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MEMORANDUM FOR DISTRICT COUNSEL, NORTH CENTRAL DISTRICT

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation)

SUBJECT: Collection Due Process Notices

This responds to your request dated April 1, 1999, asking us to review your proposed answers to a request for advice sent to you from the North Central District RRA 98 Collection Coordinator. That request sets forth various hypothetical fact patterns and questions regarding proper procedures to follow when sending a Collection Due Process ("CDP") notice. The questions are underlined with our comments on your proposed answers following.

1. We have a balance due account for income taxes of a deceased taxpayer. We have accounts for income taxes of the estate. There is also an estate tax balance due account. The probate estate has been closed and the personal representative has been relieved of future responsibility. We will be issuing a CDP notice.

A. To whom should we issue the CDP notice for the income tax account of the deceased taxpayer? To whom should we issue the CDP notice for the estate tax accounts of the probate estate? To whom should we issue the CDP notice for unpaid income taxes of the estate?

The same procedures that are followed when sending a statutory notice of deficiency will be followed when sending a CDP notice for liabilities of a deceased taxpayer. The first question is addressed by NRC Question 855. The answer is as follows "If it is known that the taxpayer is deceased, the Service should exercise reasonable diligence to determine if a fiduciary was appointed. A fiduciary is required to give notice of fiduciary to the Internal Revenue Service ("Service"). Form 56, Notice Concerning Fiduciary Relationship, may be used to notify the Service of a fiduciary relationship. Do not assume that the surviving spouse is the

executor/executrix for the deceased spouse." If the Service has been notified as to the existence of a fiduciary relationship, the L 1058 notice, "Final Notice: Notice of Intent to Levy and Notice of Your Right to a Hearing", should be sent as follows:

John Doe (Decd.)
Richard Doe, Executor
(Richard Doe's Address)

If the Service has not been notified as to the existence of a fiduciary relationship, the L 1058 should be sent as follows:

John Doe (Decd.)
John Doe's Last Known Address

In the hypothetical given, if there was a personal representative then he would be treated as the fiduciary. For estate tax accounts and unpaid income taxes of the probate estate the CDP notice should be sent to the personal representative even though he has been relieved of further responsibility because this liability accrued while he was responsible for the estate and the administration thereof.

B. Letter 3164, Notification of Potential Third Party Contact (RRA 98 Section 3417) will also be issued in this matter. To whom should this letter be sent for the deceased taxpayer's income taxes? For estate taxes? Regarding income taxes of the estate?

C. Will contact with the former personal representative be a section 3417, third party contact with respect to the liability of the deceased? The probate estate? The estate taxes?

NRC Question 27 answers these two questions. It provides "For decedent cases, whoever would normally receive the statutory notice of deficiency is the person considered to be the taxpayer. That person should also be given the Letter 3164, 'Third Party Notice.' Contacts with anyone who would not normally be authorized to receive a statutory notice on the account would be considered third-party contacts and should be documented."

2. A. When we have a Limited Liability Company (LLC) with delinquent tax accounts to whom do we send the CDP notice? Just the LLC entity? Each individual who has an interest in the LLC?

We defer to your interpretation that under Minnesota law members of an LLC are not personally liable for the tax incurred by the LLC and therefore the CDP notice should only be sent to the LLC entity. For further guidance please see the

discussion on partnerships in part 3 of this memorandum.

B. If we send the CDP notice to each individual, to what address do we send the CDP notice? The address of the LLC? The home address of the individual?

Please see response 2A.

3. A. When we have a partnership with delinquent tax accounts to whom do we send the CDP notice?

Section 6320 - Section 6320 requires the Service to notify the person described in I.R.C. § 6321, within five days of the filing of a notice of lien, of his right to challenge the filing of the lien at a CDP hearing. Temp. Treas. Reg. § 301.6320-1T(a)(2)(A-A-1) provides: "Under section 6320(a)(1), notification of the filing of a NFTL on or after January 19, 1999, is only required to be given to the person described in section 6321 who is named on the NFTL that is filed." Accordingly, if the NFTL lists only the partnership then only the partnership receives a CDP notice. However, if the NFTL lists partners, in addition to the partnership, then each individual partner named on the NFTL and the partnership must receive a CDP notice. For example, if the NFTL lists ABC partnership and A, B, and C individually then a CDP notice must be sent to ABC partnership and to A, B, and C individually.

Section 6330 - I.R.C. § 6330(a)(1) provides that "no levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing to their right to a hearing." We interpret "person" under section 6330(a)(1) as the partnership with the delinquent tax account; therefore, when the Service intends to levy on property because of a partnership liability the partnership should receive the CDP notice.

B. To what address do we send the CDP notice?

Section 6320(a)(2)(C) relating to the filing of a NFTL, requires that when a notice is mailed it is to be by certified or registered mail, to the "person's" last known address. Section 6330(a)(2)(C) relating to a levy, adds the additional requirement that the mailing must be by return receipt requested. If the notice is required to be sent to a partner it should be sent to the partner's last known address. If a notice is required to be sent to the partnership, it should be sent to the partnership's last known address.

