



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR NORTHERN CALIFORNIA DISTRICT COUNSEL
(SACRAMENTO)

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

SUBJECT: Waiver of Levy While Offer is Pending

This responds to your request dated July 25, 1999, that we prereview your proposed advice on the below issues. This document is not to be cited as precedent.

LEGEND:

Age A:
Amount A:
Amount B:
Amount C:

ISSUES: (1) Can the Service levy on a taxpayer's pension plan to fund an offer in compromise?

(2) If so, what language should be used for the taxpayer's waiver of the prohibition of levy under I.R.C. § 6331(k)(1)?

(3) Can the Service accept from a taxpayer a waiver of the right to receive a notice of intent to levy and the right to a Collection Due Process hearing?

(4) Does the taxpayer have equity in the pension plan for purposes of determining the proper amount of an offer if the Service can immediately obtain the funds in the plan by levy?

CONCLUSIONS: (1) A levy on a pension plan can only reach funds which the taxpayer can withdraw from the plan. If the taxpayer is not entitled to immediately withdraw the funds, then the Service similarly cannot obtain immediate payment by levy.

- (2) Any waiver obtained should specifically enumerate the property to be levied upon.
- (3) A taxpayer may not waive the right to the notice of intent to levy, but may waive the right to a Collection Due Process hearing.
- (4) If the Service can obtain immediate payment by levy on the plan, the taxpayer has equity in the plan for purposes of the offer.

BACKGROUND: The taxpayer, who is Age A, owes a tax liability of approximately Amount A. The collection period of limitation will expire on most of the tax liability within two years. He has approximately Amount B in a forced-contribution retirement plan, which pursuant to the manual governing the plan cannot be withdrawn until he reaches age 55 and he is retired. However, the plan administrator will honor Internal Revenue Service levies for payment of the delinquent taxes. The taxpayer has submitted an offer in compromise in which he offers to pay Amount C in full satisfaction of the tax liability. The funds would be obtained by a Service levy on the pension plan. The revenue officer has valued the equity in the pension plan as zero for purposes of determining the proper offer amount. The revenue officer wants to accept the offer in conjunction with levying on the pension plan to fund the offer. To accomplish this, the revenue officer would like to obtain a taxpayer waiver of the prohibition on levy while the offer is pending, and a waiver of the right to a collection due process (CDP) hearing. The levy would then be issued and the funds in the taxpayer's pension fund account would be turned over to the Service. We presume that it is intended that the Service would hold these funds as a deposit until the offer is accepted. See IRM 5.8.2.5.

In your proposed advice, you conclude that the prohibition on levy while an offer is pending can be waived in writing, and that once a notice of intent to levy informing the taxpayer of the right to a CDP hearing is issued, the taxpayer can waive in writing the prohibition of levy during the 30 day period following the issuance of the CDP notice. Finally, you conclude that if the Service can levy on the plan, then the taxpayer should have access to the funds and the taxpayer accordingly has equity in his pension plan.

LAW AND ANALYSIS:

I. Levy on Pension Plan

I.R.C. § 6331(a) authorizes the Service to levy upon "all property or rights to property" of a taxpayer to collect delinquent taxes. A levy extends only to property rights and obligations that exist at the time of levy. Treas. Reg. § 301.6331-1(a). Thus, funds in a retirement plan that are currently being paid out to the taxpayer, or which the taxpayer has a right to withdraw, are reachable by levy. Additionally, obligations exist for purposes of a levy when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date. Id. If the taxpayer has a present right to payment at some time in the future, the levy reaches that right. Rev. Rul. 55-210, 1955-1 C.B. 544. However, the Service can only demand

payment in the future when the taxpayer's right to payment ripens. See IRM 5.11.6.1, 5.11.6.2.

The Service's right to payment as a result of a levy on a pension plan is only as extensive as the taxpayer's right to payment. If the taxpayer is currently entitled to monthly payments, the Service is entitled to receive those monthly payments by levy. See, e.g., Shanbaum v. United States, 32 F.3d 180 (5th Cir. 1994). If the taxpayer only has the right to receive payments at some future date (e.g., upon retirement and/or a specific age), then the Service is not entitled to receive any payments as a result of its levy until such future date.

