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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

K-BOB'S CAPITAL RESOURCE GROUP
LTD, c/o ED TINSLEY, TAX MATTERS
PARTNER,

Plaintiff

vs.

Case No.
CIV-06-0309 LFG RLP

UNITED STATES OF AMERICA,

Defendant

COMPLAINT TO APPEAL NOTICE OF DETERMINATION CONCERNING INTERNAL REVENUE SERVICE COLLECTION ACTION UNDER SECTION 6330, INTERNAL REVENUE CODE.

Plaintiff K-BOB'S CAPITAL RESOURCE GROUP LTD, c/o ED TINSLEY, by and through its attorney, Patricia Tucker, Esq., of Lieuwen, La Fata and Tucker, P.A., hereby states the following in support of its complaint against Defendant:

I.

General Allegations

1. Jurisdiction of this action is based on Internal Revenue Code Section 6330(d) (26 USC). The total amount actually in controversy is about $122,125.75, after concessions described below by the Defendant, which may or may not have yet been reflected in the bills being issued by Defendant.

2. Plaintiff K-BOB'S CAPITAL RESOURCE GROUP LTD, c/o ED TINSLEY, TAX MATTERS PARTNER (Plaintiff) is a limited partnership duly registered in the State of New Mexico, which operates in the State of New Mexico and other states.

3. Defendant is the United States of America; the actions which form the substance of this action were taken by the Internal Revenue Service, which is an agency of the United States Government operating under the Department of the Treasury.

4. This complaint is an appeal of a Notice of Determination issued by John C. LaCoke, Team Manager, Appeals Office, Internal Revenue Service, an employee of the Internal Revenue Service acting in his official capacity, under Section 6330 of the Internal Revenue Code (26 USC).

II.

Factual Allegations

5. Plaintiff is a limited partnership, the business of which is franchising K-Bob's restaurants and, during the periods in issue, operating several K-Bob's restaurants.

6. Until the periods in issue, which begin in the second quarter of 1999, Plaintiff has an excellent record of compliance with the requirements of the Internal Revenue Service relating to the collection and paying over of employment tax, as well as the filing of payroll tax returns reporting both the trust fund and non-trust fund portions of the employment tax in a timely manner. In fact, Mr. Tinsley, principal of Plaintiff, personally served on a committee of the Internal Revenue Service to plan the procedure for tracking and payment of tax on tips in establishments such as restaurants in which tips were a substantial source of receipts, and actively participated in the development of the current procedures used.

7. Mr. Tinsley was personally primarily involved the management of Plaintiff rather than operation of the restaurants themselves. In one point prior to the second quarter of 1999, a manager was hired for one restaurant. Among the manager's responsibilities were to collect payroll taxes from the employees, to

timely deposit those amounts plus the employer's portion of employment tax, and to file the Forms 941, quarterly employment tax returns, on time.

8. In 2002, Mr. Tinsley, for the first time, became personally aware that the finances of that restaurant were in chaos, and at that time he learned that substantial amounts of payroll tax had not been paid for the second, third, and fourth quarters of 1999, the main quarters in issue.

9. As soon as Mr. Tinsley became aware of the delinquencies, he immediately personally went to the Internal Revenue Service office in Albuquerque, New Mexico, to make a good faith payment against the outstanding liabilities and to discuss the matter with a collection agent with the intent of dealing with the situation immediately and in a way which would bring the accounts current as soon as possible.

10. He immediately began making weekly payments on the outstanding liabilities, the first in the first week of January. These payments were made at a time when Mr. Tinsley did not have a specific agent to deal with, the case not having been assigned to any specific Revenue Officer at that time.

11. It is Mr. Tinsley's clear recollection that it was suggested by the Internal Revenue Service Revenue Officer subsequently assigned that he submit an offer in compromise on behalf of the company to reduce the amounts owed and that he not

make payments in the intervening period. In fact, in reliance on what he believed to be the advice given Mr. Tinsley, Plaintiff submitted two offers in compromise, which were eventually rejected after appeal, and payments were not made in that period.

