

LISTEN UP: THE IRS MUST CONSIDER A PRE-ASSESSMENT APPEAL BEFORE ISSUING A TRUST FUND RECOVERY PENALTY ASSESSMENT

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Section 6672 of the Internal Revenue Code provides the IRS with the authority to assess the trust fund recovery penalty, which imposes personal liability for employees' FICA and income taxes on responsible officials affiliated with an employer. I.R.C. § 6672(a). Before the penalty is imposed, the statute provides for individual notice. I.R.C. § 6672(b)(1) ("No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail . . . or in person that the taxpayer shall be subject to an assessment of such penalty."). The issuance of the notice generally tolls the assessment statute of limitations for ninety days, but "if there is a timely protest of the proposed assessment," the statute is tolled until "the date 30 days after the Secretary makes a final administrative determination with respect to such protest." I.R.C. § 6672(b)(3)(A), (B). Last week, the Eleventh Circuit ruled that the IRS must act upon a timely pre-assessment protest under Section 6672(b). *Romano-Murphy v. Comm'r*, No. 13-13186, 2016 U.S. App. LEXIS 4254 (11th Cir. Mar. 7, 2016).

Ms. Romano-Murphy was the chief operating officer of a health care staffing business that employed nurses who worked at hospitals on a temporary basis. 2016 U.S. App. LEXIS 4254 at *6.

In July 2005, she signed an employment tax return on behalf of the business that reported \$609,832.01 in taxes due. *Id.* When the employer failed to pay, the IRS elected to pursue Ms. Romano-Murphy; in July 2006, it sent her a notice of proposed assessment, which indicated that she was free to file an appeal by submitting a protest letter. *Id.* at *6-*7.

Ms. Romano-Murphy filed a protest letter with the IRS in September 2006, indicating that the IRS erred in calculating the trust fund taxes that were outstanding and in determining the amount of the penalty for which she was to be assessed. *Id.* at *8. The IRS never acted on her protest, which apparently was never transmitted to its Appeals unit. *Id.* In October 2007, the IRS issued an assessment against Ms. Romano-Murphy for \$346,732.38. *Id.* at *9. While Ms. Romano-Murphy wrote several more letters to the IRS, it ignored them all. *Id.* In August of 2008, the IRS issued a notice of intent to levy, which was followed in September 2008 by notice of a federal tax lien filing. *Id.*

In response to these notices, Ms. Romano-Murphy requested a collection due process hearing, asserting, among other things, that the relevant taxes were the subject of a settlement between the IRS and the employer. *Id.* at *9-*10. Following a telephone conference, the IRS Appeals unit issued an unfavorable determination, upholding the assessment. Ms. Romano-Murphy then proceeded to Tax Court, which initially sustained the determination by Appeals. Ms. Romano-Murphy then moved to vacate that order, arguing that the underlying assessment was illegal as she had not been afforded a pre-assessment hearing. The Tax Court rejected her argument, ruling that the IRS was not required to defer an assessment under Section 6672 of the Code if a protest has been timely filed. *Id.* at*12.

Next, Ms. Romano-Murphy filed a *pro se* appeal to the Eleventh Circuit and won. In the Court of Appeals, the IRS took the position that it had “unfettered discretion to resolve (or not resolve) timely pre-assessment protests filed by taxpayers after they receive notice of proposed assessments.” *Id.* at *15. The Eleventh Circuit disagreed.

First, the Court of Appeals focused on the language of Section 6672(b)(3)(B), which provides that if a timely protest is filed, the assessment limitations period is tolled until “the date 30 days after the Secretary makes a final administrative determination with respect to such protest.” I.R.C. § 6672(b)(3)(B). In the Court’s view, this language “contemplates that there will be a pre-assessment determination of liability and notice thereof to the taxpayer if a timely protest has been filed.” *Id.* at *17.

Next, the court turned to the relevant regulations and the Internal Revenue Manual, which it considered on the assumption that the language of the statute might be considered ambiguous. The Eleventh Circuit noted that one regulation provided, by way of examples, that “when a pre-assessment protest is filed, the IRS Appeals Office must make a determination of § 6672 liability and notify the taxpayer in writing.” *Id.* at *19 (discussing Treas. Reg. § 301.7430-3(d), Example 7) (citations omitted). The court also focused upon another regulation which indicated that a taxpayer who failed to avail herself of the opportunity for a pre-assessment appeals conference could not challenge the underlying obligation in a collection due process hearing. *Id.* at *20 (citing Treas. Reg. § 301.6320-1(e)(4), Example 3). The Eleventh Circuit commented on the collection due process regulation as follows:

If a taxpayer's failure to challenge the proposed liability or amount prior to assessment has preclusive effect (by way of abandonment or waiver), it is difficult to understand how or why the IRS would not be under an obligation to make a final determination when a timely protest is made.

Id. at *20-*21. In the court's view, these two regulations "require the IRS to make a pre-assessment determination (though not necessarily through the provision of a hearing) about a taxpayer's § 6672(a) liability when timely protest is made." *Id.* at *21.

The Eleventh Circuit then reviewed two other authorities that confirmed its reading of the regulations. First, the court noted that the IRS procedural rules provided that post-assessment appeals procedures were not available in trust fund recovery penalty cases, "because the taxpayer has the opportunity to appeal this penalty prior to assessment;" in the Eleventh Circuit's view this provision was consistent with its conclusion that the IRS was obligated to make a determination if a timely pre-assessment protest is filed. *Id.* at *23 (quoting Treas. Reg. § 601.106(a)(1)(iv)). Next, the Court of Appeals turned to the Internal Revenue Manual, which spelled out in detail the manner in which pre-assessment protests are supposed to be handled and indicated that the IRS Appeals unit was supposed to address timely protests before an assessment was issued in trust fund recovery penalty cases. *Id.* at *24-*26.

Against this background, the Eleventh Circuit ruled that the IRS had violated Rule 6672(b) and a variety of other regulatory provisions by failing to act on the protest that Ms. Romano-Murphy had filed. *Id.* at *26. That left the question of the remedy for the violation: Ms. Romano-Murphy argued that the relevant assessment had to be invalidated, while the IRS contended that any error was harmless because Ms. Romano-Murphy was later afforded substantive review of the assessment as part of her collection due process hearing. Since the Tax Court had not reached this issue, the Court of Appeals elected to remand.



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