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: ASSOCIATE AREA COUNSEL
(Small Business/Self-Employed)
CC:SB:2:GBO
Attn: A. Kennedy Dawson

FROM: Assistant Chief Counsel (Administrative Provisions & Judicial Practice) CC:PA:APJP

SUBJECT: Collection of Employment Taxes Assessed Under Name and EIN of Single Member Limited Liability Company

This Field Service Advice responds to your memorandum dated September 1, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

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official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND

Single Member Limited Liability Company =

Sole Owner =

State =

Date =

ISSUE

Whether employment tax assessments in the name and employer identification number (EIN) of a single member limited liability company are valid assessments against the company's sole owner under the circumstances described below.

CONCLUSION

Pursuant to section 6203 and the regulations thereunder, the summary record of assessment, through supporting documents, must provide identification of the taxpayer. Certain errors are permissible in making an assessment so long as the taxpayer is sufficiently identified and the errors do not mislead or prejudice the taxpayer. We conclude that the "identification of the taxpayer" element required for a valid assessment has been met in this case. Moreover, even if the assessments were erroneous in a technical sense because they were made in the name and EIN of Single Member Limited Liability Company, Sole Owner was not prejudiced or misled by this error. Thus, we conclude that the assessments are valid against the taxpayer, Sole Owner.

FACTS

Single Member Limited Liability Company is a limited liability company formed under State law. It is a disregarded entity for all federal tax purposes and its activities are treated in the same manner as a sole proprietorship, branch, or division of Sole Owner. See Treas. Reg. § 301.7701-2(a). Single Member Limited Liability Company filed delinquent employment tax returns showing liabilities for each of the periods below:

Type	Period	Date Return Filed	Assessment Date
940	12/31/98		
941	03/31/98		
941	06/30/98		
941	09/30/98		
941	12/31/98		
941	03/31/99		
941	06/30/99		
941	09/30/99		
941	12/31/99		
941	03/31/00		

Each of the returns was filed with the address of Sole Owner as the business address for Single Member Limited Liability Company. In addition, the certificate of formation of Single Member Limited Liability Company shows the address of Sole Owner as the business address for Single Member Limited Liability Company.

All of the delinquent employment tax liabilities associated with the Form 940 and Forms 941 were assessed under Single Member Limited Liability Company's EIN and under the name "Single Member Limited Liability Company," as evidenced by the Certificates of Assessments and Payments (Form 4340) for each of the periods at issue. Further, the address where each notice was sent is the business address of Single Member Limited Liability Company, which also happens to be the home address of Sole Owner. On Date, the Service filed a Notice of Federal Tax Lien against Single Member Limited Liability Company for the delinquent amounts.

LAW AND ANALYSIS

The regulations on Procedure and Administration provide that a business entity with a single owner is classified as either a corporation or disregarded as an entity separate from its owner. Treas. Reg. § 301.7701-2(a). For purposes of these regulations, a single member limited liability company is treated as a business entity. The regulations provide that certain business entities are always classified as corporations. Business entities that are not automatically classified as corporations ("eligible entities") are permitted to choose their classification for federal tax purposes. Treas. Reg. § 301.7701-3(a). A single member limited liability company is considered an eligible entity and may choose its tax classification. If a single member limited liability company does not choose its tax classification, the default classification for all federal tax purposes is that of an entity disregarded as an entity separate from its owner. Treas. Reg. § 301.7701-

3(b)(1). If a single member limited liability company is disregarded, "its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." Treas. Reg. § 301.7701-2(a).

Notice 99-6, 1999-3 I.R.B. 12, permits a single member limited liability company to separately calculate, report, and pay its employment tax obligations with respect to its employees under its own name and employer identification number. The Notice makes clear that the owner of a single member limited liability company that is treated as a disregarded entity for federal tax purposes is the employer for purposes of employment tax liability. Consequently, "the owner retains ultimate responsibility for the employment tax obligations incurred with respect to employees of the disregarded entity." Id. Thus, as a disregarded entity, Single Member Limited Liability Company cannot be the employer for employment tax purposes regardless of the fact that Single Member Limited Liability Company filed the employment tax returns for the periods at issue in this case.

Section 6201 of the Internal Revenue Code provides the authority for assessment. Until an assessment of tax has been made, the Service is not entitled to collect a tax administratively. The lien provisions of the Code depend on the making of a demand for payment, and there cannot be a demand for payment if there is no assessment. See I.R.C. §§ 6303(a) and 6321. Although Sole Owner is ultimately liable for the employment taxes incurred by Single Member Limited Liability Company, the Service is precluded from administratively collecting the liability from Sole Owner without a valid assessment.

Generally speaking, an assessment is the formal recording of a taxpayer's tax liability. Section 6203 provides that "[t]he assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." The regulations on Procedure and Administration further provide as follows:

> [t]he assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide the identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. . . . The date of the assessment is the date the summary record is signed by an assessment officer.

