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MEMORANDUM FOR THOMAS R. BURGER
Chief, Reporting Compliance, Employment Tax
S:C:CP:RC:ET

FROM: Michael A. Swim
Chief, Employment Tax Branch 1

SUBJECT: Form SS-8 Submissions Involving Partnership Issues

This memorandum responds to questions raised by a number of Forms SS-8 submissions involving partnership issues. These Forms SS-8 generally involve one of two different types of claims. The first is a claim by a worker that for federal tax purposes, although a valid partnership exists, the worker is an employee of the partnership and not a bona fide member of the partnership. The second is a claim by a worker that a partnership of which he is a purported member is not a bona fide partnership for federal tax purposes, but rather that one of the members (typically one of the general partners) is actually the employer of all the other purported members of the partnership.

Whether or not a person is a partner in a partnership, for federal tax purposes, is a question of federal law. While a person may be recognized as a partner under state law, it is not necessarily determinative of whether they will be treated as a partner for federal tax purposes.

Bona fide members of a partnership cannot be employees for purposes of the employment tax provisions of the Internal Revenue Code (the Code). However, the Form SS-8 is intended to elicit information necessary to determine the worker's proper classification under the common law rules distinguishing employees from independent contractors. The Form SS-8 is not intended to elicit information necessary to determine whether the worker is a bona fide member of a partnership. Therefore, the Service should decline to rule on any Form SS-8 submissions that would require such an analysis in order to determine the worker's classification for purposes of the employment tax provisions.

EMPLOYMENT TAXES AND PARTNERSHIPS

Employment Taxes

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Applicable employment taxes are imposed under the Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA) and Collection of Income Tax at Source. See Code §§ 3101 and 3111 (FICA tax); Code § 3301 (FUTA tax); and Code § 3402 (Collection of Income Tax at Source). FICA and FUTA taxes are imposed on wages with respect to employment and require an employer-employee relationship (unless a statutory exception applies). In addition, the Collection of Income Tax at Source imposes certain income tax withholding requirements on employers paying wages.

Application of Employment Taxes to Members of a Partnership

Income received by a bona fide partner from a partnership cannot be wages, but instead may qualify as self-employment income subject to tax under the Self Employment Contributions Act (SECA). See Revenue Ruling 69-184, 1969-1 C.B. 256. As stated in Revenue Ruling 69-184:

Bona fide members of a partnership are not employees of the partnership within the meaning of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages ... Such a partner who devotes his time and energies in the conduct of the trade or business of the partnership, or in providing services to the partnership as an independent contractor, is, in either event, a self-employed individual rather than an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

Thus, to qualify as an employee for purposes of the employment tax provisions, the worker must be classified both as not a bona fide member of a partnership and as an employee under the common law control test for distinguishing employees from independent contractors (unless a statutory exception applies).

FORM SS-8

(Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding)

The Form SS-8 may be submitted by either the worker or the firm for a determination of whether or not the worker is an employee for purposes of the employment tax provisions. The party that does not submit the initial Form SS-8 is offered the opportunity to respond. The forms are processed in either the Austin, Texas or Newport, Vermont IRS Service Centers, except for filings involving federal agencies

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which are handled by the National Office. An SS-8 ruling applies only for purposes of the employment tax provisions of the Code.

The Form SS-8 consists of a series of questions intended to elicit information necessary to determine whether the parties meet the common law test of control necessary for the finding of an employee-employer relationship. Thus, the form is generally intended to address the issue of whether the worker is an employee or an independent contractor. There are no questions addressing specifically the existence or nonexistence of a partnership arrangement, or any details of such arrangement.

Because the information gathered through the Form SS-8 is not sufficient to determine whether the worker is a bona fide member of a partnership for federal tax purposes, the classification of a worker as an "employee" for purposes of the employment tax provisions cannot be made where there is the potential for the worker to be such a member. Therefore, where the Form SS-8 submission indicates that one or more of the parties is claiming that the worker is a bona fide member of a partnership, the parties should be informed that a ruling cannot be issued.

We hope the information provided is of assistance to you. If you have any further questions, please contact Stephen Tackney (# 50-18084), the attorney who has been assigned to this matter, at (202) 622-6040.