III

THE PROCEDURAL HISTORY OF THE CASE

12. On or about November 10, 2005, the Internal Revenue Service mailed to Plaintiff by certified mail a Notice of Intent to Levy, based on four separate alleged amounts owed by Plaintiff. The four amounts are set forth below:

A. Late filing and late payment penalties for the late returns, which remain in issue. The amount in issue on this is about $122,000.

B. Payments of two amounts ($34,110.88 and $38,989.12), which were specifically designated to interest and tax other than penalties and interest on penalties, which have been located and which Plaintiff believes have been resolved and reapplied by Defendant.

2. A civil penalty of $18,923.45, which Plaintiff believes has been conceded by Defendant.

3. A civil penalty for 2001, disclosed for the first time, of over $139,000, plus penalties and interest, which was subsequently

conceded by the Internal Revenue Service.

8. The penalty listed under D above has been fully abated and is no longer in issue here. It was assessed because the Social Security Administration could not read the electronic copies of the Forms W-2, which were required to be sent electronically. Plaintiff's C.P.A., Jay Boyd, had submitted paper copies of the W-2's proving the accuracy of the reports filed, and during the appeal of the Notice of intent to levy, these hard copy W-2's were reviewed and found to match the Social Security reports exactly. Accordingly, the civil penalty of over $139,000 has been abated (removed), and is no longer in issue.

9. The same series of events occurred for 2000, when Social Security reached the conclusion, after review of the company's hard copies of the W-2's, that the reports to Social Security were correct, and abated the penalty for the alleged difference. However, for some reason never explained to Plaintiff, the penalty for 2000 for $18,923.45, which represents the additional payroll tax which would have been due had the Social Security Administration not agreed that Plaintiff's reports were correct, had not yet been abated. In December of 2005, Plaintiff was informed by the Internal Revenue Service Taxpayer Advocate's Office, that that penalty would also be abated (removed).

IV

THE RIGHT TO OBTAIN A SUBSTANTIVE DETERMINATION ON THE ISSUE OF LIABILITY FOR PENALTIES AND INTEREST ON PENALTIES

10. The purpose of the two payments referred to in paragraph 7 B was to pay all taxes and interest on taxes, and to leave only the late filing and late payment taxes and interest thereon in issue. Those penalties with interest total about $122,000 at this point, and remain in issue.

11. Plaintiff's first formal effort to request that the penalties be abated for good cause was made through a written request to the Ogden, Utah, Service Center on September 26, 2005 (by letter dated September 25, 2005), which then had the second offer in compromise under consideration. The request for abatement of penalties and interest on penalties was never acknowledged or answered. No investigation was begun as a result of this request. It was apparently either lost or ignored.

12. The second Request for Abatement of Penalties was made in later collection proceedings by letter to the Revenue Officer handling the case in Albuquerque, New Mexico, and was made in early April of 2006, since the original request could not be located. Plaintiff's attorney was informed that it would be denied and sent to appeals for consideration by the assigned Revenue Officer..

13. In the appeal with the Albuquerque Appeals Officer, she refused to consider the question of liability for the penalties, informing Plaintiff's counsel that the request would have to be made to the Revenue Officer. The Revenue Officer had already denied the request and was sending it to appeals, which refused to consider it. For those reasons, Plaintiff has not had a real opportunity to have the substantive matter of its liabilities for those penalties and interest on those penalties considered.

14. For all of these reasons, Defendant has already conceded items B, C, and D of the Notice of Intent to Levy, and only one issue remains - the substantive liability for the penalties and interest on the penalties, an issue on which Plaintiff has repeatedly been denied a substantive consideration.

15. Plaintiff does not owe the late filing or late payment penalties. The late filing of the quarters' returns in issue was an aberration - the company has before and since then had a pristine record of compliance. The late filing penalties should be abated for good cause. Interest on the late paid taxes has already been paid, as well as interest on that interest, and the Internal Revenue Service has been reimbursed for its lack of use of the tax funds during that period. The few returns in issue were filed late due to a very brief period of inept management which was ended as soon as it was discovered, and Mr. Tinsley did all he could, immediately,

to rectify the situation. Under these circumstances, no late filing penalties should be imposed.

