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BULLETIN NO. 489

COLLECTION, BANKRUPTCY AND SUMMONSES BULLETIN

Department of the Treasury | Office of Chief Counsel | Internal Revenue Service

Appeals Officer May Rely on "Literal Transcripts"

Stanifird v. Wilcox, 87 AFTR2d ¶ 2001-1058 (D. Az. June 12, 2001), is the first Collection Due Process case to be decided on a motion for summary judgment, and the first to hold that a "literal transcript" may be relied on by the appeals officer in making his decision.

The taxpayer sought judicial review of an unfavorable Notice of Determination, arguing that the Service did not follow proper procedures in assessing frivolous return penalties against him. Granting the Service's Motion for Summary Judgment, in a brief opinion the court held that the appeals officer did not abuse his discretion by relying on computer transcripts ("literal transcripts") in determining that the proposed enforcement actions described in the notice of intent to levy should be allowed to proceed.

COLLECTION DUE PROCESS

CASES

1. **BANKRUPTCY CODE CASES: Allowance of Administrative Expenses: Penalties**

In re Chris-Marine, Inc. 87 AFTR2d ¶ 2001-1032 (Bankr. M.D. Fla. May 17, 2001) - The taxpayer brought suit to quash several formal document requests issued by the Service under I.R.C. § 982(c)(1). For failure to respond to the Service's document requests during discovery, the court imposed continuing monetary contempt sanctions against the taxpayer, who responded by filing Chapter 11 bankruptcy. The total fines to date were scheduled as unsecured debts, but the plan made no provision for the continuing fines as an administrative expense. The court found that the post-petition accruing punitive penalties did not benefit the estate, nor did they resulted from continuing violations ordinarily incident to the debtor's continuing business. The per diem fines thus were not administrative expenses under B.C. § 503(b).

2. **BANKRUPTCY CODE CASES: Chapter 13: Secured Taxes**

In re Berry, 2001 Bankr. LEXIS 627 (Bankr. E.D. Tenn. May 11, 2001) - Taxpayer had a qualified retirement plan under I.R.C. § 401(a) at the time he filed for Chapter 13 bankruptcy. Although the Service had a filed tax lien which predated the bankruptcy, the debtor listed the Service's claim as unsecured. The court found that, although the retirement plan was subject to an anti-alienation clause, that state-law restriction was unenforceable against the Service's tax lien under I.R.C. § 6321. Based on this finding, the court held that the Service had a secured claim in the debtor's pension plan, which was not property of the estate as regards the debtor's other creditors.

3. **BANKRUPTCY CODE CASES: Determination of Secured Status**

Ryan v. Homecomings Financial Network, 2001 U.S. App. LEXIS 11378 (4th Cir. Jun. 1, 2001) - Real estate was subject to first deed of trust, which exceeded the property's equity, and a wholly unsecured second deed of trust. The Chapter 7 debtors moved to "strip off" the junior lien under B.C. § 506(d), arguing that the Supreme Court's decision in Dewsnup v. Timm, 502 U.S. 410 (1992) prohibits only the "strip down" of a junior lien, not the complete removal of a wholly unsecured lien. The Fourth Circuit disagreed, holding that liens pass through bankruptcy unaffected, and that to strip off the junior lien would deny a secured creditor any benefit of an increase in the property's equity. The court also found Nobelman v. American Savings Bank, 508 U.S. 324 (1993), which dealt with bifurcation of a secured claim, inapplicable to section 506(d). The court concluded that a Chapter 7 debtor may not use section 506(d) to strip off a wholly unsecured consensual junior lien from real property.

4. **BANKRUPTCY CODE CASES: Responsible Officer**

Hartung v. State, 22 P.3d 1 (Alaska 2001) - Taxpayer was CFO of a corporation that accrued unpaid state employment taxes for the first quarter of 1995. In April, 1995, the corporation filed for Chapter 11 bankruptcy, and under the cash collateral order, the corporation could not disburse funds to pay taxes without the lender's permission (which was refused). The state determined that the taxpayer was a responsible officer liable for the taxes, but the court disagreed. Finding that after the bankruptcy filing the taxpayer no longer had control over the corporation's finances, or to compel the corporation to pay its tax liability, the court held the taxpayer was not personally liable for the employer's share of the taxes. The court also found that the employee's share, under state law, was not a asset of the bankruptcy estate, and so remanded for a determination of whether the taxpayer still had the authority to make these tax payments. The dissent noted that the taxpayer could have paid the taxes in the time between the date the taxes accrued and the date the corporation filed for bankruptcy, and disagreed with the majority that subsequent events (the bankruptcy) should relieve the taxpayer of liability.

5. DAMAGES, SUITS FOR: Against U.S.: Unauthorized Collection

Kugler, Executrix v. United States, 2001 U.S. App. LEXIS 12018 (3d Cir. May 23, 2001) *(unpublished)* - Widow sued Service over her husband's suicide, following the Service's sale of their residence for unpaid taxes. The widow argued that the revenue agent recklessly or intentionally disregarded Treas. Reg. § 301.6325-1(d) by not recommending subordination of the Service's tax lien (which would have permitted the taxpayers to obtain a second mortgage and not lose their home), and so the Service was liable for damages under I.R.C. § 7433(a). The court found the regulation provided only that the taxpayer could make a request for subordination, not that the Service had a legal duty to subordinate its lien, and so the Service was not liable for damages under section 7433(a).

6. LEVY: Wrongful

Scoville v. United States, 250 F.3d 1138 (8th Cir. 2001) - Service levied on insurance proceeds payable to wife, under the theory that she was the taxpayer's nominee. The wife brought a wrongful levy suit under I.R.C. § 7426, arguing that her husband had no interest in the policy, which covered a farm titled solely in her name. The Eighth Circuit affirmed the district court, finding that the taxpayer retained an interest in the farm even though, as a self-styled tax protestor, he took steps to remove his name from the property. Although the taxpayer transferred the property to his wife as part of a divorce settlement (they later remarried), he continued to live on and use the property, and paid for its upkeep. Further, he dealt with the insurance adjustors and was a beneficiary on the policy. The court found sufficient badges of fraud to conclude the taxpayer retained a beneficial interest in the property, which provided sufficient nexus for the federal tax lien to attach to the insurance proceeds.

7. LIENS: Subrogation

Banker's Trust Co. v. United States, 2001 Kan. App. LEXIS 476 (Kan. Ct. App. May 25, 2001) - Service filed tax lien in 1992, reducing that lien to judgment in 1993, which was recorded in the land records. In 1997, the taxpayer transferred the property to his wife, who satisfied an existing mortgage by taking out a new mortgage. The new mortgage company obtained title insurance, which showed the United State's tax lien of record. In a subsequent foreclosure suit, the mortgage company argued that under the doctrine of equitable subordination, the proceeds of its loan were used to pay off the existing loan. Therefore, the mortgage company's lien should replace the earlier mortgage lien at the same priority (ahead of the United States). The court, reversing the trial court, disagreed. The court held that the doctrine of equitable subordination may not be applied to relieve a party who negligently takes a lien or an interest in property which is subject to prior liens of record of which that party had either actual or constructive notice.

The following material was released previously under I.R.C. § 6110.
Portions may be redacted from the original advice.

CHIEF COUNSEL ADVICE

OFFER-IN-COMPROMISE; THIRD PARTY DEPOSIT

CC:PA:CBS:Br2
GL-107905-00
U.I.L. 17.18.00-00
July 7, 2000

MEMORANDUM FOR ROBERT C. LONGFORD
CHIEF, RETURN DELINQUENCY & DISTRICT OFFICE SUPPORT SECTION

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy, Summonses)

SUBJECT: Advisory Opinion–Refund of Third-Party Deposits Upon Rejections of Offers in Compromise

This memorandum responds to a request for advice from Vicki L. O'Hara by e-mail on April 7, 2000, concerning refunds of deposits when the Service rejects an offer in compromise, particularly when a third party has provided the deposit. You have asked us to consider the following question: When a third party has provided the deposit for a taxpayer's offer in compromise, is the Service required or authorized to refund the deposit to the third party upon rejection; and if not, should the Service disclose this prior to taking the deposit? For the reasons which follow, we would advise that all deposits be returned to the taxpayer.

DISCUSSION

The Code, the regulations, and Form 656 state in varying language that deposits should be returned to the taxpayer. The Internal Revenue Code states that on rejection of an offer in compromise, the Service shall refund the deposit to the "maker" of the offer. I.R.C. § 7809(b). Language on Form 656 also states the assumption that deposits will be returned to the taxpayer: "the IRS will return any amount paid with the offer." Although Treas. Reg. §301.7122-1T states only that the deposit "will be refunded" in the event of rejection, it does give only the "taxpayer" the authority to authorize the Service to apply the deposit to tax liabilities. Further, the Internal Revenue Manual, in its provisions relating to deposits, clearly contemplates refunding the deposit to the taxpayer. For instance, I.R.M. 5.8.7.7(2) states that the Service should request the taxpayer to sign Form 3040, authorizing them to apply the deposit to outstanding liabilities in the event the offer is not accepted; however, it further provides, "If the taxpayer does not authorize application of the deposit, the deposit **must** be refunded to the taxpayer" (emphasis in original). Further, I.R.M. 5.8.2.5, relating

to the disposition of deposits received with unprocessable offers in compromise, provides "[d]eposits received with offers that are not processable must be returned to the taxpayer," and that the employee making the determination is "responsible for sending the deposit back to the taxpayer."

None of these sources, however, directly addresses the return of deposits made by third parties on behalf of the taxpayer. As a general rule, the Service would want to return funds received for the payment of tax liabilities to the taxpayer. This rule relieves the Service from becoming embroiled in debates over the ownership of funds submitted for the payment of taxes. This is illustrated by Ralston Steel Corp. v. United States, 340 F.2d 663 (Cl. Ct. 1965), cert. denied, 381 U.S. 950 (1965). Here, a third party advanced deposit money through an escrow agent, along with written statements that the taxpayer had borrowed the deposit money, that the offer expired on a certain date, and that the Service should return the deposit to the escrow agents if it did not accept the offer by that date. Before the Service acted on the offer, the third party asked to withdraw it and demanded return of the deposit. The Service refused and later accepted the offer in compromise. The third party then brought suit, seeking a refund of the deposit. Id. at 666.

At the time of this decision, Treas. Reg. § 301.7122-1(d)(4) provided "[a]n offer in compromise may be withdrawn by the proponent at any time prior to its acceptance." Thus, the court's analysis turned on the question whether a nonparty who had provided the deposit could be considered a proponent of the offer with the power to withdraw it. The court took a narrow view of the word proponent, and held that "'proponent,' . . . does not go beyond an offeror and, more especially, does not impose any duty on the Government to determine the real owner of the funds accompanying the offer." Id. at 670-71.

Although the court in Ralston did not consider the precise issue of whether the Service may refund a deposit to a third party, its analysis is instructive in its reluctance to impose a duty on the Service to determine the owner of deposit funds or to refund them to anyone besides the actual taxpayer.

In Dynamic Service, Inc. v. Granquist, 56-2 U.S.T.C. 9784 (D. Or. 1956), the court considered a deposit made by a third party to be "a payment made by the taxpayer," and stated that "the $1,000.00 in dispute was for purposes of this case taxpayer's money." The court dismissed the case, holding that the third party did not have standing to bring suit to recover the deposit.

From the language of the Code, the regulations, and the IRM, we presume that the Service has made a policy decision to return any funds submitted for the payment of taxes to the taxpayer rather than to a third party source of the funds. The courts that have considered similar cases have agreed that third parties cannot compel the Service to return funds to them that they may have provided to taxpayers who have made offers in compromise. Thus, unless the taxpayer has signed a Form 3040 authorizing application of the deposit to tax liabilities, the Service should refund the deposit to the taxpayer upon rejection of the offer in compromise. Advising third parties that any funds they provide will be returned to

the taxpayer may prevent later misunderstandings with third parties, but the Service has no legal obligation to do so.

