limitations on assessment for the taxpayer's federal income tax. However, Form 72 may be used for other types of tax if so specified. Thus, if a taxpayer uses Form 872 to extend the period of limitations for FICA tax, the form will be valid as long as

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paragraph (1) in the form specifies FICA tax as the kind of tax involved. The instructions to Form 872 state that “if this consent is for income tax, self-employment tax, or FICA tax on tips and is made for any year(s) for which a joint return was filed, both husband and wife must sign the original and copy of this form.”

Although Form 872 can be used to extend the statute of limitations for both income and FICA taxes if the Form 872 so specifies, the use of Form SS-10 to extend the statute for employment taxes is preferred. Form SS-10 is specially designed for employment taxes. See IRM 104.6.13.4, which states that Form SS-10 is used to obtain the taxpayer’s consent to extend the statutory period within which assessment may be made of taxes under the FICA, and certain other employment taxes. Also, FICA is a separate and distinct tax from the income tax and there are a number of instances when it is more convenient for the field to deal with FICA in a separate manner from the income tax.

You ask whether, in the case of a joint income tax return, both spouses must sign the Form SS-10. Section 6013(a) provides that a husband and wife may make a joint return for income taxes under subtitle A (income taxes). Under section 6013(d)(3), a husband and wife are jointly liable only for the income taxes reported on their joint return. The tax imposed under section 3101 is an employment tax imposed under subtitle C; thus, it is not a tax with respect to which the Service may impose joint liability on a husband and wife. See Rev. Rul. 82-185, 1982-2 C.B. 395 (“[S]ocial security tax on unreported tip income is separate and distinct from the individual income tax even though both taxes may be reported on the same form”). Because only the spouse who receives the tip income is liable for the FICA taxes with respect to the tip income, the field may prepare the Form SS-10 solely for that spouse.

If you have any further questions or need additional assistance, please contact my office at (202) 622-6040.

Sincerely,
JERRY E. HOLMES
CHIEF, BRANCH 2
ASSOCIATE CHIEF COUNSEL
(EMPLOYEE BENEFITS AND EXEMPT
ORGANIZATIONS)