16. The case for removal of the interest on late payment penalties is even stronger. Mr. Tinsley began making weekly payments against the outstanding balance as soon as he discovered it. He ceased the weekly payments on what he understood was the suggestion of the Revenue Officer to cease payments while the offer was submitted because if it were accepted, it would make the payments superfluous and in fact more that would then be owed if the offer were successful.

17. While recollections may differ as to what was said in that conversation, Mr. Tinsley stopped his periodic monthly payments in good faith and on the basis of what he believed the Internal Revenue Service advice given to him was. This is clearly good cause for abatement of the interest of the late payment penalties. All interest on the taxes, including interest on the interest on the taxes, have been fully paid and the Internal Revenue Service has been made whole. Mr. Tinsley at all time acted in good faith, and abatement is appropriate under these circumstances.

18. The appeals officer refused to consider or even discuss the remaining issue, liability for the late filing and late payment penalties, and interest thereon, stating that she had no authority to consider the issue substantively. Instead, she offered only to consider an installment agreement on those liabilities, which would have

been the equivalent of a concession of liability by Plaintiff. Accordingly, no installment agreement terms were suggested. Plaintiffs opted instead to continue its fight to have these issues heard on the merits.

19. As a result, a Notice of Determination was issued on March 16, 2006, from which this case is taken pursuant to Section 6330 of the Internal Revenue Code. A copy of that Notice of Determination is attached hereto as Exhibit A..

20. Pursuant to Section 6330 of the Internal Revenue Code (26 USC), Plaintiff is entitled to file this Complaint in United States District Court within 30 days from the date of the Notice of Determination.

21. The Notice of Determination mentioned the issues raised, but did not acknowledge the concession of three of the four issues by the Internal Revenue Service.

22. The Notice of Determination upheld the Commissioner of Internal Revenue's determination that levy was the appropriate collection alternative in this case.

23. So, in summary, the Internal Revenue Service has already conceded the second, third, and fourth assessments underling the Notice of Intent to Levy which serves as the basis for this action, and has not give Plaintiff any substantive hearing, after two requests, on the first assessment in issue. That leaves in issue

only whether the Internal Revenue Service was correct is assessing late filing and late payment penalties on the late payments. and interest thereon, and whether the proper collection option at that point was levy.

24. By Protest Letter dated December 5, 2005, Plaintiff filed a timely Request for a Collection Due Process Hearing (Form 12153) under Section 6330 of the Code, and the appeal described above resulted.

25. At the CDP hearing, the issues raised included the four issues listed in paragraph 7 above, three of which were conceded in the course of the appeal.

26. The purpose of this Complaint is to contest Plaintiff's substantive liability for the penalties and interest on the penalties and the decision that collection by levy was the appropriate collection alternative. All other issues have been conceded, and in the event that the former concessions are reversed or denied for any reason, Plaintiff renews its contest of those issues. In addition, in the event that it is determined substantively, that Plaintiff owes any amount of late filing or late payment penalties, or any other amount, Plaintiff, in the alternative, contests the Determination that levy is the appropriate collection alternative in this case, and further files this action to obtain the reversal of the Defendant's determination that levy is the legal and appropriate collection alternative in this case.

IV

CLAIM THAT PLAINTIFF MAY RAISE THE ISSUE OF LACK OF LIABILITY FOR THE ASSESSED PENALTIES IN THE CDP HEARING AND IN THIS PROCEEDING.

27. In the hearing on the CDP (Collection Due Process) appeal filed by Plaintiff, it was stated that Plaintiff was not allowed to raise the issue of its lack of substantive liability for the assessed penalties and interest because it had had the opportunity to do so previously and had not done so.

28. In this case that is not true. On two separate occasions, written requests were submitted seeking abatement of those amounts. The first was submitted to the Ogden Service Center, and was either lost or ignored. No action was taken on it. The second was submitted to a local Revenue Officer, who denied it and informed counsel it was being forwarded for appellate consideration. The appeals officer refused to consider it on asserted jurisdictional grounds.

29. Accordingly, Plaintiff never had an actual opportunity to contest its liability for the penalties and interests assessed. While substantive liability is generally not allowed to be raised in a collection due process hearing, such as this, there is an exception for cases, like this, where the Plaintiff has never had an actual opportunity to have its case on liability considered on its own merits.