Treas. Reg. § 301.6203-1 (emphasis added). Thus, to make a valid assessment, the Service must record the assessment on a signed summary record of assessment and create a supporting record which includes the four elements referred to in the regulation.

Although the regulations under section 6203 include requirements for a valid assessment, court cases interpreting section 6203 indicate that certain mistakes are permissible when making an assessment without the assessment thereby being considered invalid. Thus, for example, a United States Bankruptcy Court has indicated that although an assessment contains an incorrect social security number and address for the taxpayer, the assessment may nonetheless be valid. Gongaware v. United States, 97-1 U.S.T.C. (CCH) ¶ 50,419 (Bankr. W.D. Pa. 1997), aff'd without published opinion, 159 F.3d 1351 (3d Cir. 1998). In reaching its conclusion, the court acknowledged the errors, but found "that they were not sufficient to cause prejudice to [the taxpayer] who was sufficiently identified. . . in the assessment." Id. Similarly, in another case involving an assessment for section 6672 liability, the responsible person was correctly identified but the assessment referred to the wrong corporation. Allan v. United States, 386 F. Supp. 499 (N.D. Tex. 1975), aff'd without published opinion, 514 F.2d 1070 (5th Cir. 1975). The Allan court concluded that the assessment was valid as it correctly identified the taxpayer and the taxpayer suffered no prejudice.

The Service is not required to identify a taxpayer by a social security number when making an assessment. Moore v. United States, 93-2 U.S.T.C. (CCH) ¶ 50,495 (E.D. Cal. 1993). Similarly, there is no requirement that an employer identification number be used in making an assessment. United States v. Indianapolis Baptist Temple, 61 F. Supp.2d 836 (S.D. Ind. 1999).

In a case with facts somewhat similar to the present situation, the Court of Appeals for the Tenth Circuit held that an assessment made in taxpayers' trade name rather than taxpayers' individual names was valid. Marvel v. United States, 719 F.2d 1507 (10th Cir. 1983). In Marvel, the Service made employment tax assessments in the trade name of an unincorporated business rather than in the names of its two individual owners. The notices issued by the Service were sent to the taxpayers' business address rather than to the address of the owners, and the notices listed the taxpayer identification number for the business. The taxpayer identification number for the business was shown on the taxpayers' Schedule C attached to their

income tax returns for the years in question. The court stated that "taxpayers cannot seriously contend that the notices to the business did not operate to give actual notice to each of the taxpayers. We conclude that the assessments were valid and effective as to the individual plaintiffs, being issued in the trade name which they themselves adopted." Id. at 1513.

In Planned Investments, Inc. v. United States, 881 F.2d 340, 344 (6th Cir. 1989), the Court of Appeals for the Sixth Circuit (citing Marvel, 719 F.2d at 1507, and Allan, 386 F. Supp. at 499) stated that "Notices containing technical defects are valid where the taxpayer has not been prejudiced or misled by the error and is afforded a meaningful opportunity to litigate his claims." Thus, the fact that the taxable period in Planned Investments was incorrectly stated did not invalidate the notification to the taxpayer concerning a penalty assessment.

In the present situation, several arguments can be made in support of our conclusion that Sole Owner was adequately identified by the assessments and that Sole Owner was not prejudiced or misled by the fact that Single Member Limited Liability Company's name and EIN were used. First, given Single Member Limited Liability Company's status as a disregarded entity for all federal tax purposes and Single Member Limited Liability Company's close relationship to Sole Owner, the reference in the assessments to Single Member Limited Liability Company as the taxpayer is tantamount to an identification of Sole Owner as the taxpayer. In substance, Single Member Limited Liability Company is a trade name by which Sole Owner conducts business, as in Marvel v. United States, supra. This conclusion is supported by the fact that Sole Owner indicated that Single Member Limited Liability Company was an "LLC to be taxed as sole proprietor" on the application for EIN.

Second, although Sole Owner's social security number (SSN) was not included on the assessment, the court cases cited above indicate that an assessment is not required to identify the taxpayer by an SSN or an EIN. Moreover, the EIN used in making the assessments in this case identified Sole Owner as the taxpayer in that Sole Owner must use this EIN in preparing Sole Owner's Schedule C, which is attached to Sole Owner's federal income tax return.[1]

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[1] As a disregarded entity, Single Member Limited Liability Company's items of income, deduction, gain, and credit will be reported on Sole Owner's federal income tax return.

Further, in reference to the requirement that the taxpayer must not be prejudiced or misled by the assessment, the notices at issue were addressed to Single Member Limited Liability Company rather than to Sole Owner. However, Sole Owner was doing business as Single Member Limited Liability Company and, as the only owner of the business, Sole Owner cannot reasonably assert lack of knowledge of the notices. In addition, the home address of Sole Owner and the business address of Single Member Limited Liability Company were one and the same. Moreover, Sole Owner has not disputed actual receipt of those notices. Consequently, Sole Owner cannot contend that the notices to Single Member Limited Liability Company failed to give notice to Sole Owner of Sole Owner's tax liability. Thus, even if the assessments may have been erroneous in a technical sense, Sole Owner was not misled or prejudiced by the errors. Planned Investments, Inc. v. United States, supra.

