DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

April 21, 2000

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR Pacific Northwest District Counsel
Attn: Thomas N. Tomashek

FROM: Michael R. Arner /s/
                  Senior Technician Reviewer

SUBJECT: Application of Surplus Levy Proceeds to Unlevied Periods

This advice pertains to your memorandum concerning the above subject. This document is advisory only and is not to be relied upon or otherwise cited as precedent.

LEGEND:

City: N/A
Taxpayer: N/A
SSN: N/A
Years: N/A
Assessment Amount: N/A

ISSUE:

Whether the Internal Revenue Service ("Service") may apply surplus levy proceeds to a tax period not included on the levy where such tax period is a period in which the taxpayer has not received a Collection Due Process Hearing Notice ("CDP Notice"), or whether the Service must refund the surplus proceeds to the taxpayer.

CONCLUSION:

The Service may not apply surplus levy proceeds to a tax period not included on the levy where such tax period is a period in which the taxpayer has not received a CDP Notice. Instead, the Service must refund the surplus proceeds to the taxpayer.

FACTS:

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A levy is served that lists a specific amount of tax liability for a specific tax period. Between the time of the levy and the receipt of the levy proceeds, a payment is posted to the tax period listed on the levy. The levy proceeds are received thereafter in an amount equal to that shown on the levy. The levy proceeds are posted to the tax period shown on the levy, and because of the intervening payment a credit now exists for the tax period in question. The taxpayer has another tax liability for a tax period not included on the levy in which the taxpayer has not received a CDP Notice.

The issue is whether the Service may apply the credit to the tax liability for the period not included on the levy, or must the Service refund the amount of the credit to the taxpayer.

LAW AND ANALYSIS:

This concerns your advisory opinion dated February 29, 2000, addressed to the Pacific Northwest District Director, Special Procedures function regarding the application of surplus proceeds pertaining to the upcoming Alaska Permanent Fund Dividend Levy Program ("AKPFD"). Based on the facts described above, you concluded that pursuant to I.R.C. § 6402(a) the Service is authorized to apply the credit to the unpaid tax liability for the period not included on the levy. 1/ We disagree with your conclusion, and instead, conclude that the Service must refund the amount of the credit to the taxpayer. 2/

Pursuant to section 6330(a)(1), the Service is required to provide a CDP Notice to any taxpayer whose property rights the Service intends to levy on or after January 19, 1999. The CDP Notice must specify each tax and tax period that will be included in the levy. Temp. Treas. Reg. § 301.6330-1T(a)(3), Q&A-A3. The Service may not levy on the taxpayer's property for such tax and tax period unless

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1/ Section 6402(a) provides as follows:

> (a) General Rule. – In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e) refund any balance to such person.

2/ Your conclusion would have been correct prior to the enactment of the IRS Restructuring and Reform Act of 1998 ("RRA 98"). However, RRA 98 added I.R.C. § 6330 which entitles the taxpayer to certain CDP rights prior to levy action.

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the CDP Notice has been provided at least 30 days prior to the proposed levy. I.R.C. § 6330(a)(2). The pre-levy CDP Notice is not required if the collection of tax is in jeopardy or the Service is levying on a state tax refund. I.R.C. § 6330(f). 3/ The taxpayer is entitled to one CDP hearing with respect to the tax and tax period covered by the CDP Notice. I.R.C. § 6330(b)(2). The taxpayer must request such hearing within the 30-day period commencing on the day after the date of the CDP Notice. I.R.C. § 6330(a)(3)(B).

In the instant case, assuming the Service applies the credit to the tax period in question, the Service is in effect levying the taxpayer's property to satisfy a tax liability for a tax period that is not included on the levy. As discussed above, the Service must give the taxpayer a CDP Notice specifying each tax and tax period that will be included in the levy so the taxpayer has the opportunity to challenge the proposed levy for the specified tax liabilities. Here, a pre-levy CDP Notice has not been given to the taxpayer for the tax and tax period in question. Consequently, the taxpayer has not been given an opportunity to request a CDP hearing with respect to such tax and tax period. Thus, pursuant to section 6330(a)(1) the Service cannot apply the surplus levy proceeds to the tax and tax period in question. 4/

Accordingly, the Service may not apply surplus levy proceeds to a tax period not included on the levy where such tax period is a period in which the taxpayer has not received a CDP Notice. Instead, the Service must refund the surplus proceeds to the taxpayer.

If you have any further questions, please contact General Litigation, Branch 1 at (202) 622-3610.

cc: Assistant Regional Counsel (GL), Western Region

3/ If a taxpayer has not received a CDP Notice and the Service levies on a state tax refund or issues a jeopardy levy on or after January 19, 1999, the Service will provide a post-levy CDP Notice to the taxpayer within a reasonable time after that levy. Temp. Treas. Reg. § 301.6330-1T(a)(3), Q&A-A5.

4/ However, if the taxpayer was already given a CDP Notice for the tax and tax period in question and taxpayer has not timely requested a CDP hearing, then pursuant to section 6402(a) the Service may apply the surplus levy proceeds to such tax and tax period.