4. A. When we have a limited partnership with delinquent accounts to whom do we send the CDP notice?

Please see answer (3). Under section 6320 either a general or limited partner should receive a CDP notice when listed on the NFTL. The partnership receives a

CDP notice under section 6330.

5. The revenue officer prepares a CDP notice and a letter 3164 in preparation for a meeting with the taxpayer and the taxpayer's representative (POA). Only the POA shows up for the meeting. The revenue officer gives the POA both letters.

A. Is the giving of these letters the same as giving the letters to the taxpayer?

No. An original or copy of the notices must be provided to the taxpayer even if the taxpayer is represented by a Power of Attorney (POA). Taxpayers may authorize a representative to act on their behalf by executing a Form 2848, Power of Attorney and Declaration of Representative. Form 2848 line 7 provides that "[o]riginal notices and other written communication will be sent to you [the taxpayer] and a copy to the first representative listed on line 2 [the POA] unless you check one or more of the boxes below." The boxes below line 7 give the taxpayer the option of (a) having the POA receive the original and the taxpayer a copy of such notices or communication; (b) having a second POA receive a copy of such notices and communications; or (c) not having any notices or communication sent to the POA. There is no choice for the taxpayer to have notices or communications sent only to the POA. Accordingly, the original advance notice required under I.R.C. § 7602(c) (Letter 3164), and the CDP notice, must be sent to the taxpayer, or to the POA with a copy sent to the taxpayer.

B. Does the revenue officer still need to mail a copy of each letter to the taxpayer? Does the CDP letter need to be mailed certified in this case?

Form 2848 does not eliminate the requirement that the taxpayer be sent either the original or a copy of any notices or written communications. If on Form 2848 the taxpayer authorizes the POA to receive the original notice, then the copy of the CDP notice sent to the taxpayer does not need to be mailed certified or registered mail, return receipt requested. If the POA is not authorized to receive the original notice, then the CDP notice must be served on the taxpayer either in person, left at the dwelling or usual place of business of the taxpayer or by certified or registered mail, return receipt requested.1/ There is no requirement under I.R.C. § 7602(c) that the advance notice be provided by certified mail.

C. Which IDRS transaction codes should we use in this case TC 971 Action Code (AC) 66 - The return receipt was signed so the notice was delivered, AC 67 - Delivery was refused, AC 68 - The notice was returned, undelivered?

1/ The return receipt requested mailing requirement only applies to CDP notices under section 6330.

We agree that this question should be coordinated with the National Resource Center.

D. Can the revenue officer immediately proceed with a third party investigation under RRA 98 Section 3417?

If the advance notice (Letter 3164) is sent to the taxpayer, then the revenue officer should wait ten days before making any third party contacts. However, the taxpayer's POA may authorize the revenue officer to make certain third party contacts. Form 2848 first gives a representative the power to do all things a taxpayer could do and only then excepts from that general grant of authority certain acts not relevant here. The Form provides that "The representatives are authorized to...perform any and all acts that I (we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents." This language is sufficient to allow a taxpayer's representative to authorize a section 7602(c) contact.

If a third party contact has been authorized by the taxpayer or the taxpayer's POA, then the advance notice and recordkeeping requirements of I.R.C. § 7602(c) do not apply with respect to the particular contact that has been authorized. For example, if the revenue officer meets with the taxpayer's POA and the POA authorizes the revenue officer to contact a specific third party, the revenue officer may make this contact without providing advance notice to the taxpayer or keeping a record of this contact. However, in order to avoid any subsequent disputes as to whether the contact was authorized, there should be written documentation that the contact was authorized. The better practice would be for the revenue officer to obtain written authorization from the taxpayer or the POA, either by having the taxpayer or the POA sign the Form 12180, Third Party Contact Authorization Form, or by some other means.

6. How do we handle our IDRS transaction code TC 971 and Action Code when someone other than the taxpayer signs for the Letter 1058?

We agree that this question should be coordinated with the National Resource Center.

7. While preparing the CDP letter, Letter 1058, the revenue officer discovers that the Catalog Number (the number on the bottom of the notice which gives the number of the notice) for the macro letter on her computer is wrong. She has sent out a number of these notices to taxpayers already.

A. Does she need to reissue the notices she has previously sent?
B. Would your answer change if there is a misspelling of a word?
C. If a sentence is missing from the notice?
D. If the employees name and ID number are missing?