In this case, you have informed us that the taxpayer has no right to make an early withdrawal from his account. ^{1/} There is, therefore, no current right to payment which the Service's levy can reach. The levy can only reach the taxpayer's right to distributions in the future upon his retirement.

In such circumstances, the Service should not levy on the pension plan to obtain the funds which are to be used for a lump sum payment under the proposed offer. If the taxpayer cannot withdraw the funds himself, then he has no right to immediate payment which the Service can obtain by levy. If the plan administrator is willing to honor an IRS levy, but is not willing to provide the same funds to the taxpayer, then the administrator is mistaken as to the Service's levy authority. We, accordingly, recommend that you revise your advice to indicate that the Service should not levy unless the funds are available to the taxpayer.

II. Waiver of Levy Prohibition during Pendency of Offer

However, since a case may arise where the Service will be able to obtain pension plan funds by levy, we have some general comments regarding the waiver of the section 6331(k) prohibition.

For offers pending on or made after December 31, 1999, section 6331(k) prohibits a levy with respect to any unpaid tax during the period that an offer-in-compromise by such person with respect to that tax is pending, during the thirty days after a rejection of the offer by the Service, and if an appeal is filed within 30 days of the rejection, while the appeal is pending. I.R.C. § 6331(k)(1). An offer becomes pending when it is accepted by the Service for processing, and is no longer pending after it is withdrawn by the taxpayer, or it is accepted or rejected by the Service. Treas. Reg. § 301.7122-

^{1/} You have not, however, provided us with any specific information as to the plan rules and why the administrator will honor a levy but not a taxpayer withdrawal.

1T(c), (f). Thus, generally levies are prohibited while the Service is evaluating whether the offer will be accepted or rejected. Treas. Reg. 301.7122-1T(f)(2). 2/

Section 6331(k)(3) states that rules similar to the rules of subsection 6331(i)(3)-(5) shall apply to subsection 6331(k). Section 6331(i)(3)(A)(i) permits a taxpayer to waive in writing the restrictions on levy while a refund proceeding is pending. Thus, section 6331(i)(3)(A)(i), as incorporated by section 6331(k)(3), permits the taxpayer to waive in writing the restrictions on levy while an offer is pending. 3/

You have proposed a waiver which states “I [we] hereby state that I [we] agree to waive the prohibition under I.R.C. § 6331(k) against the IRS’s levying on my [our] property or rights to property.” This is a broad waiver which permits the Service to levy on all assets of the taxpayer for the full amount of the tax liability. Consistent with the purpose of the prohibition on levy to protect the taxpayer, we believe that the waiver should be narrowly drafted to reference the particular entity and/or asset to be levied upon (e.g., the taxpayer’s pension plan account), and to specify the dollar amount that the levy will be limited to (e.g., the offer amount). Such a narrowly drafted waiver will prevent any possible misunderstandings on the part of the taxpayer or the Service as to the intended scope of a waiver. We believe that the draft waiver form you recommend is unnecessarily overbroad.

III. Waiver of Collection Due Process Hearing

We also have some comments concerning the waiver of the right to a Collection Due Process (CDP) hearing. Your proposed advice correctly concludes that a taxpayer may not waive the right to receive a section 6330 notice but that a taxpayer may waive the 30-day period following the issuance of a CDP notice during which the Service is precluded from levying on a taxpayer’s property. The reason given for this conclusion, however, is incorrect. The proposed advice states that such a waiver is permitted by Q&A C-9 of Treas. Reg. §301.6330-1T(c)(2); specifically, the last sentence which permits taxpayers to waive some or all of the requirements regarding the contents of a notice of determination. A notice of determination is not issued by Appeals until after the requested CDP hearing is held. The waiver discussed in your advice is one which waives the taxpayer’s right to receive a CDP hearing. The waiver would be given by a

2/ We note that there is no statutory prohibition on levy after the offer is accepted, since the offer is no longer pending with the Service. Section 6331(k) would not prohibit a levy on the taxpayer’s pension plan after the offer is accepted, and no waiver of the section 6331(k) prohibition would be necessary to permit a levy after acceptance of the offer.