THIRD PARTY CONTACTS; LIMITED LIABILITY COMPANIES

CC:PA:CBS:Br3
TL-N-214-00
UIL:57.02.00-00

February 21, 2001

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (FINANCIAL SERVICES & HEALTHCARE), LMSB AREA 1, BROOKLYN

FROM: Lawrence Schattner, Chief, Branch 3
(Collection, Bankruptcy & Summonses)

SUBJECT: Application of I.R.C. § 7602(c) to Limited Liability Companies - Definition of "person other than the taxpayer"

This Field Service Advice responds to your memorandum dated October 25, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

Field Service Advice is Chief Counsel Advice and is open to public inspection pursuant to the provisions of section 6110(i). The provisions of section 6110 require the Service to remove taxpayer identifying information and provide the taxpayer with notice of intention to disclose before it is made available for public inspection. Sec. 6110(c) and (i). Section 6110(i)(3)(B) also authorizes the Service to delete information from Field Service Advice that is protected from disclosure under 5 U.S.C. section 552(b) and (c) before the document is provided to the taxpayer with notice of intention to disclose. Only the National Office function issuing the Field Service Advice is authorized to make such deletions and to make the redacted document available for public inspection. ACCORDINGLY, THE EXAMINATION, APPEALS, OR COUNSEL RECIPIENT OF THE DOCUMENT MAY NOT PROVIDE A COPY OF THIS UNREDACTED DOCUMENT TO THE TAXPAYER OR THEIR REPRESENTATIVE. The recipient of this document may share the unredacted documentation with those persons whose official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND:

Company X =
Company Y =

Company Z =
Member 1 =
Member 2 =
Member 3 =
Member 4 =
Member 5 =
Date 1 =
Date 2 =
Year 1 =
Year 6 =
Year 8 =

ISSUE

Whether Company Z should be treated as a "person other than the taxpayer" for purposes of the advance notification requirements of I.R.C. § 7602(c)(1).

CONCLUSION

Company Z should not be treated as a "person other than the taxpayer" for purposes of the advance notification requirements of I.R.C. § 7602(c)(1).

FACTS

During the course of the examination of the consolidated returns filed by Company Y, the examiners discovered a lease stripping transaction involving airplanes owned by Company Z, a subsidiary of Company Y and a member of its consolidated group. As part of an investment structuring plan, Company Z contributed fully-depreciated leased airplanes to Member 1, a corporation that is 100% owned by Company Z and also a member of the consolidated group. On Date 1, an LLC now known as Company X was formed by Member 1 and two other corporations that are owned by Company Z, Member 2 and Member 3.

Shortly thereafter, the composition of the LLC was changed by withdrawal of Member 3 and the addition of two new members. The two new members were Member 4 and Member 5. Consequently, at this stage of the transaction, the aircraft were being held by an LLC which was made up of four members. Two of the members of Company X, Member 1 and Member 2, are owned by Company Z and are members of the Company Y consolidated group.

Pursuant to the terms of Company X's operating agreement, none of its members were to have any say in the management or control of the company or to be able to act for or bind the company. Instead, management of Company X was vested in a group of three managers who were elected by Company X's Class B members. The Class A members, Members 4 and 5, had no voting power or voting rights, but did have the power to cause

Company X to be liquidated if it failed to make distributions of certain amounts in the years Year 1 through Year 8.

The Company X operating agreement also provided that capital accounts would be maintained for Members 1, 2, 4 and 5. Members 4 and 5 are also referred to as the "equity investors". Pursuant to the agreement, the capital accounts were to be increased for property contributed by each member and the book income allocated to the member, and decreased for distributions to each member and book losses allocated to each member. On liquidation, the equity investors were to receive cash payments equal to the values of their capital accounts plus "equity investor guaranteed payments."

Company X filed U.S. Partnership returns for Year 1 through Year 6 in which it designated Member 1 as its tax matters partner. As noted earlier, Member 1 is the entity to which the airplanes were contributed, is 100% owned by Company Z, and is a member of the consolidated group.

On Date 2, Members 4 and 5 sold their interests in Company X to two corporations that are subsidiaries of Company Z. Consequently, after the sale, all of the members of Company X are subsidiaries of Company Z. Because the transaction allocated income from the leased airplanes to a party other than the party that claimed the depreciation relating to them (Company Z's Transportation & Industrial unit), the transaction is a lease stripping transaction.

In connection with the examination of the returns of Company X, the LMSB Examination team proposes to summons information from Company Z. Company Z has been controlling the examination of Company X and the Tax Director of Company Z has been the team's point of contact throughout the Company X examination. The Examination team has had no contact with Company X through officers of Member 1 or the managers of Company X.

LAW AND ANALYSIS

Under I.R.C. § 7602(c)(1), an officer or employee of the Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer. The statute also requires the Service to provide the taxpayer with a record of persons contacted both periodically and upon the taxpayer's request. I.R.C. § 7602(c)(2). The congressional intent behind these requirements is to provide taxpayers with (1) the opportunity to come forward with information before third parties are contacted, and (2) the means to address any business or reputational concerns arising from such contacts, without impeding the ability of the Service to make those contacts that are necessary to enforce the internal revenue laws. With this intent in mind, an interpretative approach to section 7602(c) has been adopted that balances taxpayers' business and reputational interests, with third parties' privacy interests, and the Service's responsibility to administer the internal revenue laws effectively.

For purposes of complying with the advance notice and recordkeeping requirements of the statute, a Service employee must determine whether a person "other than the taxpayer" will be contacted "with respect to the determination or collection of the tax liability of such taxpayer." Accordingly, in order to determine whether the notice and recordkeeping requirements of the statute apply in a given situation, a Service employee must determine who is the taxpayer with respect to whose tax liability a contact is being made.

As stated in the FACTS section of this memorandum, in the instant case the Service is considering issuing a summons in connection with its examination of the returns of Company X, an LLC. Since Company X elected to be classified as a partnership for federal income tax purposes, at least for taxable years ending on or before August 5, 1997, Company X is subject to the TEFRA partnership provisions.[1] The audit of TEFRA partnerships is conducted at the partnership (entity) level pursuant to I.R.C. §§ 6221 through 6234, but any resulting liability is ultimately assessed against the individual partners. The tax matters partner (TMP) is responsible for certain administrative duties during the course of the examination, including keeping the other partners informed to the extent and in the manner provided by regulations. See I.R.C. § 6223(g). Additionally, under section 6223(a), each partner whose name and address is furnished to the Service is entitled to receive notice of (1) the beginning of an administrative procedure at the partnership level with respect to a partnership item, and (2) the final partnership administrative adjustment from any such proceeding.

In a TEFRA partnership proceeding, the tax treatment of partnership items is at issue. Although the respective tax liabilities of the partners may be affected by the results of the partnership-level proceeding, and thus, they are parties to the proceeding, a third party contact relating to the tax treatment of partnership items is not with respect to the determination of the specific tax liability of any of the partners. Hence, the partnership should generally be viewed as the taxpayer for purposes of giving notice under section 7602(c)(1). Notice should be given to the TMP because the TMP is the statutory representative of the partnership and the partners.

Applying the above to the facts in the instant case, the LLC, Company X, should be treated as the taxpayer for purposes of section 7602(c), and the required notices should be provided to Member 1 as the designated TMP of Company X.

A related question is whether contacts with members of an LLC are section 7602(c) contacts. Notwithstanding that we have concluded that the partnership (LLC), rather than the partners (members), should generally be viewed as the taxpayer for purposes of giving

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[1] As part of the Taxpayer Relief Act of 1997, certain changes were made to the TEFRA partnership provisions, such as the expansion of the small partnership exception, which potentially could effect whether Company X remains subject to those provisions for taxable years ending after the effective date for those changes, August 5, 1997.

notice under section 7602(c)(1), it does not necessarily follow that the partners (members) are persons other than the taxpayer. In fact, for the reasons discussed below, we have concluded that they are not.

Proposed regulations regarding section 7602(c) were issued by the Service on January 2, 2001. In defining the phrase "person other than the taxpayer," the proposed regulations exclude "[a] current employee, officer, or fiduciary of a taxpayer when acting within the scope of his or her employment relationship with the taxpayer." The rationale for this position is explained in the preamble to the proposed regulations as follows:

> The meaning of "person other than the taxpayer" when contacting business entities.
>
> Section 7602(c) applies to contacts with "any person other than the taxpayer." The "person" contacted may be a business entity rather than an individual. IRS employees must often contact employees of business entities. These contacts arise in two situations. First, IRS employees examining a business taxpayer generally must communicate with employees of the taxpayer. Second, in the course of determining or collecting any taxpayer's liability, an IRS employee may need to contact employees of a third-party business entity. For example, when an IRS employee contacts a bank or other business, the IRS employee actually communicates with an employee of the bank or business.
>
> With respect to the first situation, when an IRS employee contacts an employee of a taxpayer under examination, the proposed regulations provide that a taxpayer's employee is not a "person other than the taxpayer" when acting within the scope of his or her employment. Several rationales underlie this position. First, corporations may speak and act only through individuals. Moreover, state law generally provides that employers are responsible for their employees, regardless of the form under which the employer does business, when the employees are acting within the scope of their employment. It seems reasonable, therefore, to treat employees who are acting within the scope of their employment as being part of the business taxpayer under examination. Second, this approach is consistent with how employees are treated elsewhere in the Internal Revenue Code. See I.R.C. 7609(c)(2)(A)(summons issued to any person who is the taxpayer under investigation "or any officer or employee of such person" not considered a summons issued to a third party). From an administrative standpoint, IRS employees examining a business generally rely on certain individuals designated by the taxpayer to provide information and direct the IRS to whichever employees can best provide that information. The regulations will not affect this current examination practice and business taxpayers will continue to be informed about contacts with their employees pursuant to current procedures.

Prop. Treas. Reg. § 301.7602-2, 66 Fed. Reg. 77 (Jan. 2, 2001).

Consistent with the above rationale, contacts made with the partners of a TEFRA partnership are not treated as contacts with persons other than the taxpayer. Since a partnership is not a natural person, it can only speak or act through authorized agents or representatives. Similarly, contacts with a partnership generally must be through a natural person, i.e., an individual. By virtue of their owning a partnership interest, the partners are afforded certain rights and charged with certain responsibilities relating to the partnership by state laws such as the Uniform Partnership Act and the Uniform Limited Partnership Act, as well as under the partnership agreement that they entered into with respect to the specific partnership of which they are a partner. In addition, in TEFRA partnerships, each partner has the right to participate in any administrative proceeding relating to the determination of the proper tax treatment of partnership items at the partnership level. I.R.C. § 6224(a). Hence, the partners may be viewed as being in privity with the partnership, at least for purposes of the administrative tax proceeding. Consequently, a contact made with any partner of a TEFRA partnership should be treated as a contact of the partnership, rather than as a third party contact.

Likewise, applying the same rationale and noting that under the Uniform Limited Liability Company Act, members of an LLC generally have rights and obligations comparable to those of partners in a partnership, a contact with a member of an LLC that is subject to the TEFRA partnership provisions should be treated as a contact of the LLC, rather than as a third party contact. Consequently, if, for example, the Service contacted Member 1 or Member 2, the contact would be treated as tantamount to contacting Company X, and thus, would not be a third party contact. The analysis does not stop here, however, because in the instant case, the Service is contemplating contacting Company Z, which is the parent of Member 1 and Member 2, but is not itself a direct member of Company X. In determining whether contacting Company Z would constitute a section 7602(c) contact, we once again look to the TEFRA partnership provisions for guidance. Under section 6231(a)(2), the term "partner" means not only a partner in the partnership, but also includes any other person whose income tax liability is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership. I.R.C. § 6231(a)(2)(B). In the instant case, Company Z, Member 1 and Member 2, are all members of a consolidated group, the common parent of which is Company Y. Pursuant to Treas. Reg. § 1.1502-6(a), the common parent and each subsidiary that was a member of a consolidated group during any part of the consolidated return year is severally liable for the tax for that year. Thus, by virtue of being a member of a consolidated group that also includes Member 1 and Member 2, the tax liability of Company Z is determined in part by taking into account indirectly partnership items of Company X, the LLC. Therefore, Company Z is treated as a partner (member) of the partnership (LLC) for purposes of the TEFRA partnership provisions. Accordingly, since we determined above that contacting a member is treated as the equivalent of contacting the LLC rather than contacting a third party, contacting Company Z would not be a section 7602(c) contact.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[THIS MATERIAL WAS REDACTED]

OFFER IN COMPROMISE; TAX SHELTERS; EXCEPTIONAL CIRCUMSTANCES

February 8, 2001

CC:PA:CBS:Br2
GL-804160-00
UILC: 17.07.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SB/SE, AREA 7, SEATTLE

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Offer in Compromise -

This memorandum responds to your request for advice dated June 13, 2000. This document is not to be cited as precedent. You have asked our advice as to whether the above referenced taxpayer's tax shelter-related liabilities could be compromised under the Commissioner's new authority to compromise based on the promotion of effective tax administration. We conclude this case does not present exceptional circumstances such that collection of the full tax liability would be detrimental to voluntary compliance by taxpayers.

