Number: 200041028 *GL-113128-00/CC:PA:CBS:B2*
Release Date: 10/13/2000 *UIL: 9999.98-00*
AUGUST 2000 *BULLETIN NO. 479*

COLLECTION, BANKRUPTCY AND SUMMONSES BULLETIN

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

Reminder: Pre-review of Lien Foreclosure Suit Letters

Chief Counsel Notice N(34)700-2, Judicial Approval for Principal Residence Seizures, issued on February 5, 1999, contains procedures for the new judicial proceeding for court approval of principal residence seizures found in I.R.C. section 6334(e)(1). The Notice provides that pre-review of all suit letters seeking a section 6334(e)(1) proceeding is required by Branch 1 (Collection, Bankruptcy & Summonses). An occasionally overlooked portion of this Notice, however, is the requirement that suit letters seeking lien foreclosure on certain principal residences (the principal residence of the taxpayer, taxpayer's spouse, taxpayer's former spouse, or the taxpayer's minor child) must also be sent to Branch 1 for pre-review. The purpose of the pre-review is to ensure uniformity in the choice of a section 6334(e)(1) proceeding or a lien foreclosure suit.

ACCEPT NO SUBSTITUTES
Substitute Return = No Return for Discharge Purposes

In **In re Hatton, 2000 U.S. App. LEXIS 19079 (9th Cir. Aug. 10, 2000)**, the taxpayer did not file a tax return in 1983. The Service filed a substitute return under I.R.C. § 6020(b), based on information secured from third parties, and assessed the deficiency in 1987. When the debtor refused to pay, the Service filed a Notice of Federal Tax Lien. After ignoring several notices, the debtor finally met with the Service in 1991, entering into an installment agreement.

In 1994, the debtor filed Chapter 7 bankruptcy, seeking to discharge his 1983 taxes. The Service filed a proof of claim for the balance of the unfinished installment agreement, but the bankruptcy court held that the taxes were dischargeable even though chapter 7 debtor did not file a return. The court ruled that where the debtor cooperated with Service, acknowledged his tax obligations and signed an installment agreement, the debtor provided the equivalent of a return for purposes of § 523(a)(1)(B)(i). On appeal, the bankruptcy appellate panel affirmed. The Ninth Circuit, however, reversed.

Finding that B.C. § 523(a)(1) excepts from discharge a tax liability for which the required return was not filed, the Ninth Circuit determined that "return" should be given a strict construction. Using the dictionary definition of return, which the court found equivalent to the Service's definition as found in Beard v. Commissioner, 82 T.C. 766 (1984), the Ninth Circuit concluded that neither the substitute return prepared by the Service nor the installment agreement qualified as a "return." Neither document was signed under penalty of perjury, nor was either document an honest or reasonable attempt to satisfy the requirements of tax law. The appellate court found that the debtor's cooperation was due only to the Service's collection efforts, and thus was not "honest" or "reasonable." As a consequence, the 1983 taxes were nondischargeable.

BANKRUPTCY CODE CASES: EXCEPTIONS TO DISCHARGE: NO RETURN

CASES

1. BANKRUPTCY CODE CASES: Allowance of Administrative Expenses: Interest
In re Weinstein, 2000 Bankr. LEXIS 940 (B.A.P. 1st Cir. July 28, 2000) - Interest on taxes allowed first priority as administrative expenses under B.C. § 503(b) and § 726(a)(1) is itself not a first priority claim. Rather, under B.C. § 726(a)(5), such interest is a fifth priority claim. The bankruptcy appellate panel found the plain language of the statute prevailed over contrary case law, including In re Flo-Lizer, Inc., 916 F.2d 363 (6th Cir. 1990).

2. BANKRUPTCY CODE CASES: Automatic Stay: Contempt for Violation
Stewart v. United States, Adv. No. 99-4196 (Bankr. S.D. Ga. July 10, 2000) - A bankrupt debtor is not injured by the issuance of a computer generated notice of intent to levy if the debtor received assurance that the Service will not seek to collect a tax liability referenced in the notice.

