

Findings of Responsible Persons: Employer Withholding Penalty Findings Require Timely Notice

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Trust fund taxes are typically subject to responsible person laws that provide that people who have the power to remit tax, but fail to remit, are held personally responsible for the failure. Such “trust fund” taxes have that moniker because they involve collecting an amount that is to be remitted to a government entity, such as payroll withholding tax and sales tax. A sticky question is, when does the state have to inform a responsible person who owes the tax? The answer in New Jersey is that it depends on the tax and whether what is really being assessed is a penalty. A recent New Jersey Tax Court decision found that the statutes of limitations for responsible person notices in New Jersey for Employer Gross Income Tax withholding (“ER-GIT”) and Sales and Use Tax (“SUT”) run for the assessment periods applicable to the tax. When there is an additional amount sought by the Division, such as a penalty of doubled tax for ER-GIT, that assessment (or notice of finding of responsible person) also must be issued within the assessment period. *Gill v. Dir, Div of Taxation*, Docket No. 4035-2021 (N.J. Tax Ct. May 1, 2023).

The Facts: The Vice President (“VP”) and sole shareholder of a corporation (the “Company”) had decision-making authority including the responsibility to file ER-GIT returns and SUT returns in New Jersey. The Company filed ER-GIT and SUT returns but did not remit amounts for quarters in 2012 and 2013. It filed for bankruptcy protection in 2013. The Bankruptcy Court entered a final decree for Chapter 7 liquidation in 2016 and no amounts were paid to the State of New Jersey. The Division of Taxation issued a notice of finding of responsible person status to VP on March 15, 2019, for ER-GIT and SUT. It is undisputed that VP is a responsible person under the ER-GIT and the SUT.

The Decision: An employer is liable for any amount of ER-GIT required to be withheld. When a person willfully fails to collect or pay over an ER-GIT amount required to be withheld, a penalty is imposed that is equal to the total amount of tax not remitted. NJ Stat Ann 54A:9-6(g). The term “person” in that context includes any person who is under a duty to remit the amounts. NJ Stat Ann 54A:9-6(l). An express provision adds that additions to tax and penalties in that statute are assessed, collected, and paid in the same manner as taxes. NJ Stat Ann 54A:9-6(j). Though the Company filed ER-GIT returns that self-assessed the tax (such that the tax amount assessed against the Company did not need a new notice and was assessed within time), VP asserted, and the Tax Court agreed, that the addition to tax that was penalty for failure to remit (*i.e.*, the doubled tax) was a new amount that was required to be assessed within time to issue an assessment of the underlying tax (*i.e.*, three years). Because the responsible person additional amount limitations period ran at the same time as

the underlying tax and the notice was issued for the penalty after the expiration of the three years, that responsible person notice for an additional amount was issued too late.

Turning to the SUT, the Tax Court explained that every “person” required to collect the sales tax is personally liable for the tax required to be collected. NJ Stat Ann 54:32B-14. Further, a “person” includes the seller and “any officer or employee of a corporation ... who as such officer or employee is under a duty to act for such corporation in complying with any requirement of” the sales tax. NJ Stat Ann 54:32B-2(w). The Tax Court found that the SUT was self-assessed but not remitted. It ruled that the self-assessment (that did not contain an additional penalty amount) was self-assessed such that the Division of Taxation did not need to issue a responsible person notice for the tax. The self-assessment was assessed within the required time. Again, the responsible person timing for SUT ran at the same time as the assessment of the tax. The SUT was upheld as self-assessed within time.

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National Law Review, Volume XIII, Number 139

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