DOCUMENT RESUME

02821 - [A2073145]

[Individual's Tax Lien Cannot Be Offset in Favor of Partnership]. B-188943. July 19, 1977. 3 pp.

Decision re: David H. Miller; Kenneth W. Miller; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Tax Administration (2700).
Contact: Office of the General Counsel: General Government Matters.
Budget Function: General Government: Central Fiscal Operations (803).
Organization Concerned: Department of Housing and Urban Development: Equal Opportunity and Administrative Div.; Internal Revenue Service.
Authority: 31 U.S.C. 227. 26 U.S.C. 701. David H. Miller and Kenneth W. Miller v. United States, Ct. Cl. No. 59-71. Boehm v. United States, 20 Ct. Cl. 142 (1885). United States v. Kaufman, 267 U.S. 408 (1925). Blodgett v. Silberman, 277 U.S. 1 (1927). Adler v. Nicholas, 166 F.2d 674 (10th Cir. 1948). Bushmiaer v. United States, 146 F. Supp. 329 (W.D. Ark. 1956).

An opinion was requested concerning a prior decision on a tax lien offset. A tax debt cannot be offset against a judgment in favor of a partnership where it is properly assessed against only one of the parties and not the entire partnership. (Author/DJM)

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DECISION | THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188943 DATE: JUL 19 1977

MATTER OF: David H. Miller and Kenneth W. Miller

DIGEST:

A tax debt, like other debts owed the United States, against one of the members of a partnership may not be offset from a judgment in favor of the partnership, since the tax was neither assessed against, nor due from the partnership, but from the individual.

The Associate General Counsel, Equal Opportunity and Administrative Division, Department of Housing and Urban Development (HUD), has requested our views on the opinion which our Claims Division (reference PA Z-2731109-352), gave to the Internal Revenue Service (IRS) that a tax lien against an individual cannot be offset from a judgment in favor of a partnership in which that individual is a member.

The facts of the case are as follows: On February 23, 1977, the Court of Claims in David H. Miller and Kenneth W. Miller v. United States, Ct. Cl. No. 59-71, awarded a $27,947.75 judgment to David H. Miller and Kenneth W. Miller, as partners, jointly. The judgment award arose out of a suit based on a contract executed in 1970 between the partnership and the defendant, HUD. In footnote 1 of its opinion, the Court states that "Miller" is used to stand for the Miller brothers' partnership, although David Miller alone administered the contract. The Court also took note of the basic partnership principle that acts of one partner bind the partnership.

On April 11, 1977, our Claims Division was informed by HUD that the IRS had served a Notice of Levy on Wages, Salary, and Other Income of $2,033.13 upon David H. Miller for the 1973 tax year. In a letter of April 20, 1977, the Claims Division advised IRS that a lien cannot be offset from a judgment unless the indebted party is the "plaintiff" in whose name the judgment was rendered. The partnership, and not David H. Miller as an individual, was the real party in interest in the suit; therefore, there could be no setoff.

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Amounts due from the United States generally may be offset from judgment awards, according to 31 U.S.C. § 227 (1970):

> "When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, * * * it shall be the duty of the Comptroller General to withhold payment of an amount of such judgment equal to the debt then due the United States * * *."

26 U.S.C. § 701 provides that:

> "[A] partnership is not subject to the income tax, * * * and [p]ersons carrying on business as partners shall be liable for income tax only in their separate or individual capacities."

As early as 1885, the Court of Claims ruled that a judgment against several members (as individuals) of a partnership cannot be set off against a claim by the partnership. [illegible] v. United States, 20 Ct. Cl. 142 (1885). In United States v. Kaufman, 267 U.S. 408 (1925), the Court held that:

> "[T]axes [are] assessed against the individual partners and due from them to the United States. They were neither assessed against, nor due from, the partnership. The tax assessed against [the partner] was none the less an individual tax because the income on which it was based was derived from partnership business."

Id. at 410-11. See Blodgett v. Silberman, 277 U.S. 1 (1927), [illegible] v. Nicholas, 164 F.2d 674 (10th Cir. 1948), [illegible] v. United States, 144 F. Supp. 379 (W.D. Ark. 1956).

The Court of Claims, in [illegible] Plumbing & Heating Co. v. United States, 456 F.2d 713, 717 (1972), a decision involving a fact pattern analogous to that in the instant case, found that joint venturers, one of whom had signed the contract as a formal party to it, were in actuality a partnership. The Court held that the defendant IRS had no lawful authority to apply part of an equitable adjustment due the partnership to satisfy one of the joint venturer's separate tax obligations that were unrelated to the contract.

In the present case, the tax was assessed against and owed by David H. Miller as an individual and therefore cannot be offset from the judgment in favor of the partnership. Accordingly, we are advising our Claims Division to pay the judgment without setoff.

Paul G. Dembling

For the Comptroller General
of the United States