3. BANKRUPTCY CODE CASES: Automatic Stay
BANKRUPTCY CODE CASES: Chapter 13: Property of the Estate
BANKRUPTCY CODE CASES: Refunds: Setoff
In re Holden, 86 AFTR2d ¶ 2000-5192 (D. Vt. July 25, 2000) - The Service's "v. freeze" code, preventing tax refunds from being issued to bankrupt debtors, violates the automatic stay. The district court noted that although upon confirmation of a chapter 13 plan, under B.C. § 1327(b) property is revested in the debtor; B.C. § 1306(a)(1) provides that all post-petition property is property of the estate. Reconciling this conflict, the court adopted the reasoning of the bankruptcy court that immediately after confirmation (where, under section 1327, all property revests in the debtor), newly-acquired property such as wages is again added to the estate. Therefore, because a post-confirmation tax refund is property of the estate, the Service's freeze of the debtor's funds was a violation of the confirmation order. And because the Service did not move the court to permit setoff, nor move to dismiss or convert, the debtor was entitled to $7,000 damages for emotional distress.

4. BANKRUPTCY CODE CASES: Determination of Secured Status (§ 506)
In re McIver, No. DKC 99-2787 (D. Md. August 7, 2000) - District court held that the Service held a secured claim against the debtor's annuities, because the Service's tax lien under I.R.C. § 6321 attaches to the debtor's right to receive payments. Although the restrictions on transfer in the annuities would ordinarily exclude the debtor's interest from the bankruptcy estate under B.C. § 541(c)(2), those spendthrift provisions are ineffective against a tax lien. Therefore under section 541(c)(1) the debtor's pension rights remain property of the estate and the Service under section 506(a) thus has a secured claim to the extent of their value.

5. BANKRUPTCY CODE CASES: Exceptions to Discharge: No, Late or Fraudulent Returns

In re Grothues, 2000 U.S. App. LEXIS 22016 (5th Cir. August 28, 2000) - Service claimed unpaid excise taxes owed by corporations against owners as alter-egos. Owners filed bankruptcy, and the district court found the taxes dischargeable. The Fifth Circuit reversed as to one of the owners, based on a guilty plea to willful tax evasion. Since under B.C. § 1141(d)(2), an individual in Chapter 11 is not discharged from debts, including taxes, nondischargeable under section 523, the Service had a valid claim for taxes, regardless of the theory used to pierce the corporate veil. Although the debtor pled guilty to evasion for only one tax period, the plea agreement included other tax periods, and the debtor also promised to pay the unpaid excise taxes.

6. BANKRUPTCY CODE CASES: Liens: Avoidance by Trustee

Stangel v. United States, 2000 U.S. App. LEXIS 18300 (5th Cir. Aug. 1, 2000) - Chapter 13 debtor sought to avoid tax lien under B.C. § 545. The Fifth Circuit found Hartford Underwriters Insurance Co. v. Union Planters Bank, 120 S.Ct. 1942, 2000 U.S. LEXIS (May 30, 2000), controlling. The Supreme Court in Hartford, although dealing with B.C. § 506(c) in a Chapter 11 case, held that where the bankruptcy code states that the trustee may act, *only* the trustee may act. Since section 545 provides that the trustee may avoid a statutory lien, only the trustee (and not the debtor) may avoid such a lien.

7. BANKRUPTCY CODE CASES: Proofs of Claim: Amendment

United States v. Jones, 2000 U.S. Dist. LEXIS 12432 (W.D. Mich. June 28, 2000) - The district court rejected the Service's untimely proof of claim under B.C. § 502(b)(9). The court held the Service's proof of claim was not an amendment to the debtor's claim filed on its behalf, because it was filed before the debtor's claim. Nor did the bankruptcy court abuse its discretion in disallowing the claim where the Service took no other action to preserve its interest. The court also held property revested in the debtor free and clear of the tax liens, because the Service had notice of the debtor's plan and did not object, so the lien was "provided for" where the debtor proposed nominal payment, and because the underlying tax did not achieve priority status under B.C. § 507(a)(8) and so was dischargeable.

8. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code

Kreuzberg v. United States, 2000 Bankr. LEXIS 898 (Bankr. M.D. Pa. July 11, 2000) - Finding In re Taylor, 81 F.3d 20 (3d Cir. 1996) controlling, the bankruptcy court found the three year lookback period of B.C. § 507(a)(8)(A)(i) was tolled by a prior bankruptcy under B.C. § 108(c) and for an additional six months under I.R.C. § 6503(h). The debtor's taxes were ruled nondischargeable under B.C. § 523(a)(1)(A).

9. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code

In re Messer, 2000 U.S. Dist. LEXIS 9965 (S.D.N.Y. July 15, 2000) - The bankruptcy court held that neither B.C. § 108(c) nor I.R.C. § 6503 tolls the running of the three year period provided by B.C. § 507(a)8)(A)(i), and so found the debtor's taxes dischargeable under B.C. § 523(a)(1)(B)(ii). The court found the statutory language clear, and did not lead to an absurd result. The Government did not argue equitable tolling under B.C. § 105.

10. COLLECTION DUE PROCESS

Davis v. Commissioner, 115 T.C. 4 (July 31, 2000) - The Service issued a Notice of Intent to Levy, which was upheld after a collection due process hearing. The Tax Court found that Appeal's reliance on a Form 4340 Certificate of Assessments and Payments to verify the assessments complied with I.R.C. § 6330(c)(1). The Court also held that the taxpayer had no right to subpoena witnesses at a collection due process hearing.

11. COLLECTION DUE PROCESS

McCune v. Commissioner, 115 T.C. 7 (Aug. 8, 2000) - Taxpayer, after receiving Notice of Intent to Levy, requested a collection due process hearing. On July 29, 1999, the Service issued a Notice of Determination. The taxpayer requested reconsideration, which was denied September 8, 1999. The taxpayer then filed a petition for review with the district court on October 18, 1999, and when that was dismissed for lack of jurisdiction, the taxpayer filed with the Tax Court on March 1, 2000. The Tax Court observed that the taxpayer would be entitled to an additional 30 days to file suit under I.R.C. § 6330(d)(1) because he made his appeal to an incorrect court. However, the court dismissed the petition because the taxpayer failed to file his initial petition within 30 days of the date of the notice of determination, July 29. The court ruled the taxpayer could not unilaterally extend the statutory limit of 30 days by filing a motion to reconsider.

12. COLLECTION DUE PROCESS

MRCA Information Services v. United States, 2000 U.S. Dist. LEXIS 12550 (D. Conn. Aug. 1, 2000) - Taxpayer defaulted on installment agreement, and requested CDP hearing when Service instituted collection actions. The CDP officer, who previously had denied the taxpayer's appeal of a prior defaulted agreement, denied relief. In review, the district court first established that review of a CDP determination was by an abuse of discretion standard, rather than de novo. The court then held that, although the hearing officer's rejection of the taxpayer's payment plan was not an abuse of discretion, the hearing officer was not impartial officer under I.R.C. § 6330. The court remanded for a new hearing.

13. DECEDENT'S ESTATES: Priority
PRIORITY: Insolvency

United States v. Bielaski, 86 AFTR2d ¶ 2000-5174 (Md. July 28, 2000) - In the case of an insolvent decedent's estate, the Maryland Supreme Court overturned the

decision of the probate court (which ordered pro-rata distribution to all creditors) and ordered payment of the United States' tax claim as the first priority under the Insolvency Act, 31 U.S.C. § 3713. The court found the Insolvency Act controlling over the state distribution priority statute, because the Insolvency Act gives absolute priority to any debt of the United States.

14. INNOCENT SPOUSE

King v. Commissioner, 115 T.C. 8 (Aug. 10, 2000) - Where one spouse petitions the court for innocent spouse relief, the non-petitioning spouse may intervene. If a claim is filed under I.R.C § 6015, the court ruled, the Service must advise the other spouse or ex-spouse of the right to intervene and challenge the entitlement to innocent spouse relief, then certify to the court that such notice was provided.