LEGEND:

X =
Y =
Date 1=
a =
b =

BACKGROUND:

In 1983, the taxpayer learned of the opportunity to invest in X, a partnership which was itself a partner in several of the nationally marketed Y partnerships. The tax attorney who told him of the investment assured him that the general partners were credible and that the investment was real and substantive as opposed to merely a tax shelter. The taxpayer states that he also sought the advice of his accountant and hired an independent tax attorney to review the materials, and that both advised him that the investment was sound from both a tax and profit potential standpoint. The taxpayer signed on as a limited partner and immediately realized investment tax credits which significantly reduced or eliminated his tax liabilities for 1980, 1981, 1982, and 1983.

In 1988, the taxpayer learned that the Y partnerships were under investigation by the Service and that the investment tax credits would be disallowed. In an attempt to remove the partnership-related items from his return, the taxpayer filed amended returns for the

years 1980 through 1985. The Service Center did not process the returns, concluding that the statute of limitations for assessment had run for those years.

In 1989, the taxpayer accepted the Service's settlement offer with respect to the proposed adjustments to the partnership items on his returns. Consistent with this settlement, tax motivated transaction interest under former section 6621(c) was assessed against the taxpayer. In 1996, the taxpayer received a letter outlining the Service's settlement proposal with respect to overvaluation, substantial underpayment, and negligence penalties. Partners accepting the settlement would be assessed only a 10% section 6659 overvaluation penalty. For partners who declined to settle, the letter explained that the Service's litigation position would be that they were liable for both substantial underpayment and negligence penalties. The taxpayer apparently declined to settle, and statutory notices of deficiency were issued shortly thereafter. The taxpayer defaulted on the notices and penalties were assessed in late 1996. As of Date 1 the tax liability totaled more than $a.

The taxpayer has offered to compromise with the Service on terms more favorable than those he declined to accept in 1996. He proposes to pay just over $b in full satisfaction of his liabilities relating to investment in the tax shelter. The collection information statements in the file reveal that this offer represents less than 10% of the current value of his assets, without taking current and prospective income into account. In fact, it is undisputed that the assessed tax liability, including all interest accruals, could be collected in full without causing the taxpayer economic hardship as defined under Treasury regulations. The taxpayer's offer is premised not on any hardship or collectibility grounds, but on the theory that holding him liable for full payment would be unfair and would therefore be detrimental to voluntary compliance.

The taxpayer raises two principal arguments in support of his contention that equity and fairness warrant the acceptance by the Service of less than the previously determined and assessed tax. First, the taxpayer argues that he should not be held liable for penalties or tax-motivated transaction interest because he performed "due diligence" prior to investing in the partnership and signed on as a partner with a legitimate expectation of future profits. Second, the taxpayer argues that the Service erred by failing to process the amended returns he submitted in December of 1988. In addition to these specific allegations, the offer and the supporting documentation imply that the Service should compromise with the taxpayer because he was defrauded by the tax shelter promoters.

In sum, the taxpayer argues that acceptance by the Service of his proposed compromise would promote effective tax administration because collecting the tax in full would be detrimental to voluntary compliance by taxpayers. Your draft memorandum to the offer group concludes that compromise of the taxpayer's tax shelter-related liabilities would not promote effective tax administration. As is explained more fully below, we agree with your conclusion.

DISCUSSION:

The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to referral to the Department of Justice for prosecution or defense. I.R.C. § 7122(a). Permissible bases for compromise are established by Treasury regulations. Temporary regulations issued July 19, 1999, expanded the Service's authority to compromise beyond the traditional bases of doubt as to collectibility or doubt as to liability. See Temp. Treas. Reg. § 301.7122-1T. Where there are no grounds for compromise on collectibility or liability grounds, a compromise may be entered into to promote effective tax administration, where: (1) collection of the full liability would create economic hardship within the meaning of section 301.6343-1 of the Treasury Regulations; or (2) exceptional circumstances exist such that collection of the full liability would be detrimental to voluntary compliance by taxpayers. Temp. Treas. Reg. § 301.7122-1T(b)(4). No such compromise may be entered into where it would undermine future compliance with the tax laws. Id.

The taxpayer has proposed compromise of this case based on a determination that it would "promote effective tax administration" under the standards articulated in the regulations. The taxpayer argues that even though, as is noted above, the tax liability at issue could be collected in full without causing economic hardship, collection of the full tax liability would be detrimental to voluntary compliance by taxpayers. Where this basis can be established, compromise is authorized regardless of the taxpayer's financial circumstances. See Temp. Treas. Reg. § 301.7122-1T(b)(4)(ii). The regulations do not give a more exact standard or list factors to be considered, but illustrate this basis through two examples. See Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(E). The procedures implementing this basis for compromise show that the Service anticipates compromising when collection of the full liability would be unfair or inequitable. See IRM 5.8.11.2.2(3); Form 656, Offer in Compromise (Rev. 1-2000), Instructions at 2.

The taxpayer maintains that his "due diligence" in investigating the partnership before investing demonstrates that his decision to invest was motivated by profit potential. However, his personal profit motive is not relevant to determination of the tax motivated transaction interest he seeks to avoid. Whether a partnership transaction is entered into for profit is determined by the intent of the partnership, based on the intent of the general partners entering into the transaction. See Polakof v. Commissioner, 820 F.2d 321 (9th Cir. 1987); Brannen v. Commissioner, 78 T.C. 741, 501-504 (1982), aff'd, 722 F.2d 695 (11th Cir. 1984). See also Goodwin v. Commissioner, 75 T.C. 424, 437 (1980), aff'd without published opinion, 691 F.2d 490 (3d Cir. 1982); Siegel v. Commissioner, 78 T.C. 659, 698 (1982), acq., 1984-2 C.B. 1 and acq., 1984-2 C.B. 2.[2] As a "partnership item," profit motivation is determined in a partnership level proceeding. Treas. Reg. § 301.6231(a)(3)-1(b); I.R.C. § 6221.

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[2] Similarly, the valuation of partnership assets for purposes of the overvaluation penalty under former section 6659(c) and section 6662(b)(3) is determined at the partnership level. Smith v. Commissioner, T.C. Memo. 1990-510. Such an overvaluation makes tax motivated interest apply under former section 6621(c)(3)(A)(i).

A partner is bound with respect to "affected items" based on the determination of partnership items. Affected items are items that are affected by partnership items. I.R.C. § 6231(a)(5). Affected items include penalties. Temp. Treas. Reg. § 301. 6231(a)(5)-1T. Tax motivated interest under former section 6621(c) is an affected item. White v. Commissioner, 95 T.C. 209 (1990). If a transaction is determined to be a sham at the partnership level because the partnership did not enter into the transaction for profit, tax motivated interest under former section 6621(c) applies irrespective of an individual partner's personal motive for investing in the partnership. See Thomas v. United States 83 AFTR2d Par. 99-369 (6th Cir. 1999) (section 6621(c) applies because the transactions were shams, regardless of the individual partner's profit motive). See also Chakales v. Commissioner, 79 F.3d 726, 728 (8th Cir.), cert. denied, 117 S. Ct. 85 (1996); Anderson v. Commissioner, 62 F.3d 1266, 1274 (10th Cir. 1995); Estate of Carberry v. Commissioner, 933 F.2d 1124, 1130 (2d Cir. 1991); Karr v. Commissioner, 924 F.2d 1018, 1026 (11th Cir. 1991); Kozlowski v. Commissioner, 66 T.C.M. (CCH) 754, 755-56 (1993), aff'd, 70 F.3d 1279 (9th Cir. 1995); Klieger v. Commissioner, 64 T.C.M. (CCH) 1624, 1638 (1992).

The taxpayer's offer makes no effort to dispute any of the foregoing. His offer maintains that these rules are unfair and that his personal profit motive should be taken into account. He is essentially maintaining that Congress has enacted an unfair statutory scheme and that the Service should use its compromise power to rewrite the rules regarding the determination of partnership liabilities. We cannot agree that the authority to compromise under section 7122 is so broad as to allow the Service to disregard or override the considered judgments of Congress.[3] The Service's procedures for compromise based on the promotion of effective tax administration recognize that the policy choices made elsewhere in the Code must be given due consideration. See IRM Handbook 4.3.21, Exam Offer in Compromise, Section 3.4(3). Where, as here, Congress has enacted an express and comprehensive scheme which dictates a certain result, a decision to categorically disregard that scheme would be beyond the Service's authority.

As is mentioned above, the taxpayer attempted to amend his returns to remove most of the investment tax credits related to his investment in the subject partnership. Upon receipt of the amendments, the Service Center concluded that the statute of limitations prevented amendment of the returns in question. The taxpayer and the offer examiner

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[3] An analogy to bankruptcy law may help illustrate this point. Congress has granted bankruptcy courts the power "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). However, the Supreme Court has held that even this broad grant of power does not exist in a vacuum and cannot be used to disregard or circumvent specific Bankruptcy Code provisions. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (stating that a bankruptcy court's equitable powers "must and can only be exercised within the confines of the bankruptcy code"). It is logical to conclude that the Secretary's discretionary compromise authority is similarly constrained.

have correctly pointed out that the statute of limitations for assessment of the items the taxpayer sought to amend was held open by the on-going partnership level proceeding. However, it does not follow from this conclusion regarding the statute of limitations that the amended returns should have been processed. The Code requires that all partnership items on an individual partner's return be treated in a manner consistent with the position taken on the partnership return. See I.R.C. § 6222(a). A partner who wishes to amend partnership items can request to do so by filing an administrative adjustment request with the Service within three years of the filing of the partnership return and prior to the issuance of a final partnership administrative adjustment (FPAA) to the tax matters partner. See I.R.C. § 6227(a) & (d). After the time for filing an administrative adjustment request has expired, an individual partner can make a deposit to stop the accrual of interest, but only in the manner specified by Announcement 86-114, 1986-47 I.R.B. 46. Because the taxpayer did not file an administrative adjustment request (Form 8082) with his return, and did not comply with the deposit procedures of Announcement 86-114, the amended returns should not have been processed.[4]

Finally, we address the claim that the fraudulent acts of the tax shelter's general partners create a basis for compromise of this case. We cannot agree with this premise. In directing the Service to consider additional bases for compromise in order to promote effective tax administration, Congress gave no indication that it intended that the Service would adopt a standard under which the Government would act as an insurer or would relieve taxpayers of those risks attendant to business and financial transactions. The regulations expanding the Commissioner's compromise authority are also inconsistent with this idea. They give two examples of potential compromises based on the conclusion that collection would be detrimental to voluntary compliance by taxpayers. In the first, a taxpayer is incapacitated and unable to comply with the tax laws. Upon regaining his ability to do so, the taxpayer immediately attends to his tax obligations. In the second, the taxpayer incurs a liability when he relies on erroneous advice by the Service and it is clear that he could have, and would have, avoided the liability had the advice been correct. See Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(E).

Compromise due to the acts of third parties beyond the control of the Service, particularly acts by a taxpayer's partners, employees, or other fiduciaries, is a departure from these examples. In both of the examples in the regulations, the implicit assumption is that the taxpayer would have complied but for some occurrence over which he had no control. That is not so in this case. Here the taxpayer's liability arose out of sham transactions in which he chose to participate as a partner. Regardless of whether the taxpayer knew or had reason to know that the general partners were making misrepresentations or would later fail to perform on their obligations as promised, the taxpayer was the individual in the best position to evaluate those risks.

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[4] It is our understanding that the payment made at the time the taxpayer submitted the amended returns has since been applied as the taxpayer initially instructed, and that interest accruals have been adjusted accordingly.

Under these circumstances, we do not agree that collection would be detrimental to voluntary compliance by taxpayers. To the contrary, compromise on the basis of the general partners' fraud would place the Government in the role of an insurer against poor business decisions by taxpayers, reducing the incentive for taxpayers to thoroughly investigate the consequences of transactions. For the Service to play that role would be particularly inappropriate when the transaction at issue is participation in a tax shelter. Reducing the risks of participating in tax shelters would encourage more taxpayers to run those risks, thus undermining, rather than enhancing, compliance with the tax laws. See Temp. Treas. Reg. § 301.7122-1T(b)(4)(ii) (no compromise based on the promotion of effective tax administration may be entered into where it would undermine compliance with the tax laws). Compromise in this case could also seriously undermine the Service's ongoing efforts to settle large tax shelter litigation on a consistent basis. See I.R.C. § 6224(c) (requiring that consistent settlements be offered to all partners). For these reasons, compromise under these circumstances could not be said to "promote effective tax administration."