30. Under the applicable regulations, a person may raise the issue of lack

of substantive liability for assessed penalties if no actual prior opportunity for such contest was available. Plaintiff here had no actual prior opportunity to have the issue of liability considered on the merits, and accordingly is entitled to raise the issue of liability at this time and in this action, and it was error for the Appeals Office to deny Plaintiff that opportunity.

V.

CLAIM THAT LEVY IS NOT THE APPROPRIATE COLLECTION ALTERNATIVE IN THIS CASE

31. Defendant, in its Notice of Determination, upheld the Commissioner's determination that the appropriate collection alternative in this case is to proceed by levy on Plaintiff's assets. Defendant did not acknowledge in that Notice that three of the four issues had been conceded in the course of the appeal, leaving only one issue, as to which Plaintiff's had been repeatedly denied the opportunity for a hearing on the merits. The only choices offered were levy or Plaintiff's concession of that issue and an installment agreement to pay amounts still in controversy.

32. Any collection action is premature at this time because the issue of Plaintiff's substantive liability for the only unconceded issues has not been determined, and collection is improper before liability is established. This choice

does not balance the equities between the parties. It denies any equity to the Plaintiff and instead imposes the most severe penalty prior to the time that liability has been established. This is a denial of due process to Plaintiff.

35. If any collection action is warranted, levy is not the appropriate collection alternative at this point. If it is determined that Plaintiff is legally liable for the remaining penalties and interest, at that point collection alternatives should be considered, including an installment agreement or possibly immediate or delayed voluntary payment.

Wherefore, Plaintiff requests an order:

a. Finding that Plaintiff has not had an opportunity to contest its substantive liability for the penalties and interest still in issue, and that no collection alternative should be considered until after that opportunity has been fairly given to Plaintiff;

b. Finding that the question of whether Plaintiff owed the penalties and interest in issue should have been considered in the CDP hearing before the Settlement (Appeals) Officer;

c. Remanding the case to the Appeals Officer with direction to afford Plaintiff the opportunity to contest his substantive liability for the penalties

and interest in issue.

d. Alternatively, if liability is found, finding that levy is not the appropriate collection alternative, but rather that the appropriate collection alternative is either an installment agreement or a short term delay to allow time for either voluntary payment, borrowing, or whatever other alternatives are available at that time.

e. Granting such other relief as may be appropriate.

Respectfully Submitted,

Lieuwen, La Fata Tucker, P.A.

By [signature]
Patricia Tucker, Esq.
4101 Indian School Rd. NE, Ste. 310N
Albuquerque, New Mexico 87110

ATTORNEY FOR PLAINTIFF

(505) 262-0009 phone
(505) 262-1244 fax

Dated: April 15, 2006

Internal Revenue Service
Appeals Office
5338 Montgomery Blvd. N.E.
Albuquerque, NM 87109

Date: MAR 1 6 2006

K-BOB'S CAPITAL RESOURCE GROUP LTD
C/O ED TINSLEY
PO BOX 708
CAPITAN NM 88316

Department of the Treasury

Person to Contact:
Joann Mares
Employee ID Number: 85-00667
Tel: 505-837-9003
Fax: 505-837-9006
Refer Reply to:
AP:FW:ALB:JXM
SSN/EIN Number:
85-0405352
Tax Type/Form Number:
Employment/941 and Civil Penatly
In Re:
Collection Due Process Hearing
(District Court)
Tax Period(s) Ended:
09/1999 12/1999 03/2000 09/2000
12/2000 06/2001 12/2001

Certified Mail 7002 2030 0003 4617 4214

NOTICE OF DETERMINATION
CONCERNING COLLECTION ACTION(S) UNDER SECTION 6320 and/or 6330

Dear Taxpayer:

We have reviewed the taken or proposed collection action for the period(s) shown above. This letter is your Notice of Determination, as required by law. A summary of our determination is stated below. The attached statement shows, in detail, the matters we considered at your Appeals hearing and our conclusions.

If you want to dispute this determination in court, you have 30 days from the date of this letter to file a complaint in the appropriate United States District Court for a redetermination.