15. LEVY: Sale of Real Property Acquired by United States
REDEMPTION: By IRS

United States v. Comer, 2000 U.S. Dist. LEXIS 12268 (E.D. Mich. July 5, 2000) - Court held Government's action to foreclose federal tax lien prohibited creditor from gaining interest in property by filing his own state court forfeiture action. Alternatively, the court found the Government had timely redeemed the property under I.R.C. § 7425, and so the taxpayers no longer had any interest in the property to which the creditor could make claim.

16. LIENS: Notice: Filing

Sum of $66,839.59 v. United States, 86 AFTR2d ¶ 2000-5219 (N.D. Ga. May 17, 2000) - Plaintiff was in the process of purchasing real estate from the taxpayer, and a title search was done on August 12. On August 24, the Service properly recorded a Notice of Federal Tax Lien with the clerk of the court. The plaintiff had a second title search made on September 30, the day of closing, but the Service's lien was not discovered. The court felt that, although the tax lien was in the court's computers, which were available to the public, the fact that the lien was not in the written records excused the plaintiff from having notice. Since, in acquiring the real estate, the plaintiff paid off the taxpayer's mortgage, the court held that the tax lien would be equitably subordinated.

17. LIENS: Priority Over Constructive Trusts

Blachy v. Butcher, 2000 U.S. App. LEXIS 17509 (6th Cir. July 21, 2000) - Following a complex series of real estate transactions by the taxpayers, condominium owners discovered they did not own their properties, and sued to impose a constructive trust. The Service claimed a tax lien which predated the litigation, but came after the taxpayers first transferred the property to a holding company. The court held that a judicially-created equitable remedy cannot be applied retroactively to defeat a federal tax lien. Although the constructive trust relates back to the date on which the taxpayers first transferred the property, the trust itself did not arise or become choate until the court created it, and so could not defeat the prior federal lien. The dissent argued that the Service could not obtain

a better right to the property than the taxpayers had, and so the tax lien would not have attached to the property subject to the constructive trust.

18. LIENS: Priority Over Homesteads

United States v. Stalker, 86 AFTR2d ¶ 2000-5131 (M.D. Fla. July 6, 2000) - Taxpayer purchased property and transferred it to his wife. The court found the transfer fraudulent, and further held that the wife's homestead interest in the property, which due to the fraudulent conveyance was not a vested right, could not defeat the federal tax lien.

19. OFFSET

REFUNDS: Requirement of Claim

City of Perth Amboy v. Custom Distribution Services, Inc., 2000 U.S. App. LEXIS 20907 (3d Cir. Aug. 17, 2000) - The debtor, after purchasing environmentally contaminated property, argued that the property was overvalued for real estate tax purposes. The bankruptcy court agreed, and reduced the city's tax assessments pursuant to B.C. § 505. The city then argued that, as the debtor had not made timely refund requests for any of the years at issue, the debtor was precluded from getting any taxes refunded under B.C. § 505(a)(2)(B). The Third Circuit agreed. Finding the language of the statute ambiguous, the appellate court examined the legislative history, and determined that Congress intended the "properly requests" language of section 505(a)(2)(B)(i) to prevent the bankruptcy court from adjudicating the right to refund where the debtor has not first sought a refund with the taxing authority, as required by law. The Third Circuit also dismissed the debtor's argument that section 505(a)(2)(B) did not apply to offsets. Because the right to offset is derived from the right to refund, it is jurisdictional. A court may only consider an offset request if the taxpayer timely files a request for refund.

20. PROPERTY SUBJECT TO COLLECTION: Tenancy, Held in: Entireties

Pletz v. United States, 2000 U.S. App. LEXIS 19083 (9th Cir. Aug. 10, 2000) - How much should the Service receive as the value of the debtor's interest in entireties property? The Chapter 13 debtor and his non-debtor wife owned real estate by the entireties (which, in Oregon, is subject to a tax lien). The Service argued that the debtor's plan undervalued its secured interest by using the value of his survivorship interest in the property. The Ninth Circuit held that the court must use joint-life actuarial tables to calculate the concurrent interests of both spouses in the property, where the debtor continues to use and occupy the property.