INVALID CREDIT; FRIVOLOUS REFUND

April 12, 2001

UIL: 9999.92-00 CC:PA:CBS:3
6201.07-03 TL-N-2075-01WLI2

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SB/SE AREA 5, SALT LAKE CITY, ATTN: MARK H. HOWARD CC:SB:5:SLC

FROM: ROBERT A. MILLER, SENIOR TECHNICIAN REVIEWER BRANCH 3 (COLLECTION, BANKRUPTCY & SUMMONSES)

SUBJECT: SIGNIFICANT SERVICE CENTER ADVICE

This responds to your request for Significant Service Center Advice dated April 4, 2001, in connection with a question from the Frivolous Return Unit in the Ogden Compliance Center.

ISSUE

With respect to a frivolous refund claim based on a claim of entitlement to an invalid, nonexistent credit (such as for Black reparations), you ask can the Service, and if so by what procedures or remedies, refuse to post the credit to the account, reverse a frivolous credit posted to the account, stop FMS from processing a refund voucher (whether for a check or an electronic fund transfer, EFT), intercept a mailed check or EFT, recover the check from the hands of the taxpayer or the bank prior to final processing of the check, recover deposited Treasury check or EFT proceeds before or after the proceeds become available for withdrawal, or recover Treasury check proceeds withdrawn from the bank account by the taxpayer?

CONCLUSIONS

If the frivolous claimed credit is discovered:

(1) during processing and prior to posting the credit to the Master File (MF) account, and action is taken to deny the credit as not existing, do not post the credit to the account;

(2) after posting the credit to the MF account but before an electronic refund voucher is sent to Financial Management Services (FMS), reverse the credit on the MF account for the reason that it does not exist;

(3) immediately after an electronic refund voucher has been processed to FMS but before the voucher has been processed by FMS, reverse the credit on the MF account and send an electronic order to FMS directing that FMS stop processing the voucher and, as applicable, restore funds to the IRS' Treasury account;

(4) immediately after a voucher has been processed by FMS, and before the check or EFT has gone out (that is, before the check is put in the hands of the United States Postal Service, USPS, or before the EFT is transmitted to a correspondent bank), reverse the credit on the MF account and request that, as applicable, FMS secure and cancel the check, or cancel the EFT, and in either case restore the funds to the IRS' Treasury account;

(5) shortly after a check is put in the hands of USPS, reverse the credit on the MF account and submit an expedited request, to the local and regional USPS offices which have initial jurisdiction over the refund checks issued by FMS, asking for return to the IRS (as sender) of the envelope containing the Treasury check;

(6) shortly after an electronic funds transfer has been sent by FMS to a correspondent bank, reverse the credit on the MF account and ask that a stop payment be electronically issued by FMS;

(7) while a check is being held by the taxpayer, revenue officers should converse with the taxpayer, face to face, inform the taxpayer that the check was obtained by misrepresentation of a material fact, request that the taxpayer turnover the check to the IRS, and inform the taxpayer that assessment and collection action will be taken if the request is not honored;

(8) after taxpayer presents the check for negotiation to a depositary bank but while the check is still in the possession of the bank and before the bank makes funds available for withdrawal, the bank can be requested to withhold processing of the check under 12 C.F.R. 229.13(b),(f),(h) (In that circumstance one or more revenue officers should converse with the taxpayer, face to face, inform the taxpayer that the check was obtained by misrepresentation of a material fact, request that the taxpayer consent to the bank turning

the check over to the IRS, and inform the taxpayer that assessment and collection action will be taken if the request is not honored.);

(9) after the depositary bank has deposited proceeds of the check in the taxpayer's account but before the funds are available for withdrawal:

(a) one or more revenue officers should converse with the taxpayer, face to face, inform the taxpayer that the check was obtained by misrepresentation of a material fact, request that the taxpayer voluntarily return the amount of the erroneous refund, and inform the taxpayer that failure to do so will result in assessment and collection action;

(b) If the taxpayer will not voluntarily turn over the funds to the IRS, after meeting with one or more revenue officers, the IRS should make an I.R.C. § 6201(a)(3) assessment;

(10) after the funds have been withdrawn from the bank account by the taxpayer, the IRS should make a section 6201(a)(3) assessment.

FACTS

A number of taxpayers have filed claims for refund based on a claim of entitlement to an invalid, nonexistent credit (such as for Black reparations). The IRS has centralized in the Ogden Compliance Center the processing of frivolous return claims under I.R.C. § 6702, Frivolous return Penalty, and particularly the Black reparations claims for the entire United States. It was discovered that some offices of the IRS have erroneously processed returns and allowed some Black reparations claims to proceed to an approved refund status. However, the IRS has often discovered this error either before the check is mailed to the taxpayer or before the check has cleared the banking process.

DISCUSSION

With respect to a frivolous refund claim based on a claim of entitlement to an invalid, nonexistent credit (such as for Black reparations), you ask can the Service, and if so by what procedures or remedies, refuse to post the credit to the account, reverse a frivolous credit posted to the account, stop FMS from processing a refund voucher (whether for a check or an EFT), intercept a mailed check or EFT, recover the check from the hands of the taxpayer or the bank prior to final processing of the check, recover funds after the check or EFT has been deposited in the taxpayer's bank account and before or after the funds became available for withdrawal, or recover Treasury check proceeds withdrawn from the bank account by the taxpayer? Generally, we conclude that if the Service acts quickly enough, there are pre-assessment administrative procedures for recovery at each step of the process a check or EFT follows, and if those are unavailing, there are assessment, collection, and erroneous refund remedies. Our positions, explained in more detail below, is drawn from a number of prior advisories and other authorities, which we take this opportunity to collect and update.

(1) If the frivolous claimed credit is discovered during processing, and action is taken to deny the credit as not existing prior to posting the credit to the Master File (MF) account, do not post the credit to the account. Our position is implied from our prior Significant Service Center Advice, 200034028, WTA-N-110702-00, dated July 21, 2000, which concludes that a frivolous claim to an invalid, nonexistent credit (Black reparations credit in that instance) can be reversed.

(2) If the frivolous invalid, nonexistent credit is discovered after posting the credit to the MF account but before an electronic refund voucher is sent to Financial Management Services (FMS), reverse the credit for the reason that it does not exist. See our prior Significant Service Center Advice, 200034028, WTA-N-110702-00, dated July 21, 2000, which concludes that a frivolous claim of an invalid, nonexistent credit (Black reparations credit in that instance) can be reversed.

(3) If the frivolous claimed credit is discovered immediately after an electronic refund voucher has been processed to FMS but before the voucher has been processed by FMS, send an electronic order to FMS directing that FMS stop processing of the voucher and, as applicable, restore funds to the IRS' Treasury account. See our prior Significant Service Center Advice, SCA 1998-017, TL-N-5968-97, dated December 12, 1997. We note in this regard that we have been advised by FMS that their processing time for a check is ten days and their processing time for an EFT is three days, both measured from the date that FMS receives the electronic voucher

(4) If the frivolous claimed credit is discovered immediately after a voucher has been processed by FMS, and before the check or EFT has gone out (that is, before the check is put in the hands of the USPS, or before the EFT is transmitted to a correspondent bank), request that, as applicable, FMS secure and cancel the check, or cancel the EFT, and in either case restore the funds to the IRS' Treasury account. FMS has informally acknowledged that FMS is able to do this. We note in this regard that we have been advised by FMS that their processing time for a check is ten days and their processing time for an EFT is three days, both measured from the date that FMS receives the electronic voucher.

(5) If the frivolous claimed credit is discovered shortly after a check is put in the hands of USPS, immediately submit an expedited request to any USPS post office identifying the mailpiece and the Treasury Department (IRS) as the sender. This procedure is provided in USPS Domestic Mail Manual (Issue 56 plus Postal Bulletin changes through PB22047, 4-5-01) D030 1.2, which states: "[a] federal agency may recall any mailpiece sent as official mail by submitting to any post office a Mailgram or an Express Mail letter identifying the piece." The USPS treats the IRS as the sender of all IRS refund checks.

(6) If the frivolous claimed credit is discovered shortly after an electronic funds transfer has been sent by FMS to a bank, ask that a stop payment be issued by FMS electronically to the correspondent bank and the depositary bank. We mention the correspondent bank

because EFTs, while designed to be a transmittal that occurs quickly, sometimes incur delay between receipt and retransmittal by a correspondent bank.

The regulations providing for funds availability as the result of clearance of EFTs, and providing procedures for the issuer of the funds to stop the clearance, are contained in 12 C.F.R. 229. An EFT is cleared (received) when the receiving bank has received the payment in “actually and finally collected funds” and information on the account to be credited. See section 229.10(b)(2). Thus, normally, a Treasury EFT would be made available for withdrawal the business day after the banking day on which the EFT is finally received by the depositary bank. See section 229(b). However, if the IRS acts quickly enough and if the bank is still in possession of the funds (including if they are in the taxpayer’s bank account), it may still be possible for the EFT transaction to be reversed.

(7) If the frivolous claimed credit is discovered while a check is being held by the taxpayer, one or more revenue officers should converse with the taxpayer, face to face, inform the taxpayer that the check was obtained by misrepresentation of a material fact, request that the taxpayer turnover the check to the IRS, and inform the taxpayer that failure to do so will result in assessment and collection action.

(8) If the frivolous claimed credit is discovered after taxpayer has presented the check to a depositary bank but before the financial institution has given funds to the taxpayer or released deposited funds for withdrawal, the bank can be requested to withhold processing of the check. Section 229.10(c)(1),(i) provides, in the case of funds derived from a Treasury check deposited in an account of the payee of the check, that a depositary bank shall make the deposited funds available for withdrawal not later than the business day after the banking day on which the funds are deposited (next day availability). However, two exceptions, are provided in section 229.13. The first exception, section 229.13(b), provides that section 229.10(c) does not apply to deposits in excess of $5,000 on any one banking day. The second exception, section 229.13(f), provides that section 229.10(c) does not apply to funds deposited by check in a depositary bank in the case of an emergency condition beyond the control of the depositary bank. For purposes of both exceptions, section 229.13(h) provides that the depositary bank may extend the next day availability time period established by section 229.10(c) by a reasonable period. Section 229.13(h)(4) defines reasonable period as, normally, an extension of up to six business days for checks described in section 229.10(c)(1); however, that provision notes that a longer period may be reasonable but the bank bears the burden of so establishing. In our view, one or more revenue officers should converse with the taxpayer, face to face, inform the taxpayer that the check was obtained by misrepresentation of a material fact, request that the taxpayer consent to the bank turning the check over to the IRS, and inform the taxpayer that failure to do so will result in assessment, imposition of interest and collection action.

(9) If the frivolous claimed credit is discovered after the proceeds of the check have been deposited by the depositary bank to the taxpayer’s account and the funds have been made available for withdrawal:

(a) one or more revenue officers should converse with the taxpayer, face to face, inform the taxpayer that the check was obtained by misrepresentation of a material fact, request that the taxpayer voluntarily return the amount of the erroneous refund, and inform the taxpayer that failure to do so will result in assessment, imposition of interest and collection action;

(b) if the taxpayer will not voluntarily turn over the funds to the IRS, after meeting with one or more revenue officers, the IRS should make a section 6201(a)(3) assessment.

(10) If the frivolous claimed credit is discovered after the check has been negotiated and funds have been withdrawn from the bank account by the taxpayer, the IRS should make a section 6201(a)(3) assessment.

OTHER CONSIDERATIONS

If the IRS makes a section 6201(a)(3) assessment, the IRS then has available the full range of administrative and judicial collection authority. In this regard, the IRS generally has ten years from the date of the assessment to administratively collect, including by levy. If use of the levy authority cannot recover some part of the refund, a collection suit to reduce the assessment to judgement can be brought at any time within the ten year period.

Alternatively, as you mention, an erroneous refund suit under I.R.C. § 7405 is an available remedy for obtaining a judgement. The period for bringing an erroneous suit in respect of a refund premised on an invalid, nonexistent credit is the I.R.C. § 6532(b) five year period that applies to misrepresentations of material fact. See our Chief Counsel Advice, CT-104674-99, dated March 17, 1999.

Jeopardy levy may be an appropriate remedy in many of these instances. See Chief Counsel Advice, CT-104674-99, dated March 17, 1999. In determining whether jeopardy exists, local counsel will review the jeopardy proposal and determine whether jeopardy levy is appropriate in the circumstances. In this regard, we refer you to the discussion of jeopardy in our prior Chief Counsel Advice CT-104674-99. We suggest that, among other factors, local counsel consider: whether the relative level of the taxpayer's reported income is low in respect to the size of the erroneous refund (here, $40,000 or $80,000), thereby suggesting a likelihood that if withdrawn a significant amount may not be recovered; and whether, upon being contacted by one or more revenue officers in a face to face conversation as described above, the taxpayer refused to voluntarily return or to consent to the bank's return of the check or funds.