The time limit for filing your complaint (30 days) is fixed by law. The courts cannot consider your appeal if you file late. If the court determines that you made your complaint to the wrong court, you will have 30 days after such determination to file with the correct court.

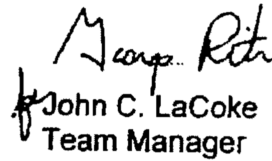
If you do not file a complaint with the court within 30 days from the date of this letter, your case will be returned to the originating IRS office for action consistent with the determination summarized below and described on the attached page(s).

Exhibit A

- If you have any questions, please contact the person whose name and telephone number are shown above.

Summary of Determination
It is determined that the Area Director was correct when he/she determined a levy should be served.

Sincerely,



John C. LaCoke
Team Manager

Enclosures

cc: Patricia Tucker

ATTACHMENT TO NOTICE OF DETERMINATION:

Appeals Case Memorandum
Collection Due Process

The Issue:

The taxpayer has requested a Collection Due Process Hearing under the provisions of IRC §6330 in response to "Final Notice – Notice of Intent to Levy and Notice of Your Right to a Hearing.

There are no statute issues or concerns at this time.

Verification of Legal and Procedural Requirements:

A review of the best information available, including the Secretary's computer records, indicates that all legal requirements have been met and all administrative procedures have been followed. The Appeals Officer had no prior involvement with respect to the unpaid tax specified in IRC §6330(a)(3)(A) before the first hearing under IRC §6330 or IRC §6320 as required by IRC 6330(b)(3). The assessments have been properly made and are correct. All required notices have been sent to the taxpayer including the Notice and demand for the balance due as required by IRC §6303 that was mailed to the taxpayer's last known address. The Final Notice of Intent to Levy was mailed to the taxpayer by certified mail – return receipt requested on November 14, 2005. The taxpayer's request for a Collection Due Process Hearing was timely and submitted on form 12153 that was received on December 5, 2005. The taxpayer did not dispute the finding that all legal requirements have been met and all administrative procedures have been followed.

Relevant Issues Raised by the Taxpayer and Discussion:

The taxpayer has several issues attached to form 122153 these include, "misapplication of two payments made of $34,110.88 and $38,989.12, by hand delivery on April 29, 2005, which were specifically designated as payments for tax and interest on tax, and not for penalties or interest on penalties...taxpayer requested the abatement of late filing and late payment penalties and interest on those penalties. If that request were granted, taxpayer would owe nothing on the employment taxes, since only penalties and interest on penalties remain unpaid...the Social Security Administration originally claimed to be a mismatch between the amount of wages reported per Forms W-2 for 2001 and the amount of wages reported to the Social Security Administration. This penalty is erroneous, and taxpayer does not owe any penalty for 2001 on this basis."

Balancing the need for the efficient collection of taxes with the legitimate concerns of the taxpayer that any collection action be no more intrusive than necessary:

The Director of the Service Center sent all required notices to the taxpayer including the final notice of intent to levy.

The Government proposes levy action because the taxpayer has not paid the outstanding liability.

The taxpayer filed a timely request for a Collection Due Process Hearing in response to the notice of intent to levy. A telephone hearing was conducted on February 14, 2006 with the taxpayer's Power of Attorney Patricia Tucker. At that time collection alternatives were discussed. It was determined that an in-business Installment Agreement may be the best collection alternative. The Power of Attorney was asked to provide a payment proposal on or before February 23, 2006 and was further advised if the payment proposal was not received the determination letter would be issued based on any information previsiously provided to this office. To date, there has been no response.

The proposed collection action balances the need for efficient collection of taxes with the taxpayer's legitimate concern that the collection action be no more intrusive than necessary. In general, the most efficient collection of taxes and the least intrusive collection action is the voluntary full payment by the taxpayer. The least efficient and most intrusive action is the seizure of the taxpayer's asset(s). All other collection actions fall between those two actions. Before collection alternatives to the proposed collection action can be considered, the taxpayer must be in current compliance and indicate a willingness to discuss collection alternatives. The taxpayer did not because the taxpayer did not respond to the hearing he requested. **Therefore, it is the determination of the Appeals Office that the Area Director was correct when he/she determined that a levy should be served.**