We conclude that in the present situation the employment tax assessments under the name and EIN of Single Member Limited Liability Company are valid against Sole Owner.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

A court might accept the argument that Single Member Limited Liability Company is a separate entity under State law and should also be viewed as a separate entity for employment tax purposes, even if it is not a separate entity for income tax purposes. In support of this view, Single Member Limited Liability Company is arguably the common law employer. Also, it made payment of wages to the employees of the business and thus could be viewed as the employer under section 3401(d) and Otte v. United States, 419 U.S. 43 (1974). Moreover, it made payments or deposits of employment taxes and filed returns using its own name and EIN in accordance with Notice 99-6. This method of reporting and paying

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The instructions to Schedule C of Form 1040 indicate that an EIN must be included on Schedule C if the sole proprietor is required to file an employment tax return. As mentioned above, Sole Owner is the employer and is responsible for filing employment tax returns. Although Notice 99-6 allows Single Member Limited Liability Company to file the employment tax returns, Sole Owner remains ultimately liable for the employment taxes and is required to file an employment tax return in the absence of filing by Single Member Limited Liability Company. Thus, the EIN of Single Member Limited Liability Company is required on Schedule C of Sole Owner's return.

employment taxes arguably undercuts the Service's position that Single Member Limited Liability Company is a disregarded entity. A court might view this method of reporting and paying employment taxes as providing support for treatment of Single Member Limited Liability Company as a separate entity for employment tax purposes, notwithstanding the Service's position to the contrary.

Also, with respect to whether Sole Owner was prejudiced or misled by the errors in the assessments, Sole Owner might argue that the facts in this case are not parallel to Marvel. Unlike the notices in Marvel that were made using the taxpayers' trade name (Marvel Photo), the notices and assessments in this case used the name of a legal entity that is recognized under State law. Further, a court might be sympathetic to Sole Owner's lack of knowledge of the tax law. Thus, Sole Owner might believe that Single Member Limited Liability Company is an entity separate and distinct from Sole Owner for federal employment tax purposes as well as State law purposes. Based on such a belief, it could be argued from Sole Owner's perspective that the assessments and the notices sent by the Service did not identify him as the taxpayer but, rather, identified Single Member Limited Liability Company as the taxpayer.

Moreover, in several cases a tax assessment which named the partnership entity, but not individual members of the entity, was held to be invalid against an individual member. In re Briguglio, 2000 Bankr. LEXIS 1148 (Bankr. C.D. Cal. Sept. 11, 2000); In re Galletti, 2000 Bankr. LEXIS 1147 (Bankr. C.D. Cal. Sept. 11, 2000); El Paso Refining, Inc. v. Internal Revenue Service, 205 B.R. 497 (Bankr. W.D. Tex. 1996). In El Paso Refining, an assessment was made against a limited partnership and liens were filed against the general partner. The court concluded that the Service failed to meet the requirements of section 6203 because the general partner was not assessed for the liability. Consequently, assessment of the limited partnership was not sufficient to allow the Service to file liens against the general partner, even though the general partner was liable for the debts of the partnership under state law.

Similarly, the courts in Galletti and Briguglio concluded that a valid employment tax assessment against individual partners rather than the partnership was a prerequisite to tax collection against the individual partners. The government has appealed both cases to the United States District Court, Central District of California, Eastern Division. While the decisions in Galletti, Briguglio, and El Paso Refining may seem contrary to our conclusions we have reached in this case, we

believe that our case is clearly distinguishable based on the differences between a partnership and a single member limited liability company.

Subchapter K treats a partnership as an entity for certain tax purposes; for example, a partnership is required to file a tax return and partnership elections affecting taxable income are generally made at the partnership level under section 703(b). Most importantly, a partnership is an employer and is liable for payment of federal employment taxes. Treas. Reg. §§ 31.3401(d)-1(c); 31.3403-1. By contrast, a single member limited liability company is a nonentity for all federal tax purposes and has no obligation to file a tax return or pay federal employment taxes.[2] Therefore, regardless of the ultimate outcome in Galletti and Briguglio, and the court's decision in El Paso Refining, we believe these partnership cases are not relevant to the issue in this case.

[redacted]

If you have questions, please contact Susan L. Hartford at (202) 622-4940. Also, before collection action is undertaken in this case, we suggest that you contact Ms. Hartford and Walter Ryan, who is the Assistant Branch Chief of the branch office responsible for collection matters (CC:P&A:CBS:Br.1). Mr. Ryan may be reached at (202) 622-3610.

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[2] [redacted]

CURTIS G. WILSON

By: _____
Michael L. Gompertz
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Branch 2