If the refund of the frivolous credit cannot be recovered, the refund constitutes income to the taxpayer in the year in which the taxpayer received the refund. See Chief Counsel Advice (Field Service Advice) TL-N-8392-93, 1999 TNT 55-49, dated August 26, 1993. The normal deficiency procedures are used to impose income tax in respect of this income.

You posed an additional question relating to the holding in Neece v IRS, 922 F.2d 573 (10th Cir 1990), but informally indicated that few of the taxpayers involved with the invalid, nonexistent credits are located within the Tenth Circuit. Because of the limited application of the question to the facts you present, and because the Neece question has been addressed in prior advisories, there is no need for us to address it here.

ERRONEOUS REFUNDS; REPAYMENT

CC:PA:CBS:Br3
WTA-N-122554-00WLI7
UIL: 6532.03-01

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SMALL BUSINESS/SELF-EMPLOYED, AREA 1, BROOKLYN CC:SB:1:BRK
ATTN: PAREIEGGER

FROM: ROBERT A. MILLER, ACTING CHIEF, BRANCH 3 COLLECTION, BANKRUPTCY & SUMMONSES

SUBJECT: ABILITY OF IRS TO RETAIN ERRONEOUS REFUNDS REPAID MORE THAN TWO YEARS AFTER ERRONEOUS REFUNDS MADE Your ref: CC:SB:1:BRK:TL-5479-00

This is in response to your memorandum dated October 23, 2000, in which you requested Significant Service Center Advice under CCDM 35.2.13.3(4), et. seq.. The memorandum deals with two scenarios in which the Service made erroneous refunds for which, more than two years after the refunds were made, it requested and received repayment. The primary concern of the Service Center is whether it is permissible for the Service to keep the repayments. Because of the refund aspects of your inquiry, this office coordinated with Administrative Provisions and Judicial Practice (APJP). After discussions with your office and APJP, because of the uncertainty of the facts in the inquiry, which facts probably were not discoverable, we reclassified this case from a Significant Service Center Advice to a Chief Counsel Advisory.

ISSUES

Scenario 1.

(1) Do the facts, as developed or could reasonably be developed within a short time frame, sufficiently support bringing an erroneous refund suit against an individual more than two years after such refund was made, where the individual submitted a check noted with a partnership EIN, which resulted in the check being posted to a partnership account and the amount thereof refunded to the partnership, but for which, upon his request, he was credit with a payment in the amount of the check, with the portion exceeding his outstanding liabilities refunded to him with interest?

(2) Do the facts, as developed or could reasonably be developed within a short time frame, sufficiently support the position that the Service is not required to repay funds to a third party, where the funds were received from the third party in response to a request for repayment of an erroneous refund made to a partnership and where the Service's request for repayment and the repayment were made more than two years after the erroneous refund was made?

(3) Where the erroneous refund repayment requested of the partnership was apparently made by a third party without interest, do the facts, as developed or could reasonably be developed within a short time frame, sufficiently support seeking recovery of the interest by an erroneous refund suit against the third party?

Scenario 2.

Do the facts, as developed or could reasonably be developed within a short time frame, sufficiently support the position that the Service is required to repay funds received in response to a request for repayment of an erroneous refund made to an individual, where the request for repayment and the repayment were made more than two years but less than five years after the erroneous refund was made?

CONCLUSIONS

Scenario 1.

(1) The facts, as developed or could reasonably be developed within a short time frame, do not appear to sufficiently support bringing an erroneous refund action against the individual.

(2) The facts, as developed or could reasonably be developed within a short time frame, do not appear to sufficiently support the position that the Service is required to return the funds.

(3) The facts, as developed or could reasonably be developed within a short time frame, do not appear to sufficiently support bringing an erroneous refund action against the third party to recover interest.

Scenario 2.

The amount received in response to a request for repayment of an erroneous refund is an overpayment, where the request and repayment were made more than two years but less than five years after the erroneous refund was made and the facts do not suggest that the five year period is applicable; thus, since the period for taxpayer to claim a refund has not expired, the Service should either notify the taxpayer of the overpayment and request instructions as to disposition, or the Service could on its own initiative refund the overpayment with interest.

FACTS

Scenario 1.

A remittance in the form of a check from an individual was received by a service center. On the check was noted the Employee Identification Number (EIN) of a TEFRA partnership. The remittance was posted to a tax year of the partnership that was undergoing a TEFRA audit. The posting was made using a TC640 code to show a remittance in the nature of a cash bond. At the conclusion of the TEFRA partnership case, a TC300 (subsequent assessment by examination) for ".00" was input to that partnership account, indicating that the case had been concluded at the partnership level. The TC300 released the freeze holding the remittance in the tax account and a refund of the deposit was issued to the partnership without interest. One week later, another service center, at the request of the individual, transferred the remittance to the individual's account for the same year as that of the partnership. The service center treated the remittance as a payment, as of the date received by the Service, which satisfied the individual's outstanding liability and resulted in a refund for the difference plus interest.

At some point, one of the service centers realized that the Service had twice applied funds in connection with the same remittance. That service center determined that the partnership, rather than the individual, was erroneously returned the deposit. More than two years after return of the deposit to the payee partnership, the service center sent a request for repayment to the partnership at the address on its final return and indicated that interest would be waived if repayment was made within a stated period. Somewhat later than the stated period, repayment was made in the amount of the returned deposit by another partnership, which requested that interest be waived.

The continuing (winding up) status under state law of the partnership, which was the payee on the refund check, is unclear. The partnership filed its final return prior to the erroneous return of the deposit. The individual, who is now deceased and whose date of death can be ascertained from state records, was a partner. The refund check was negotiated by a stamp of the name of the partnership without the signature of a signatory; however, the account to which it was deposited, particularly whether it was an account of someone other than the payee partnership, can be ascertained.

Scenario 2

A payment check was received by a service center. On the check was noted the tax year, Form 1040, and an SSAN (which contained a misstatement in the SSAN). The service center posted the payment to the individual income tax account for the tax year of the taxpayer whose SSAN was noted on the check.

Shortly thereafter, a check was received from the taxpayer, to whose account the first check was misapplied, in full payment of the liability reported on his return. Upon posting of the second check to the taxpayer's account, a refund was generated in the amount of

the first check plus interest. Thereafter, the Service received notice that the first check was dishonored.

The service center determined that the first check was sent by a third party and that the SSAN noted on the first check contained an error; the first check should not have been deposited to the account of the taxpayer to whom the noted SSAN belongs. Therefore, the service center transferred the entries regarding posting of the check, and the dishonoring of the check, out of the account of the taxpayer to which it was misapplied and over to the tax account of the person who wrote the check.

More than two years but less than five years after making the erroneous refund, the service center billed the taxpayer, to whose account the check had been misapplied, for a tax in the amount of the erroneous refund. The taxpayer paid the bill within the five year erroneous refund period.

DISCUSSION

Scenario 1

(1) The issue is whether the facts sufficiently support bringing an erroneous refund suit against an individual more than two years after such refund was made. The individual submitted a check noted with a partnership EIN, which resulted in the check being posted to a partnership account. However, upon his request, he was credit with a payment in the amount of the check as of the date of the Service's receipt of the check, with the portion exceeding his outstanding liabilities refunded to him with interest?

Because the individual wrote the check on a personal account, the Service accepted as correct the individual's claim that the remittance was made as a payment of his individual tax liability. The individual is now deceased, and it appears that no facts can be developed to contradict his claim that the remittance was made in connection with his own liability. Accordingly, the facts, as developed or could reasonably be developed within a short time frame, do not appear to sufficiently support bringing an erroneous refund action against the individual.

(2) The issue is whether the facts sufficiently support a position that the Service is required to repay funds to a third party. An amount received from an individual, but noted with the EIN of the payee partnership, was posted to an account of the payee partnership as a deposit. The partnership did not pay the money in and did not have any right to the deposit. Thus, the funds were never more than a deposit and were not received, nor treatable as received, from the partnership as a collection of tax. Following posting of a TC 300 code to the account, the deposit was released and a check in the amount of the deposit (without interest) was issued to the payee partnership.

Funds in repayment were received from a third party partnership in response to a request for repayment made to the payee partnership. The Service's request for repayment and the repayment were made more than two years after the deposit was refunded.

If a period longer than two years is applicable to the Service's recovery of the deposit, the repayment by the third party was timely received and the Service is not required to return the repayment to the third party. We conclude that a sufficiently long period is available to the government. [5]

What was paid by the Treasury check was the return of a deposit. A deposit is not a payment of tax. Rosenman v United States, 323 US 658 (1945). Thus, the recovery of an erroneous return of a deposit would not be subject to the remedies and limitations of the Internal Revenue Code.

In comparison, we point out that in recovering a deposit, a taxpayer it is not subject to Internal Revenue Code procedures, such as regarding refunds and the statute of limitations applicable to recovery of refunds. The taxpayer's action is in the form of an action on an implied contract, and is in the nature of an action for unjust enrichment. See Rosenman, supra (note that the action was brought within six years of the notice of

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[5] Several periods appear available. A six year period is provided by 28 U.S.C. §2415(a) for recovery on an implied contract if the exception of section 2415(h) does not apply; that exception provides that section 2415 does not "apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes." The Supreme Court, in Rosenman, supra, held that a deposit is not subject to the Internal Revenue Code procedures; thus, recovery of an erroneous return of a deposit would also be outside the Internal Revenue Code.

The erroneous refund check was negotiated after the payee partnership filed its final return, and negotiation was by use of a name stamp of the payee partnership without an authorized signatory's signature. It can likely be determined whose account the refund was deposited to, whether anyone retained signatory authority over the payee partnership's account, and who had signatory authority over the account to which the check was deposited. A six year period is provided by the False Claims Act, 31 U.S.C. §3729, et seq, to recover damages for presentation of a false claim, which includes negotiation of a government check, if the exception of section 3729(e) does not apply; that exception provides that section 3729 "does not apply to claims, records or statements under the Internal Revenue Code." The recovery of the proceeds of a Treasury check from someone other than the payee does not relate to a claim record or statement under the Internal Revenue Code by the person who wrongly negotiated the check. Alternatively, the section 1396(a)(2) cause of action could be brought within the section 2401 period.

A voluntary repayment can be made to the Service within any of these periods.

application). Jurisdiction is given to the district courts and the Court of Federal Claims by 28 U.S.C. 1396(a)(2). The six year period of 28 U.S.C. 2401 applies to an action on an implied contract, and begins upon the accrual of the cause of action.

We also point out that taxpayers recover overpayment interest by use of an action under section 1396(a)(2), that is subject to the six year period of section 2401, rather than subject to the refund procedures and limitations. See, Alexander Proudfoot Co. v. United States, 454 F2d 1379 (Ct. Cl. 1972); Barnes v. United States, 137 F.Supp. 716 (Ct. Cl. 1956); Murphy v. United States, 78 F.Supp. 236 (SD CA 1948); Colgate-Palmolive-Peet Co. v. United States, 58 F2d 499 (Ct. Cl. 1932); Rev. Rul. 56-506, 1956-2 CB 959; Rev. Rul. 56-574, 1956-2 CB 959; Rev. Rul. 57-242, 1957-1 CB 452; Rev. Proc. 99-19, 1999-1 CB 842; Rev. Proc. 99-43, 1999-2 CB 579; Rev. Proc. 2000-26, 2000-1 CB 1257.

We further point out that the government has been allowed to use periods outside the Internal Revenue Code in regard to recovery on collateral. See, Golub v. United States, 204 Ct. Cl. 935 (1974).

In view of the foregoing, we conclude that recovery of an erroneously returned deposit is not a tax, and is not governed by a remedy and a limitations period outside the Internal Revenue Code. We further conclude that the period had not expired when the Service received the repayment. Accordingly, the facts, as developed or could reasonably be developed within a short time frame, do not sufficiently support the position that the Service is required to return the funds.

(3) Where the repayment requested of the payee partnership was made without interest by a third party partnership, do the facts, as developed or could reasonably be developed within a short time frame, sufficiently support seeking recovery of interest, for the period of time that the funds were outside of the government's possession, by an erroneous refund suit against the third party?

The letter sent to the payee partnership specifically indicates that, if repayment is made, no interest would be charged. The repayment was made by the third party partnership with reference to the interest term of the letter and a stated request that the interest be abated. The Service received the repayment and has not returned the repayment.