3/ However, neither the regulations concerning offers in compromise, nor the Internal Revenue Manual provisions governing offers in compromise, address waivers of the prohibition on levy. See section 301.7122-1T(f)(2); IRM 5.8.3.5.

taxpayer upon receipt of a CDP notice. This waiver occurs before any CDP hearing request is made and is not a waiver of the type being discussed in Q&A C-9.

The reason why such waivers of the right to a hearing are permitted is because the Service recognizes that taxpayers may waive any rights granted to them under the Internal Revenue Code. In this regard, taxpayers were administratively permitted to waive their right to receive a notice of intent to levy under I.R.C. § 6331(d) prior to the enactment of I.R.C. § 6330. The notice of intent to levy required to be given under section 6330 is similar to the notice of intent to levy required to be given under section 6331(d). However, the major difference between these provisions is that the section 6330 notice also advises taxpayers of their right to a CDP hearing and, if the section 6330 notice is mailed, the 6330 notice is required to be sent certified mail with a return receipt requested.

Thus, conceptually a taxpayer could waive a notice of intent to levy under section 6330. However, a waiver of a taxpayer's CDP rights do implicate, at least tangentially, the provisions of section 3468 of the Internal Revenue Service Restructuring and Reform Act of 1998. That section prohibits Service employees from requesting a taxpayer to waive the taxpayer's right to bring a civil action against the United States or any Service employee for any action taken in connection with the internal revenue laws unless the taxpayer waives that right knowingly and voluntarily, or that request is made in person and the taxpayer's attorney or representative is present, or the request is made in writing to the taxpayer's attorney or representative. Taxpayers who waive their right to a CDP hearing do not receive a CDP hearing or a notice of determination by Appeals from which they could otherwise seek court review. Accordingly, the consequences of a waiver of the taxpayer's right to a CDP hearing should be discussed with the taxpayer or the taxpayer's representative, if the taxpayer is represented. In order to prevent any misunderstandings, it is the Service's current practice to provide a taxpayer with a section 6330 notice of intent to levy before accepting any waiver from that taxpayer of his right to obtain a CDP hearing. 4/

4/ We note that in contrast to the waiver of the prohibition of levy during the pendency of the offer, the waiver of the taxpayer's rights to a CDP hearing cannot be limited to specific property. As a general matter, under section 6330, no levy may be made upon any property of a taxpayer for a particular tax and tax period until notice has been given to the taxpayer of both the Service's intention to levy and of the taxpayer's right to a hearing with Appeals. The taxpayer's rights under section 6330 are with respect to the first levy that is proposed to be made for a particular tax and tax period. The taxpayer is not entitled to either notification of intent to levy or to a hearing for any subsequent levy actions that may be necessary with respect to that particular tax and tax period. More importantly for the purposes of this memorandum, taxpayers are not entitled to separate CDP notification with respect to each asset or type of asset that they may possess. Accordingly, any waiver of the right to a CDP hearing should be broadly worded so as to encompass all of the taxpayer's assets.

IV. Valuation of Pension Plan

Finally, we agree with your conclusion that if the plan administrator will honor a Service levy, the pension plan should not be valued as zero for purposes of the offer. Pursuant to the manual guidelines the taxpayer has equity in his forced-participation plan for purposes of determining the amount of the offer only if he has current access to the funds. IRM 5.8.5.3.5. As discussed above, the Service can only obtain the funds by levy to fund the offer if the taxpayer has current access to the funds. Therefore, pursuant to the manual guidelines it is inconsistent to value the plan as zero for purposes of the offer, while at the same time agreeing to fund the offer by obtaining immediate payment of the pension plan assets by levy.

We, therefore, recommend that you revise your proposed advice consistent with this memorandum. This memorandum has been coordinated with the office of the Chief, Branch 1 (CB&S), which has jurisdiction over CDP and levy issues. Please contact this office at (202) 622-3620 if you have any questions or comments.

cc: Assistant Regional Counsel (GL), Western Region
Chief, Branch 1 (CB&S)