This office issued a memorandum dated November 10, 1998, that addressed the legal requirements of a notice of a hearing under I.R.C. § 6330. In that memorandum we concluded that courts will presumably rule on the sufficiency of a notice under section 6330 as they have under I.R.C. § 6331(d). Courts have ruled that there is not any "magic" language that qualifies notice given by the Service as fulfilling the requirements of section 6331(d). Rather, the notice must explain to the taxpayer the nature of the act that will occur, i.e., the levy, and what the taxpayer can do to prevent such action from occurring. See, Watts v. United States, 96-2 USTC ¶ 50,648 (D. Wyo. 1996) (The court ruled that section 6331(d) was satisfied where the notice explains the nature of the notice and the appropriate measures to obtain relief from the levy); Person v. United States, 90-2 USTC ¶ 50,365 (D. Haw. 1990) (The court found that the IRS followed proper procedures and that the requirements of section 6331(d) were fulfilled, when the IRS sent the taxpayer a letter stating "this is your *Final Notice* before we proceed with enforcement action and levy on your property or right to property in accordance with section 6331(d) of the Internal Revenue Code."); Bay v. United States, 995 F.2d 230 (9th Cir. 1993) (In discussing whether the United States complied with the procedures of I.R.C. § 6303(a) and section 6331(d), the court ruled that the form of the notices was irrelevant, as long as it provided the taxpayer with the information required under the statute.) Courts also note that the notice does not need to be signed by an IRS official and can be computer generated. See Watts; In re Hopkins, 192 B.R. 760 (D. Nev. 1995) (The court ruled that where plaintiffs received a Fourth Delinquency Notice encaptioned "Notice of Intent to Levy, " even though it was computer generated, with no signature of an IRS employee, it qualified as notice under section 6331(d)).

There are no cases that discuss the specific language that is required to fulfill the notice requirements of section 6331(d); however, it is clear that strict compliance with the statute is necessary. For example, each year's assessment where enforcement action is going to occur must be listed on the notice of intent to levy. Where a specific year is not listed, and property is levied upon, to recover for a year's assessment that was not listed on the notice, the levy is in violation of section 6331(d). See Gonsalves v. United States, 782 F. Supp. 164 (D.Me. 1992) (Where the United States could prove that notices were provided for all the tax years in question, except 1981, the court ruled that a notice of intention to levy is required for each tax year, and whether the notice was sent for 1981 was a matter that could not be disposed of in summary judgment.); James v. United States , 970 F.2d 750 (10th Cir. 1992).

The content, rather than the form of the notice, will determine whether the Service has complied with section 6330. This provision was enacted so that taxpayers have "adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property." S. REP. NO.105-174 (1998). The notice must clearly inform the taxpayer of his right to a hearing, the process of securing a hearing and explain the consequences that will occur if a hearing is not requested,

namely levying on property. Therefore, if an inaccurate catalog number is the only error with the letter and the letter provides the information that is provided on a correctly identified Letter 1058, a substitute letter does not need to be sent. A misspelling of a word does not indicate that they need to be resent; however, if a sentence is missing from the notice and it is a sentence that addresses or explains a statutory right then a corrected notice should be sent. Specifically, RRA § 3705 provides that any correspondence that the taxpayer receives from the Service must contain an employee's name and a unique identifying number; therefore, if this information is missing from the CDP notice a "substitute" notice should be sent. Temp. Treas. Reg. § 301.6330-1T(A-A10); Temp. Treas. Reg. § 301.6320-1T(A-A12).

8. Can the revenue officer working a case type or print in the District Director's name on the Letter 1058 and Letter 937 and send the letters? Do we need to reissue CDP letters that we have sent without any signature, typed name, or printed name in the signature space?

We agree that this question should be coordinated with the National Resource Center.

9. In the past when we talked to a taxpayer and advised the taxpayer that we were going to file a Notice of Federal Tax Lien (NFTL), we filed the NFTL. However, if we had not advised the taxpayer we would send a "Final Notice" letter to the taxpayer and wait 30 days to file the NFTL. With the coming of the Collection Due Process procedures both IRC Section 6320 and Section 6330 we are more cautious about filing the NFTL even if we have talked with the taxpayer and advised the taxpayer of the NFTL filing. Must we send the CDP letter first and wait 45 days before filing the NFTL? Or can we still file the NFTL immediately after advising taxpayer that the NFTL will be filed?

The 6330 notice does not create a 45 day waiting period for lien filing. Rather, a NFTL can be filed after giving the taxpayer warning and a chance to satisfy his tax liability. Policy Statement P-5-47 provides that "A notice of lien shall not be filed, except in jeopardy assessment cases, until reasonable efforts have been made to contact the taxpayer in person, by telephone or by a notice sent by mail, delivered in person or left at the taxpayer's last known address, to afford him/her the opportunity to make payment." After filing a NFTL the taxpayer must be notified of the filing of the NFTL not more than five business days after the date of such filing.

10. When we have sent one CDP letter and 180 days have passed our warning of enforcement is no longer considered timely. If it is then appropriate to take enforcement action, we must issue letter 3174, "Warning of enforcement." Should this letter be sent by certified mail? How long should we wait after mailing this letter before we can take enforcement action?

We agree that this question should be coordinated with the National Resource Center.