The above facts provide, at least, an appealing equitable argument that the Service's acceptance of the repayment was acceptance of the Service's offer. Thus, the facts, as developed or could reasonably be developed within a short time frame, do not appear to sufficiently support bringing an erroneous refund action against the third party to recover interest.

Scenario 2

Do the facts, as developed or could reasonably be developed within a short time frame, sufficiently support the position that the Service is required to repay funds received in

response to a request for repayment of an erroneous refund made to an individual, where the request for repayment and the repayment were made more than two years but less than five years after the erroneous refund was made?

The refund was not in any way induced by the individual. Thus, the five year period of section 6532(b) does not apply.

Under I.R.C. §6401, "[t]he term overpayment includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." Since the facts do not suggest that the five year period is applicable, the amount received more than two years after the erroneous refund was made is an overpayment.

Accordingly, the facts, as developed or could reasonably be developed within a short time frame, sufficiently support the position that, since the period for taxpayer to claim a refund has not expired, the Service should either notify the taxpayer of the overpayment and request instructions as to disposition, or the Service should on its own initiative refund the overpayment with interest.

OFFER IN COMPROMISE; BASIS FOR ACCEPTANCE

CC:PA:CBS:Br2
GL-131739-00
UILC: 17.00.00-00

MEMORANDUM FOR MICHAEL W. BITNER
ASSOCIATE AREA COUNSEL (SB/SE)

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Advisory Opinion–Offers in Compromise

This memorandum responds to a request for advice received from your office on December 26, 2000. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent. This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. You have asked us to consider whether it is necessary to amend Form 656 when a taxpayer submits an offer in compromise on the basis of doubt as to collectability, and after investigation, the Service decides to accept the offer due to effective tax administration.

ISSUE

Whether the Service must request the taxpayer to amend Form 656 when a taxpayer has submitted an offer in compromise checking the box indicating doubt as to collectability and the service has decided to accept the offer on the basis of effective tax administration?

CONCLUSION

No, the Service need not obtain an amended Form 656 from the taxpayer. The reason underlying the Service's decision to accept or reject a taxpayer's offer in compromise (whether doubt as to collectability or affective tax administration) is not a material term of the compromise agreement between the taxpayer and the Service. Thus, when a taxpayer makes an offer based upon doubt as to collectability and the Service accepts that offer on the basis of effective tax administration, the Service is not required to ask the taxpayer to amend Form 656 to reflect the change.

BACKGROUND

Your correspondence with us indicates concern arising out of language in IRM 5.8, which sets out the basic procedures for the offer in compromise program. Section 5.8.1.1(3) of the IRM provides that offers can be based on doubt as to collectability, doubt as to liability, and effective tax administration, and IRM 5.8.4.8(1) provides that taxpayers may submit an offer based upon any one or combination of these three reasons. The taxpayer indicates this choice by checking any of the three boxes on line 6 of Form 656.

The manual states that during the offer investigation, the Service will consider all bases the taxpayer indicates, but will determine only one basis for accepting the offer. See IRM 5.8.4.8(1). The manual then states that Collection is to first evaluate the offer on the grounds of doubt as to collectability, and that if while working the calculations for doubt as to collectability, they determine that reasonable collection potential is greater than the amount due, but special circumstances exist, they are to consider the offer to compromise on the basis of effective tax administration. IRM 5.8.4.8(1); IRM 5.8.4.8(5). It then states that it is not necessary to amend Form 656 to show effective tax administration. Your concern is that by attempting to accept the offer on a basis different than the taxpayer has indicated, the Service has actually made a counteroffer, and thus no enforceable contract results, or that the contract may not be enforceable because there has been no meeting of the minds. You, therefore, believe this language should be changed to require the taxpayer to amend Form 656.

DISCUSSION

The Secretary's authority to enter into offers in compromise with taxpayers comes from I.R.C. § 7122, which provides, "The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense." The Secretary has delegated this authority to the

Commissioner, who has then delegated it to various officials throughout the Service. See Delegation Order No. 11.

Treasury regulations pertaining to section 7122 likewise set out the permissible bases for offers in compromise, including doubt as to liability, doubt as to collectability, and to promote effective tax administration. The regulations further provide that a taxpayer's offer is not accepted "until the IRS issues a written notification of acceptance to the taxpayer." Treas. Reg. § 301.7122-1T(d)(1). Section 301.7122-1T(d)(5) provides that acceptance of an offer will "conclusively settle" the taxpayer's liability, and that neither the taxpayer nor the Government will be permitted to reopen the case except where the taxpayer has supplied false information or documents, the taxpayer has concealed assets, or "a mutual mistake of material fact sufficient to cause the offer agreement to be reformed or set aside is discovered."

When interpreting agreements to compromise federal tax liabilities under I.R.C. § 7122, courts have applied generally accepted contract principles. See United States v. Feinberg, 372 F.2d 352 (3d Cir. 1967); United States v. Lane, 303 F.2d 1 (5th Cir. 1962). In recognition of this concern, the Service requires the taxpayer to submit a Form 656 setting forth the essential terms of payment including the tax liabilities covered and the taxpayer's obligations, including the amount and the time in which the taxpayer has to pay. Form 656 asks the taxpayer to indicate a basis for the compromise. The stated basis provides the authority for the Service to accept the offer. It is not a term of the agreement. The taxpayer has offered to pay a stated amount to resolve the outstanding liability. The Service's acceptance of the offer binds the taxpayer to that payment obligation, regardless of the legal basis for the compromise.

In the scenario you present, the only difference between the taxpayer's offer and the Service's acceptance would be the grounds underlying the Service's decision to accept the offer; i.e., the box the taxpayer checked on line six of Form 656. The underlying basis for the compromise relates only to the Service's authority to compromise. Changing it from doubt as to collectability to effective tax administration results in no material change to the taxpayer's rights or obligations under the compromise agreement. It changes neither the payment amount, nor the timing the payments come due, or any other obligations of the taxpayer. Accordingly, it is not a material term of the contract. Thus, when the Service decides to accept the offer on the basis of effective tax administration, rather than doubt as to collectability, this acceptance does not constitute a counteroffer.

Further, compromises serve the goals of obtaining the amount potentially collectable at the earliest possible time and at the least cost to the government. See Policy Statement P-5-100; IRM 5.8.1.1.1. So long as the Service accepts the offer on the same payment terms, neither the Service nor the taxpayer would benefit from a requirement to file an amended Form 656 simply to check another box. The result would only be further delay to the process. Accepting the offer on the basis of effective tax administration without requiring the taxpayer to amend Form 656 benefits both the

taxpayer and the Service, because the process is more expeditious. Because the IRM in its current form reflects these principles, we do not believe revisions are necessary at this time.

COLLECTION DUE PROCESS; TAX LIEN; REVOCATION OF RELEASE

CC:PA:CBS:Br1
GL-805109-00
UIL# 6330.00-00
January 29, 2001

MEMORANDUM FOR ASSOCIATE AREA COUNSEL SBSE - SAN FRANCISCO
CC:SB:7:SF:1
Attn: TRMackinson

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)
CC:PA:CBS:Br1

SUBJECT: ________________________________

You have requested that we reconsider the conclusion in our November 2, 2000 memorandum (copy attached) that are entitled to a CDP hearing on the filing of a new notice of federal tax lien after the previously-filed notices of federal tax lien were erroneously released. You argue that the exception found in Treas. Reg. § 301.6323(g)-1(a)(3)(i) requires a different conclusion. Section 301.6323(g)-1(a)(3)(i) provides that a lien does not need to be refiled during the required refiling period if a suit to foreclose that lien has been commenced prior to the expiration of that refiling period. Based on this regulation, you contend that the new notice of federal tax lien did not need to be filed to establish our priority, because we did not lose our priority when the liens self-released. As a result, do not need to be given a CDP hearing on the lien filing.

We would agree with your analysis if the liens in this case had not self-released. The self-releasing lien form has been adopted for notices of federal tax lien filed after December 31, 1982. This form provides that "... unless notice of lien is refiled by the date [specified], this notice shall, on the day following such date operate as certificate of release as defined in I.R.C. § 6325(a)." Self-releasing liens operate the same as the filing of a certificate of release. Municipal Trust and Savings Bank v. United States, 114 F.3d 99, 102 (7th Cir. 1997), reh'g denied, 1997 U.S. App. LEXIS 16535 (7th Cir. 1997); Griswold v. United States, 59 F.3d 1571, 1579 n. 18 (11th Cir. 1995); In re Cole, 205 B.R. 668, 673 (Bankr. D. Mass. 1997). Moreover, the self-releasing lien was not contemplated when section 301.6323(g)-1(a)(3)(i) was adopted shortly after the passage of the Federal Tax Lien Act of 1966. Accordingly, it is our opinion that Treas.

Reg. § 301.6325-1(f)(2) applies to the facts of this case, not section 301.6323(g)-1(a)(3)(i).

In addition, while we cannot find any case law specifically addressing the applicability of section 301.6323(g)-1(a)(3)(i) where the subject lien has been released after commencement of the suit, there are at least two district court decisions applying section 301.6325-1(f)(2) under these circumstances. United States v. Winchell, 793 F. Supp. 994 (D. Colo. 1992); United States v. Reid, 2000-1 U.S.T.C. ¶ 50,340; 2000 U.S. Dist. LEXIS 5106. Both cases held that pursuant to section 301.6325-1(f)(2)(iii)(b) the revocation of the erroneous lien release reinstated the lien but not the notice of federal tax lien. As such, the priority of the federal tax lien dated from the date a new notice of federal tax lien was filed after the revocation. Id.

Based on our conclusion that section 301.6325-1(f)(2) applies to the facts of this case, a new notice of federal tax lien needed to be filed in order to establish priority, as of the filing date, of our lien against a subsequent purchaser, holder of security interest in the property, mechanic's lienor, or judgment lien creditor. This new filing of a notice of federal tax lien entitles the   to a CDP hearing under I.R.C. § 6320.

OFFER IN COMPROMISE; RELEASE OF LEVY

May 10, 2001

CC:PA:CBS:Br2
GL-106846-01
UILC: 17.40.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE), AREA 2, WASHINGTON, D.C.

FROM: Joseph W. Clark
Senior Technician Reviewer, Branch 2
(Collection, Bankruptcy & Summonses)

SUBJECT: Release of Levy When an Offer in Compromise is Pending

This Chief Counsel Advice responds to your memorandum dated February 16, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES:

1. Whether the Internal Revenue Service is required, pursuant to either section 6331(k) of the Internal Revenue Code or the Commissioner's policy on withholding collection while an offer in compromise is pending, to release a levy on Social Security retirement benefits which was made prior to the offer becoming pending with the Service.

2. Whether property levied prior to submission of an offer in compromise but received after the offer became pending must be returned to the taxpayer.

CONCLUSIONS:

1. Neither section 6331(k) nor the Service's policies and procedures require release of a prior levy on Social Security retirement benefits once an offer in compromise becomes pending.

2. The Service is not required to return property levied prior to submission of an offer in compromise but received after the compromise became pending.

BACKGROUND:

You have asked that we pre-review a proposed memorandum from your office to an offer in compromise group in your area. The offer group manager has requested advice on the following scenario. In Year 1, the Service levies upon the retirement, survivors, and disability insurance (RSDI) benefits of the taxpayer by serving a notice of levy on the Social Security Administration.[6] The levy is not contested, and the majority of the taxpayer's monthly benefits are sent to the Service each month for the next several years. In Year 3, the taxpayer submits an offer in compromise. The compromise meets the minimal requirements for processing and is recognized as pending by the Service.

The offer group has asked you to address: 1) whether the levy must be released under section 6331(k), which prohibits the making of a levy while an offer in compromise is pending, for thirty days after a rejection, and during any appeal of such a rejection; 2) whether, if section 6331(k) is inapplicable, the Service's policy on withholding collection while an offer is being considered requires release of the levy; and 3) whether levy payments received after the offer became pending must be returned to the taxpayer.