CHIEF COUNSEL ADVICE

Collection Due Process; Offers in Compromise

CC:PA:CBS:Br1
August 24, 2000 GL-700795-00

UILC 6330.00-00

MEMORANDUM FOR NORTH CENTRAL DISTRICT COUNSEL

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

SUBJECT: Processing Offers in Compromise During or After Collection Due Process Proceedings

The purpose of this memorandum is to indicate a change in a position previously set forth in a June 16, 2000, memorandum for your office on the above-cited topic. The June 16, 2000, memorandum was written in response to your office's request for assistance in formulating procedures for the Collection Division for working offer in compromise cases during the time in which the Office of Appeals ("Appeals") has jurisdiction over a Collection Due Process ("CDP") proceeding. The June 16, 2000, memorandum was recently released as public Chief Counsel Advice and was published in the July 24, 2000 Tax Notes Today (reference number 2000 TNT 142-64).

On page 2 of the June 16, 2000, memorandum, the third paragraph provides as follows:

> Similarly, if Appeals has issued its determination, but retains jurisdiction over that determination pursuant to section 6330(d)(2), a proposed offer made to a Revenue Officer should be referred to Appeals. Appeals may reconsider its original determination at that time.

I.R.C. § 6330(d) provides that within 30 days of an Appeals determination in a CDP hearing, a taxpayer may seek judicial review of that determination. Pursuant to section 6330(d)(2), Appeals retains jurisdiction with respect to any determination made under

section 6330, including any subsequent hearings requested by the person who requested the original hearing on issues regarding collection actions taken or proposed with respect to such determination, and (after the person has exhausted all administrative remedies) a change in circumstances with respect to such person which affects such determination. The cited paragraph from the June 16, 2000, memorandum pertains to the extent of this "retained jurisdiction" by Appeals.

The cited paragraph incorrectly suggests that the "retained jurisdiction" of Appeals requires coordination with Appeals of offers in compromise made subsequent to a CDP determination. Rather, the retained jurisdiction of Appeals may be invoked by a taxpayer for the purposes described in section 6330(d)(2)–i.e., for a hearing on (1) issues regarding collection actions taken or proposed to be taken with respect to the CDP determination, or, after the taxpayer exhausts administrative remedies, (2) reconsideration of Appeals' original determination because of a change in circumstances. See also Temp. Treas. Reg. §301.6330-1T(h)(1). A Revenue Officer who receives a proposed offer after Appeals has issued a CDP determination may evaluate that offer under the regular offer procedures and is not required to refer the offer to Appeals. Similarly, the Revenue Officer may consider and act on other collection alternatives proposed subsequent to a CDP determination without referring the matter to Appeals. Only if the taxpayer invokes the retained jurisdiction of Appeals should the matter be referred to that function.

This memorandum supersedes the cited paragraph in the June 16, 2000, memorandum. The discussion in the remainder of the June 16, 2000 memorandum remains unchanged.

THIRD PARTY CONTACTS

TL-N-49-00
CC:EL:GL:Br3:BTCamp
UIL 57.00.00-00

MEMORANDUM FOR Jody S. Tancer, Associate District Counsel
Brooklyn CC:NER:BRK

FROM: Gary D. Gray, Assistant Chief Counsel
General Litigation CC:EL:GL

SUBJECT: Application of Section 7602(c) to Contacts Made at Request of *** Government

You have asked whether section 7602(c) applies to contacts made by a Service employee at the request of the *** Government. After careful consideration of both the language and history of the statute, we conclude that section 7602(c) does not apply to such contacts because they are not sufficiently causally related to the determination of an internal revenue tax to fall within the statute's ambit.

