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## Department of Revenue

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### Directive 13-1: Collection of Trustee Tax Pending Appeal

#### Introduction:

Due to a statutory change, effective July 1, 1999, taxpayers are generally no longer required to pay a contested tax liability during the pendency of a timely-filed appeal. G.L. c. 62C, § 32(e). However, under certain circumstances, the Department may proceed with collection activity against a taxpayer or responsible person<sup>[1]</sup> even if an appeal has been filed. This Directive explains those situations.

**Issue:** Under what circumstances will the Department proceed with collection activity against a taxpayer that has filed a timely appeal of a trustee tax liability?

#### Directives:

**Directive 1:** Where a taxpayer has voluntarily filed a trustee tax<sup>[2]</sup> return and self-assessed but not paid a tax, the Department will presume that the taxpayer has collected the tax due from its customers or employees and will proceed with collection activity against the taxpayer or responsible person. The taxpayer or responsible person may rebut this presumption by checking Box 5 on the CA-6, Application for Abatement. The taxpayer can also provide additional information to the Collections Bureau that rebuts the presumption that the taxpayer collected the tax due.

**Directive 2:** Where evidence is obtained through the audit process or from third party sources, such as W-2s or wage reporting, that a taxpayer or responsible person has trustee taxes in its possession which it has not paid over to the Department, including but not limited to, non-filer assessments for withholding tax, the Department will proceed with collection activity.

#### Discussion of Law:

Prior to 1999, the rules pertaining to payment requirements pending appeal provided that taxes were due and payable at the time a tax return was due, determined without regard to any extension. Any amount of tax not paid before the statutory due date accrued interest and penalties pursuant to G.L. c. 62C, §§ 32 and 33. A taxpayer was required to pay the amount assessed, even if that amount was subject to dispute; otherwise, the Department would commence involuntary collection activity.

Pursuant to the statutory amendment that repealed the rules pertaining to payment requirements pending appeal, a taxpayer may delay payment, and the Department may not involuntarily collect, certain taxes if the taxpayer is contesting the amount of tax due at the Departmental level under G.L. c. 62C, § 37, or at the Appellate Tax Board (ATB) or probate court under G.L. c. 62C, § 39. Additionally, the taxpayer may delay paying any amount determined not to be due by the ATB or probate court if there is a further appeal taken from that decision. See TIR 99-18: *Legislative Repeal of So-Called "Pay-to-Play" Provisions*.

Therefore, a taxpayer is not required to pay tax, and the Commissioner cannot involuntarily collect tax during the time the taxpayer: (A) has pending a timely application for abatement filed with the Commissioner under G.L. c. 62C, § 37 contending no tax is due, or (B) has pending a petition filed with the ATB or Probate Court under G.L. c. 62C, § 39, or (C) has pending an appeal from a decision on a petition described in (B), to the extent that the taxpayer has prevailed at the ATB or Probate Court. See G.L. c. 62C, § 32(e). These provisions only apply to assessments, or any portion thereof, that are in dispute. An undisputed assessment or portion thereof must be paid, and may be involuntarily collected by the Department.

This Directive discusses the exceptions that allow the Department to proceed with collection of taxes despite a pending appeal in the case of trustee taxes imposed under G.L. cc. 62B and 64G to 64I, inclusive, where the taxes were in fact withheld by the employer or collected by the vendor and not remitted to the Department, and the presumptions that the Department will apply in determining those taxes were withheld or collected by the employer or vendor.

In addition to the statutory provisions allowing collection of a contested trustee tax that has been collected by a taxpayer, G.L. c. 62C, § 32(e) also specifies certain circumstances in which taxpayers who may be attempting to delay payment of the tax by contesting the amount of the tax due may be required to post security in a form satisfactory to the Commissioner. In general, the Commissioner may require security (1) when collection of the tax will be jeopardized by delay, (2) when the past tax return filing or payment history of the taxpayer raises doubt as to the collection of the tax if delayed, or (3) when any application for abatement or petition is frivolous and has been filed primarily to avoid prompt payment of the tax. Frivolous appeals include those where a taxpayer claims an inability to pay rather than challenging the validity of the underlying assessment. In these cases, the Commissioner must notify the taxpayer in writing by certified or registered mail of the security requirement, and the taxpayer may appeal the requirement to the ATB within 30 days of the date of the Commissioner's notice. See DOR Directive 06-6. Depending upon the facts of a particular abatement application, the requirements to post security in this paragraph may apply to trustee taxes, even if a presumption of actual collection of trustee tax does not apply under those facts. If a vendor fails to post security within 30 days of demand, the Department will proceed with collection unless there has been a timely

appeal of the demand to the ATB.

/s/Amy Pitter

Amy Pitter  
Commissioner of Revenue

AP:MF:wm

May 24, 2013

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[1] A “responsible person” is defined under 830 CMR 62C.31A.1(2) as any person who is or was under a duty to pay over taxes imposed on a corporation, partnership or limited liability company by G.L. cc. 62B, 64G, 64H and 64I.

[2] Trustee taxes include withholding taxes due under G.L. c. 62B or room occupancy, sales and meals taxes, etc. due under G.L. cc. 64G through 64I.

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