LAW & ANALYSIS:

When any person liable for payment of tax neglects or refuses to pay the tax following notice and demand, the Service may levy upon "all property and rights to property" belonging to that person to secure payment of the tax. See I.R.C. § 6331(a). As a general rule, levy reaches only property or obligations in existence at the time of the levy. See I.R.C. § 6331(b). A levy does not reach property acquired after the levy has been made, see Treas. Reg. § 301.6331-1(a)(1), and does not reach payments

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[6] RSDI benefits are computed based on social security taxes paid during a person's working years and are not exempt from levy. See I.R.C. § 6334(c). In contrast Supplemental Security Income (SSI) payments are needs based and are exempt from levy. See I.R.C. § 6334(a)(11)(A).

promised a taxpayer but contingent upon the performance of some future service. See United States v. Long Island Drug, 115 F.2d 983, 986 (2d Cir. 1940).[7]

Property or rights to property are considered to be in existence and subject to levy when they are fixed and determinable. Id. This is so even if the taxpayer's right to receive payment of an obligation is deferred until a later date. See Treas. Reg. § 301.6331-1(a)(1). As long as the taxpayer's right to receive future payment is fixed and determinable, a levy will attach to the vested accrued right to receive money in the future. See United States v. Morey, 821 F. Supp. 1438, 1440-42 (W.D. Okl. 1993); Rev. Rul. 55-210, 1955-1 C.B. 544. Thus, under the facts you have given, the single levy on the taxpayer's Social Security retirement benefits attached the taxpayer's present right to receive future payments. See IRM 5.11, Notice of Levy Handbook, Section 6.1.1.

Section 3462(b) of the Internal Service Restructuring and Reform Act of 1998 amended section 6331 by adding a new subsection (k), which reads, in part:

> No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax—
>
> (A) during the period that an offer-in-compromise by such person under section 7122 of such unpaid tax is pending with the Secretary, and
>
> (B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period such appeal is pending).
>
> For purposes of subparagraph (A), an offer is pending beginning on the date the Secretary accepts such offer for processing.

I.R.C. § 6331(k)(1). The offer group has asked whether, pursuant to this section, it is required to release a levy on RSDI payments when a taxpayer submits an offer to compromise the tax liabilities the levy is intended to collect.

Section 6331(k), by its plain language, does not mandate release of a prior levy on RSDI payments. The section states that "no levy may be made" while an offer is pending. A levy is "made" by serving a notice of levy on the person in possession of the property or rights to property subject to the levy. See Treas. Reg. § 301.6331-1(a)(1). The facts supplied by the offer group state that levy was made several years before the

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[7] Section 6331(e) contains a statutory exception to this general rule. Pursuant to that section, a single levy on salary or wages is effective from the date the levy is first made until the levy is released pursuant to section 6343. This is true even though the taxpayer's right to receive future payments will not have come into existence at the time the levy is made. As the payments at issue here are not salary or wages, that section is inapplicable.

offer was submitted. That the levy remains in place, and that additional payments are sent to the IRS pursuant to the original notice of levy, does not mean that the levy is "made" or "re-made" each time the taxpayer is entitled to an additional payment. Subsection 6331(k) is therefore inapplicable to the levy at issue in this fact pattern.

Any confusion regarding whether the section affects prior levies is cleared up by paragraph 6331(k)(3). That paragraph states that "rules similar to" those contained in several paragraphs of subsection 6331(i), governing levy during the pendency of a proceeding for refund of a divisible tax, shall apply for purposes of the prohibition of levy while offers in compromise are pending. One of the cross-referenced provisions specifically states: "This subsection shall not apply to ... any levy which was first made before the date that the applicable proceeding under this subsection commenced." I.R.C. § 6331(i)(B)(iii). Although this language is arguably superfluous given the plain language of paragraph 6331(k)(1), it provides further evidence that the prohibition of levy while an offer in compromise is pending was not intended to mandate release of levies made prior to the date the offer became pending.

The offer group has suggested, however, that the Service's policy with respect to withholding collection while an offer in compromise is being considered may be broader than the statutory prohibition of levy. The Service's policy states:

> Stay of collection — offer in compromise cases: Submission of an offer in compromise does not automatically stay collection of an account. If there is any indication that the filing of an offer in compromise was solely for the purpose of delaying collection of the liability or that delay would jeopardize the Government's interest, immediate steps should be taken to collect the unpaid liability. However, if it is determined that the Government's interests would not be jeopardized by delay, collection action will be withheld pending consideration of the offer in compromise.

Policy Statement P-5-97 (Approved July 10, 1959). Although this statement's references to "collection action" could be read as broader than the statutory reference to "levy," the policy states that the Service will "withhold" action, not take steps to reverse or undo actions already taken. The offer in compromise handbook states that collection will be withheld, but does not direct offer specialists to release levies or return property. See IRM 5.8.3.5. Likewise, the Internal Revenue Manual in effect prior to the addition of section 6331(k) expressed the policy of withholding collection in a prospective manner only. No mention is made of releasing prior levies or returning property previously levied upon. See IRM 57(10)9.3 (9-22-94).

Although submission of an offer in compromise will not, itself, require release of levy in these circumstances, we agree with your suggestion that release of levy will sometimes be mandated based on other factors. The Service is required to release a levy when it determines that the levy is causing economic hardship due to the financial condition of the taxpayer. See I.R.C. § 6343(a)(1)(D). This condition exists if the levy will cause the

taxpayer to be unable to pay his or her reasonable basic living expenses. See Treas. Reg. § 301.6343-1(b)(4). This determination must be made individually, based on a taxpayer's unique circumstances. Id. If a taxpayer who has submitted an offer in compromise and the necessary collection information statements requests release of levy on these grounds, the financial information provided by the taxpayer should enable the Service to determine whether a levy should be released. Similarly, although neither law nor policy require the return of property levied upon under these facts, levied property may be returned to taxpayers if return is authorized under section 6343(d).

LIEN FORECLOSURE; PROPERTY LIQUIDATION SPECIALIST; MARSHAL

May 9, 2001

CC:PA:CBS:Br1
GL-128613-01
UIL 51.08.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE) AREA 2
ATTN: JEANNE GRAMLING

FROM: Alan C. Levine
Chief, Branch 1 Collection, Bankruptcy & Summonses

SUBJECT: Foreclosure of Federal Tax Liens - Sale of Property by Property Appraisal and Liquidation Specialists

This Chief Counsel Advice responds to your memorandum dated February 7, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

You requested our views on whether it is legally permissible for a Property Appraisal and Liquidation Specialist (PALS), rather than the United States Marshals Service (U.S. Marshal), to conduct a lien foreclosure sale. We understand that the Service believes that the local PALS is better equipped to sell property where the federal tax lien has been foreclosed.

ISSUE

Whether the PALS can sell real property in a lien foreclosure action, either upon the court's order or after appointment by the U.S. Marshal.

CONCLUSION

There is no legal impediment to the PALS' conducting foreclosure sales. However, the determination of whether it is advisable for the PALS or the U.S. Marshal to conduct the

sale will be made by the Department of Justice, which has responsibility for litigating lien foreclosure actions.

DISCUSSION

Section 7403 of the Internal Revenue Code (the Code) provides that the district court, after determining the merits of the various claims on the property, "may decree a sale of such property, by the proper officer of the court." I.R.C. § 7403 (c). We have found no case law under section 7403 addressing who would be a "proper officer of the court." However, the provisions for conducting lien foreclosure sales are found at 28 U.S.C. § 2001 et seq. Section 2001 provides:

> Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

28 U.S.C. § 2001(a) (emphasis added). [8]Section 2003 sets forth procedures for situations in which the U.S. Marshal cannot complete the sale or execute the deed after the sale because of death, removal from office, or the expiration of the term of his commission. This provision offers the only indication [9]that the U.S. Marshal is the only party permitted to conduct judicial sales: because any hypothetical party appointed by the court to conduct a sale might become unable to complete the sale, the reference only to the U.S. Marshal might suggest that sales can be conducted only by the U.S. Marshal. However, whatever inference might be drawn by the failure to refer to any party who might conduct sales other than the U.S. Marshal notwithstanding, we note that there is no statutory provision [10]or case law which states that only the U.S. Marshal is authorized to conduct sales under section 2001.

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[8] Personal property sold under court order is sold in the same manner as real property under section 2001, unless the court orders otherwise. 28 U.S.C. § 2004.

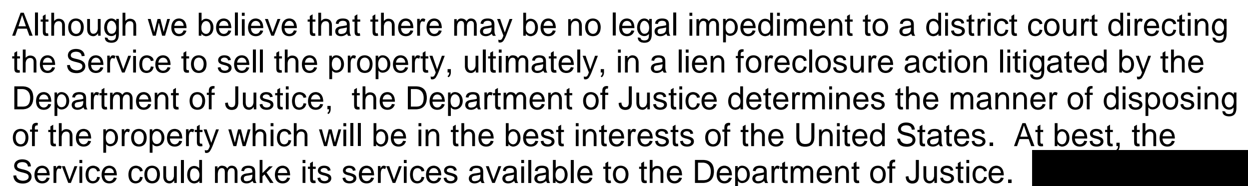
[9] While this may be the only provision which suggests that the U.S. Marshal is the proper party to conduct sales, we note that the U.S. Marshal has typically conducted judicial sales. See United States v. Peters, 10 Cl. Ct. 602 (1986) (the hallmark of a judicial sale is that it is ordered by a court and carried out by someone appointed by the court, generally a U.S. Marshal). Historically, the U.S. Marshal has always conducted sales in connection with foreclosed federal tax liens.

[10]Not only is there nothing in 28 U.S.C. § 2001 et seq. that specifically precludes a party other than the U.S. Marshal from selling property, there is similarly nothing contained in the statutory provisions regarding the Marshals Service, 28 U.S.C. § 561 et seq.

To the contrary, as noted above, section 2001(a) vests in the district courts the discretion to set the terms and conditions of judicial sales. In addition, case law, though not addressing the specific question of who can conduct sales, has held that courts have broad discretion regarding the manner of sale. See, e.g., Revere Copper & Brass, Inc. v. Adriance Machine Works, Inc., 68 F.2d 708 (2d Cir. 708 1934) (under 28 U.S.C. §§ 847, 848, the predecessor to 28 U.S.C. § 2001, the method of conducting a judicial sale rests within the discretion of the district court); United States v. Hunwardsen 39 F. Supp. 2d 1157 (N.D. Iowa 1999) (in a tax lien foreclosure action, the district court has broad discretion in setting the terms and conditions of the sale under 28 U.S.C. § 2001).

We believe that, as a general matter, a district court can properly provide in the foreclosure order that the property be sold by the Service, [11]rather than the U.S. Marshal. One caveat would be whether there is any local district court rule which would prohibit the court from doing so. We did not find anything in the local rules for the District Court for the Western District of North Carolina that would preclude the court from directing the Service to sell the property. We do not know the extent to which other courts in your area may have local rules which would bar the Service from selling property in foreclosure actions. [12]

Although we believe that there may be no legal impediment to a district court directing the Service to sell the property, ultimately, in a lien foreclosure action litigated by the Department of Justice, the Department of Justice determines the manner of disposing of the property which will be in the best interests of the United States. At best, the Service could make its services available to the Department of Justice.



Finally, from informal contacts with SB/SE Headquarters, we believe that SB/SE is amenable to the PALSs conducting foreclosure sales. If this remains the case, it would

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[11] Legally, the property could be sold by a PALS or a revenue officer. Section 3443 of the Restructuring and Reform Act of 1998 (RRA) bars revenue officers from participating in sales under I.R.C. § 6335. A foreclosure sale is not a sale under section 6335. Therefore, revenue officer participation would not be barred by the RRA. However, as an administrative matter, there appears to be a presumption that the PALSs will be conducting all sales–sales under section 6335, as well as sales of perishable goods and acquired property. We have no reason to believe that SB/SE would treat foreclosure sales differently.

[12] Solely by way of example, we note that a local rule for the District Court for the Eastern District of California discusses in considerable detail the role of the U.S. Marshal. See Local Rule A-570.

be advisable that the Internal Revenue Manual be revised to reflect that the Service may request that the Department of Justice ask the court to include in the foreclosure order a provision that the Service will sell the property. In addition, the procedures for such sales should be set forth in the Manual.

COLLECTION DUE PROCESS; HEARING BY MAIL

March 23, 2001
CC:PA:CBS:B01
GL-129111-00
UIL: 6330.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SB/SE LAS VEGAS OFFICE
Attn: Wendy Harris

FROM: Alan C. Levine, Chief, Branch1 CC:PA:CBS:B01

SUBJECT: CDP Procedures- Hearings by Mail.

You have asked for our review and comments with respect to a form “Hello” letter that Las Vegas Appeals intends to use in Collection Due Process (CDP) cases in which only frivolous or constitutional arguments are raised. You have indicated that the proposed letter will state that Appeals no longer plans to offer face-to-face or telephone CDP conferences to taxpayers who indicate in their request for a CDP hearing that they are raising only frivolous or constitutional arguments to the proposed collection action. Las Vegas Appeals plans to send the form letter advising the taxpayers that unless they raise a relevant issue with 15 days from the date of the “Hello” letter, the appeals officer will issue a Notice of Determination sustaining the proposed collection action. For the reasons set forth below, it is our view that the CDP hearing envisioned by this letter does not satisfy the statutory requirements of I.R.C. § 6330(b).

