

## **Alter Ego Tax Liens: Refund Claims Are Barred By The Substitution of Value Remedy.**

The IRS has a number of third-party collection theories which it employs to collect taxes from someone other than the taxpayer, including an alter ego theory. Alter ego cases are tricky for the collection target, as certain of the normal remedies a taxpayer has don't apply. For example, an entity that the IRS has classified as an alter ego does not enjoy the right to obtain a collection due process hearing in the IRS appeals unit. I.R.M. 5.12.1.2.11 (01-09-2009). A recent case from the Southern District of Ohio highlights another complication; the person who has been tagged as an alter ego cannot bring a normal refund suit. *Portsmouth Ambulance v. United States*, 2013 U. S. Dist. LEXIS 64292 (S.D. Ohio May 6, 2013).

Portsmouth provided emergency medical care and transportation services in Ohio. It acquired a separate company, Urgent Care, which became its wholly-owned subsidiary in September 2007. *Id.* at\*2. Both companies had significant tax problems: Portsmouth had employment tax issues and associated penalties, while Urgent Care had outstanding corporate and employment taxes liabilities. Two tax liens were recorded against Urgent Care prior to its acquisition by Portsmouth. Then, in June 2009, the IRS recorded an alter ego tax lien against Portsmouth for urgent care's liabilities. *Id.* Subsequently, Portsmouth's assets were sold. The IRS applied a significant portion of the proceeds to Urgent Care's liabilities; it also applied most of the balance to non-trust fund taxes. *Id.* at\*3.

After making a formal refund claims, Portsmouth filed a refund action. In response, the government filed a motion to dismiss for lack of subject matter jurisdiction. The government's theory was that it had not consented to waive sovereign immunity and the action because it did not fall within the scope of 28 U.S.C. §1346(a)(1). The government's position was solid and its motion was granted.

Historically, courts had allowed the target of an alter-ego lien to sue for a refund due to the concern that there was no viable remedy. *United States v. Williams*, 514 U.S. 527, 532-39 (1995). In 1998, Congress developed a remedy for the target of an alter-ego lien. First, it amended Section 6325 of the Internal Revenue Code, which deals with the release of liens and discharge of property, to give a property owner the right to "substitute value." This permits the property owner to substitute property or post a bond and obtain a certificate of discharge of the tax lien on the property. See I.R.C. § 6321(b)(4). Second, Congress amended Section 7426 of the Code, which authorizes a variety of civil actions against the federal government in tax matters, to include provisions authorizing a civil action in cases where a substitution of value is made; the provision requires that suit be brought within 120 days of the date the certificate of discharge is filed. I.R.C. § 7426(a)(4).

The taxpayer in *Portsmouth Ambulance* did not avail itself of these provisions, instead, it pursued a refund. This was a fatal error: in *EC Term of Years Trust v. United States*, 550 U.S. 429, 433-35 (2007), the Supreme Court had broadly hinted that refund claims would no longer be available in the alter-ego context. In *Portsmouth Ambulance*, the court held that the specific remedies provided by Sections 6321(b)(4) and 7426(a)(4) barred a refund claim, relying upon a controlling decision from the Sixth Circuit, along with a decision from the Court of Federal Claims. 2013 U. S. Dist. LEXIS 64292, slip op. at \*12-\*14 (citing *Munaco v. United States*, 522 F.3d 651 (6th Cir. 2008); *Four Rivers Investments, Inc. v. United States*, 77 Fed. Cl. 592 (2007)).

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