Background

We understand the facts underlying your question to be as follows. The *** Government has asked the Service to obtain certain information from a corporation incorporated and operating in the United States. The information relates to a transaction between the U.S. corporation and a U.S. citizen living in *** whom the *** Government is investigating. The U.S. citizen is not under examination in the United States. Before passing the information on to the *** Government, however, the Service plans to review the information to see whether it is consistent with the taxpayer's returns. There is no reason to believe that the information will or will not lead to a decision to open an examination.

Analysis

Section 7602(c), as amended by section 3417 of the IRS Restructuring and Reform Act ("RRA"), P.L. 105-206 (1999), provides:

> (c) NOTICE OF CONTACT OF THIRD PARTIES. --
> (1) GENERAL NOTICE. -- An officer or employee of the Internal Revenue 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 that contacts with persons other than the taxpayer may be made.
>
> (2) NOTICE OF SPECIFIC CONTACTS. -- The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.
>
> (3) EXCEPTIONS. -- This subsection shall not apply --
> (A) to any contact which the taxpayer has authorized,
> (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person, or
> (C) with respect to any pending criminal investigation.

We interpret the (c)(1) language as applying to any contact which:

1. Is a communication initiated by a Service employee, made to
2. Any person other than the taxpayer, which
3. Is with respect to the determination or collection of the taxpayer's federal tax liabilities,
4. Identifies the taxpayer, and
5. Identifies the employee's association with the Service.

The phrase "with respect to" contains the idea of purpose. That is, a contact is "with respect to" the determination of a federal tax liability when it is made for the purpose of

determining the tax. This is true whether or not the Service has opened a formal examination of any particular return.

The contact with the U.S. corporation in your case is not made for the purpose of determining the U.S. citizen's federal tax liability. The contact is made because the *** Government asked it to be made. In other words, it is made for the purpose of fulfilling the United States' treaty obligations to *** with respect to a *** tax liability. The fact that a Service employee may review the information before passing it to *** is immaterial to the reason for the contact. The *** Government has requested the contact be made and the contact will be made regardless of whether a Service employee reviews the information or not. The Service's review of the information does not convert the purpose of the contact from one of fulfilling a treaty obligation to one of determining a federal tax. Even though the purpose of the review is to see whether an examination should be made of the U.S. citizen's federal tax liabilities, the purpose of the contact is still to comply with our treaty obligations.

Since the contact is not for the purpose of determining a federal tax liability, it is not therefore "with respect to" the determination or collection of the U.S. citizen's federal tax.

NOTICE OF INTENT TO LEVY; POWER OF ATTORNEY

June 20, 2000

CC:EL:GL:Br1
TL-N-7164-98
UILC: 50.20.00-00

MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL, KANSAS-MISSOURI

FROM: Michael R. Arner
Senior Technician Reviewer

SUBJECT: Warning of Enforcement Actions Against Corporations

This responds to your request for Significant Advice dated December 3, 1998. [1] Initially, we responded in a memorandum dated December 28, 1998, Service Center Advisory number 199907019. The December 28, 1998, memorandum contained an inadvertent

[1] In your memorandum you requested our advice as to whether the Internal Revenue Service (Service) should issue a notice of intent to levy upon a corporate officer, rather than a person holding a power of attorney for the corporation. You concluded that section 6331(d) of the Internal Revenue Code (Code) requires the Service to give the notice of intent to levy to a corporate officer rather than the power of attorney; and further, that I.R.C. § 6304(a) does not require the Service to give the notice to the power of attorney.

error. [2] This memorandum corrects the error and rescinds the December 28, 1998, memorandum. Accordingly, our views are provided below with respect to the positions stated in your December 3, 1998, memorandum.

ISSUE:

Whether the notice of intent to levy required by section 6331(d) must be issued to the corporation rather than a person holding a power of attorney when the corporation has authorized a person to represent the corporation.

CONCLUSION:

The notice of intent to levy required by section 6331(d) must be issued to the corporation and a person holding a power of attorney when the corporation has authorized a person to represent the corporation.