The form “Hello” letter (copy attached) invites the taxpayer to present additional information that would be relevant to an issue upon which Appeals can grant relief. The letter states that if no further information is received, the CDP hearing will consist of a review of the taxpayer’s correspondence and other information in Appeals’ possession. Nowhere does the letter offer the taxpayer a face-to-face CDP hearing on relevant issues nor does it offer the taxpayer the alternative of a telephone conference.

Section 6330(b)(1) provides that if a taxpayer timely requests a CDP hearing, Appeals must hold the hearing, but neither the statute nor the Treasury Regulations explicitly define what a CDP hearing is. However, it was the consensus of the Service in interpreting the statute and drafting the regulations that Congress meant

for CDP hearings to be held in Appeals' normal, informal manner. Appeals has traditionally held hearings in person, by telephone, or by correspondence.

At a meeting with the Department of Justice, Appeals, and Chief Counsel, it was decided that Appeals would strive to grant, at a minimum, face-to-face conferences to all requesting taxpayers. Conferences by other means, such as by telephone or correspondence, are also acceptable provided the taxpayer has consented to this procedure, has been offered the opportunity for a face-to-face conference, and the basis for this type of conference is documented in the file. Konkel v. Commissioner, 86 AFTR2d 5545 (M.D. Fla. 2000) is instructive. In Konkel, a taxpayer who explicitly stated that he wanted all communication with Appeals regarding his CDP hearing to be by correspondence argued in his district court complaint that he did not receive a face-to-face hearing. At the suggestion of a Magistrate Judge during the course of the proceedings, Appeals offered the taxpayer a face-to-face hearing, but the taxpayer did not respond. The court granted the Government's motion for summary judgment.

More importantly, a taxpayer is entitled to a CDP hearing even if he will raise only frivolous or constitutional arguments because the appeals officer must cover the statutory requirements of sections 6330(c)(1) and (3)(C) of verification and balancing. Section 6330(c)(1) requires an appeals officer to "obtain verification from the Secretary that the requirements of any applicable law or administrative procedures have been met." Section 6330(3)(C) requires the appeals officer to "balance the need efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." In order to create an adequate record for the court, Appeals should grant face-to-face CDP hearings to taxpayers who request them. The appeals officer should inquire whether the taxpayer has any collection alternatives or other relevant issues. The word "relevant" is the key. I.R.C. § 6330(c)(2)(A) permits the taxpayer to raise any relevant issues relating to the unpaid tax or the proposed levy. This could include spousal defenses, collection alternatives, and challenges to the appropriateness of the collection actions. Frivolous arguments and worn constitutional arguments are not relevant issues. In our view, the appeals officer can conclude the CDP hearing if the taxpayer has no relevant issues to raise. The appeals officer is not required to spend much time beyond the minimum outlined here.

We appreciate the need to expedite these cases and to conserve both administrative and judicial time and resources. We suggest that appeals officers make use of the recent case of Pierson v. Commissioner, 115 T.C. No. 39 (filed Dec. 14, 2000). In that case, the Tax Court held that the taxpayer had instituted or maintained his frivolous and groundless case primarily, if not exclusively, as a protest against the Federal income tax. While, the Court declined to impose the penalty provided by I.R.C. § 6673 because the Tax Court's jurisdiction in CDP matters has been relatively short, the court, citing White v. Commissioner, 72 T.C. 1126 (1979), warned that it was providing "fair warning to those taxpayers who, in

the future, institute or maintain a lien or levy action primarily for delay or whose position in such proceeding is frivolous or groundless." The court has stated emphatically that it will henceforth impose sanctions pursuant to section 6673 in CDP cases. Therefore, we encourage appeals officers to inform taxpayers of the Pierson case at the CDP hearing. They may want to provide taxpayers with a copy of the opinion. Accordingly, Appeals must offer an opportunity for a face-to-face hearing to all taxpayers, regardless of what arguments they raise. Taxpayers may choose a telephone or correspondence alternative. Appeals should rely strongly on the Pierson case, and those cases that will, undoubtedly, follow Pierson, to impress on taxpayers the importance of raising relevant issues in a CDP hearing.

We have met with Appeals Headquarters about this issue and they concur with our opinion. Your local Appeals office should tailor their "Hello" letters to incorporate the advice given in this memorandum.

COLLECTION DUE PROCESS; JOINT RETURN

November 2, 2000
CC:PA:CBS:Br1
GL-604125-99
23.01.00-00
6330.00-00

MEMORANDUM FOR Robert B. NADLER, ASSOCIATE AREA COUNSEL NASHVILLE
Attn: Rebecca Harris

FROM: Alan C. Levine, Chief, Branch 1
(Collection, Bankruptcy, and Summonses)

SUBJECT: Disclosure and Copy of Notice of Federal Tax Lien

You have requested our review of informal advice given to area counsel on the following issue. We have coordinated your request with Disclosure & Privacy Law in CC:PA:DPL and their advice is incorporated into this memorandum. This document is not to be cited as precedent.

ISSUE:

Whether the Internal Revenue Service (Service) has violated IRC § 6103 by sending a duplicate Collection Due Process (CDP) Notice for a joint return liability to a spouse when the parties are separated or divorced. The CDP Notice includes

a copy of the filed Notice of Federal Tax Lien (NFTL) that lists the address of the spouse with the primary Taxpayer Identification Number (TIN). [13]

CONCLUSION:

It is not a violation of section 6103 when the parties are divorced or separated to send a copy of the NFTL with the address of the spouse who has the primary TIN to the other spouse where the filed NFTL includes the address of the primary taxpayer.

FACTS:

I.R.C. § 6320 requires the Service to send a CDP notice offering a CDP hearing to a taxpayer after the Service files a NFTL. When the Service is aware that taxpayers who have filed a joint return are divorced or separated, they send a CDP Notice to the taxpayer with the primary taxpayer identification number (TIN) and a duplicate CDP Notice to the divorced or separated spouse. Copies of the NFTL are sent to both taxpayers. The last known address of the primary taxpayer will appear on the copy of the NFTL sent to the secondary taxpayer.

LAW & ANALYSIS:

I.R.C. § 6321 provides for a lien on all property and rights to property of a taxpayer after assessment, notice, and demand by the Service. The lien that arises continues until the liability is satisfied or becomes unenforceable due to lack of time. I.R.C. § 6322. To preserve its priority with respect to other creditors, the Service may file a NFTL pursuant to I.R.C. § 6323. I.R.C. § 6320(a)(2) requires the Service to send a CDP notice to a taxpayer not more than five days after filing the NFTL. The Service is required to provide the amount of the unpaid tax, notice of the right to request a hearing, the administrative appeals available to the taxpayer, and the provisions and procedures relating to release of a lien. There is no requirement in the statute to send a copy of the NFTL. Temp. Treas. Reg. § 301.6320-1T(a)(2)Q&A-A10 similarly does not provide for sending a copy of the NFTL. Rather, the Service has had a practice of sending the taxpayer a copy of the NFTL for informational purposes after filing that predates the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98).

Section 3201(d) of RRA98 states that the "Secretary ... shall, wherever practicable, send any notice relating to a joint return under section 6013 [Joint Returns of Income Tax by Husband and Wife] of the Internal Revenue Code of 1986

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[13] The primary taxpayer identification number is the first social security number listed on a joint federal income tax return.

separately to each individual filing the joint return." [14] The Service has determined that it was practicable to use the same practice for administrative convenience to send separate notices in the CDP situation. Therefore, when the federal tax lien with respect to a joint return is filed, both taxpayers (including those taxpayers who are still married) receive the CDP notice and accompanying copy of the NFTL.

The general rule is that returns and return information, including addresses, are confidential, unless there is an exception in I.R.C. § 6103 or elsewhere in the Internal Revenue Code authorizing disclosure. I.R.C. § 6103(a). I.R.C. § 6323 provides for the public filing of a notice of federal tax lien. I.R.C. § 6323(a) and (f). I.R.C. § 6103(k)(6) provides, in connection with official duties relating to, among other things, collection activity, for the disclosure of return information to the extent that disclosure is necessary in obtaining information not otherwise reasonably available with respect to, among other things, the collection of tax. The regulations authorize the disclosure of return information in order to properly accomplish, among other things: "[t]o establish or verify the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in subparagraph (3) of this paragraph to be collected, or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability[.]" Treas. Reg. § 301.6103(k)(6)-1(b)(6). Chisum v. United States, 69 A.F.T.R.2d (RIA) 91-512 (D. Ariz. 1991), aff'd, U.S. App. Lexis 23636 (9th Cir. 1993), Egbert v. United States, 940 F.2d 1539 (10th Cir. 1991), cert. denied, 502 U.S. 1016 (1991), Elias v. United States, 1990 U.S. Dist. Lexis 19466 (C.D. Cal. Dec. 21, 1990), aff'd, 974 F.2d 1341 (9th Cir. 1992), Lake v. Atkins, 71A S.F.T.R.2d (RIA) 93-4098 (S.D. Fla. 1991), Lovelace v. United States, 71A A.F.T.R.2d (RIA) 93-3441(D. Tenn. 1991), aff'd mem. 956 F.2d 269 (6th Cir. 1992), Lutz v. United States, 919 F.2d 738 (6th Cir. 1990), Maisano v. United States, 908 F.2d 408 (9th cir. 1990), Simpson v. United States, 71A A.F.T.R.2d (RIA) 93-3956 (N.D. Fla. 1991).

With respect to a joint return, the NFTL provides notice of a lien on property that may be used to satisfy the joint liability. Thus, the NFTL is the return information of both spouses and is available to either. I.R.C. §§ 6103(e)(1)(B) and (e)(7). Further, once the NFTL is publicly filed, it is the Government's position that the notice is not subject to the confidentiality provided by section 6103(a). Rowley v. United States, 76 F.3d 796 (6th Cir. 1996).

Thus, the issue becomes whether the Service is authorized to put the present address of the primary taxpayer on an NFTL. I.R.C. § 6323(f) sets forth the provisions for filing a NFTL. Subsection 6323(f)(1)(A)(i) requires filing a notice of federal tax lien against real property in one office within the State, as designated by

[14] Section 3201(d) was never codified into the Internal Revenue Code.

State law in which the property subject to the lien is located. With regard to personal property, subsection 6323(f)(1)(A)(ii) provides that the notice of lien should be filed in one office within the State as designated by the laws of such States in which the property subject to the lien is situated. Subsection 6323(f)(2) states that the situs of personal property is deemed to be "at the residence of the taxpayer at the time the notice of lien is filed." Subsection (f)(3) states that the "form and content of the notice . . . shall be prescribed by the Secretary." The Treasury regulations prescribe the form of the NFTL.

The Treasury regulations do not specifically require the taxpayer's address to appear on a NFTL. Treas. Reg. § 301.6323(f)-1(d)(1) provides for filing a NFTL on Form 668 "Notice of Federal Tax Lien under Internal Revenue Laws" and subsection (d)(2) states that "a Form 668 must identify the taxpayer. . . ." Therefore, we conclude that the address is properly on the NFTL because the regulations require proper identification of the taxpayer. The taxpayer's address must appear for practical reasons because it clearly identifies the delinquent taxpayer from a person with the same or a similar name. For example, John Doe on Elm Street is differentiated by address from John Doe on Maple Street. Further, the purpose of the NFTL is to put creditors on notice of the priority that the United States is asserting. It is important to correctly and specifically identify the taxpayer to preserve the priority afforded to the government by the filing of the NFTL. As the above example demonstrates, the taxpayer's mailing address provides the proper specificity to accomplish the goal of notice to competing creditors.

In addition, Form 668 (presently Form 668Y) has been used by the Service for at least thirty-nine years. The earliest available Form 668 that we were able to locate is from 1961 and is virtually identical to the modern form. Both have a space for the residence of the taxpayer. The 1961 form is annotated to show that the taxpayer's address should be added to the space for residence. [15] The Federal Tax Liens Handbook included in IRM 5.12.1.14 outlines notice preparation. A current copy of the Form 668Y is included as Exhibit 5.12.1-5. (Copy attached.) While there is no statement in the Internal Revenue Manual text that the taxpayer's address should appear, the exhibit shows the space for residence and directs that the street address, city, state, and zip code of the taxpayer should be inserted. We conclude from this that the Secretary has authorized taxpayer's address to appear on the NFTL, and also that it may be disclosed to either spouse to whom the joint tax liability relates.

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[15] The copy of the Form 668 from 1961 was made from microfiche and is very faint. We are unable to reproduce it for attachment. The copy is in the legal file.