



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

OFFICE OF
CHIEF COUNSEL

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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.¹ 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 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).²

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

¹ 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).

² 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.

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 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).

If you have any questions or need further assistance, please contact the attorney assigned to this matter at (202) 622-3620.