



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

OFFICE OF
CHIEF COUNSEL

February 24, 2000

Number: **200016018**
Release Date: 4/21/2000
UIL: 6013.04-00;3121.12-00

CC:EBEO:2
WTA-N-119639-99

MEMORANDUM FOR CLARENCE WALKER
PROGRAM ANALYST, COLLECTION
OP:CO:C:IE

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

SUBJECT: Does Joint and Several Liability Apply to FICA Tax on
Unreported Tips?

This is in response to your inquiry of December 2, 1999, concerning whether joint and several liability applies to unpaid FICA tax. Because this memorandum will be forwarded to a field office, it constitutes conduit Chief Counsel Advice and is subject to the disclosure provisions of Code section 6110.

QUESTION

In a case where a husband and wife have filed a joint federal income tax return, do the spouses have joint and several liability for the employee FICA taxes of one spouse that are attributable to unreported tips?

BRIEF ANSWER

Joint and several liability does not apply to unpaid employee FICA tax on unreported tips. Joint and several liability arises when a joint return is filed. Section 6013(d)(3). A joint return may be made with respect to income taxes under subtitle A of the Code. Section 6013(a). FICA tax is an employment tax imposed by subtitle C. Hence, joint and several liability does not apply to employee FICA tax.

LAW AND ANALYSIS

Code section 6013(a) provides that a husband and wife may make a single return jointly of income taxes under subtitle A. Section 6013(d)(3) provides that, if a joint return is made, the liability with respect to the tax shall be joint and several.

WTA-N-119639-99

Section 3101 imposes FICA tax on the income of employees as a percentage of wages. FICA taxes are not income taxes under subtitle A, but employment taxes under subtitle C.

Employers of tipped employees withhold and pay employee FICA tax on tips under rules which are specific to tip income. Section 6053(a) requires tipped employees to report tips which are wages to their employers in written statements. The employers are required to withhold and pay the employee portion of the FICA tax only on tips which are reported pursuant to section 6053(a) and only to the extent of the employee wages (excluding tips) under their control. Section 3102(c).

Section 3102(c) of the Code imposes a liability on the employee to pay the employee's FICA tax if the employee has tip income that was not reported to the employer.

Section 31.6011(a)-1(d) of the Employment Tax Regulations provides that an employee shall file a Form 1040 for the calendar year in respect of the tax imposed on tips by section 3101 of the Code that cannot be collected by the employer.

Section 3121(q) defines all tips received by an employee as remuneration for employment and deems unreported tips to be paid at the time received. Thus for employment tax purposes tipped employees are required to report unreported tips for the taxable year in which they are received.

Rev. Rul. 95-7, 1995-1 C.B. 185, states that the employee is liable for the employee portion of the FICA tax on unreported tips. The employee pays the employee portion of the FICA tax by completing Form 4137, Social Security Tax on Unreported Tip Income, and filing it with Form 1040, U.S. Individual Income Tax Return.

Rev. Rul. 79-39, 1979-1 C.B. 435, states that the income tax imposed by section 1 and the FICA tax imposed by section 3101 are separate and distinct taxes. The requirements for filing a return apply separately to each class of tax, even though provision has been made for reporting both classes of tax on Form 1040. Form 4137, on which unreported tip income must be reported for social security tax purposes, is an attachment to Form 1040. Form 4137 constitutes the FICA tax return for purposes of the statute of limitations.

While there are no cases or revenue rulings dealing directly with joint and several liability for employee FICA tax, it is an established principle that FICA tax liability applies to the wages of the employee who earned them. Rev. Rul. 71-116, 1971-1 C.B. 277 (holding that FICA tax applies to the wages of the spouse who earned them, regardless of the fact that the wages are community property under state law). Similarly, even in community property states, SECA tax applies to the

WTA-N-119639-99

net earnings from self-employment of the spouse carrying on the trade or business. Rev. Rul. 82-39, 1982-1 C.B. 19.

Under section 6013(d)(3), a husband and wife who file a joint return are jointly liable only for the income taxes imposed by subtitle A. The employee FICA tax is an employment tax imposed by subtitle C. Thus it is not a tax with respect to which the Service may impose joint liability on a husband and wife.

CONCLUSION

Under these facts, section 6013 imposes joint liability only with respect to income taxes. Spouses are individually liable for employee FICA tax on tips.