FACTS:

The corporation has authorized a person holding a power of attorney to represent the corporation. In accordance with section 6331(d), a notice of intent to levy is to be issued to the corporation for an unpaid tax liability.

DISCUSSION:

A. A notice of intent to levy must be issued to the corporation

The Treasury Regulations (Regulations) and case law support the conclusion that a notice of intent to levy must be issued to the corporation. Section 6331(d)(1) of the Code provides that the Service may levy upon property of any person "only after the Secretary has notified such person in writing of his intention to make such levy." [3] Section 6331(d)(2) states the following:

> The notice required under paragraph (1) *shall be*-
>
> (A) given in person,
> (B) left at the dwelling or usual place of business of such person, or

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[2] In our December 28, 1998, memorandum we inadvertently stated that a notice of intent to levy required by I.R.C. § 6331(d) must be issued to a corporate officer. There is no such requirement.

[3] The term "person" shall be construed to mean and include an individual, ... company or corporation. I.R.C. § 7701(a)(1).

> (C) sent by certified or registered mail to such person's last know address, no less than 30 days before the day of the levy. (emphasis added)

The Regulations unambiguously state that the notice of intent to levy must be sent to the taxpayer. [4] Section 301.6331-2(a) of the Regulations provides that the Service may levy on the property of a taxpayer after the director "has notified the taxpayer in writing of the intent to levy. The notice must be given in person, be left at the dwelling or usual place of business of the taxpayer, or be sent by registered or certified mail to the taxpayer's last know address." [5] Thus, the Commissioner has by regulation construed section 6331(d) of the Code to require that a notice of intent to levy be issued to the taxpayer. [6]

Furthermore, case law strongly supports that the notice of intent to levy must be served upon the taxpayer. The Fourth Circuit noted the following:

> ... § 6331(d) provides that the government can make a levy upon a person's property subject to a tax lien "only after the Secretary has notified such person in writing of his intention to make such a levy," *see* 26 U.S.C. § 6331(d)(1), and such *notice must be served on the person upon whose property levy is intended*, "no less than [30] days before the day of the levy." *See* 26 U.S.C. § 6331(d)(2). (emphasis added).

See United States v. Potemken, 841 F.2d 97, 101 (4th Cir. 1988). See, e.g., James v. United States, 970 F.2d 750, 755-56 (10th Cir. 1992); Haggert v. Philips Medical Systems, Inc., 39 F.3d 1166 (1st Cir. 1994). Moreover, courts have held that "strict compliance with this procedure is 'necessary to effect a valid levy and seizure.'" Potemken, 841 F.2d at 101 (quoting Matter of Computer Management Inc., 40 B.R. 201, 203 (N.D.Ga.1984)). See also, James, 970 F.2d at 756.

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[4] The term "taxpayer" means any person subject to any internal revenue tax. I.R.C. § 7701(a)(14).

[5] In your memorandum you concluded that "as applied to a corporation this regulation requires the notice to be delivered in person to a *corporate officer*, left at the corporation's usual place of business or mailed to the corporation's last know address." (emphasis added). There is no requirement in the Code, Regulations, or Internal Revenue Manual that requires a notice that is delivered in person be given exclusively to a corporate officer.

[6] Since Congress has delegated to the Commissioner the power to promulgate "all needful rules and regulations for the enforcement of [the Internal Revenue Code]," I.R.C. § 7805(a), the courts will defer to the regulatory interpretations of the Code so long as they are reasonable. Cottage Sav. Ass'n v. C.I.R, 111 S.Ct. 1503, 1508 (1991). See also, National Muffler Dealers Assn., Inc. v. United States, 99 S.Ct. 1304, 1306-1307 (1979).

B. A copy of the notice of intent to levy must be sent to the power of attorney

The Regulations require that a copy of the notice of intent to levy be sent to a person holding a power of attorney for the corporation. [7] Section 601.502 et seq., provides the rules for powers of attorney. Section 601.501(a) states that "[t]hese rules [as to the power of attorney] apply to all offices of the Internal Revenue Service in all matters...." Therefore, the power of attorney rules must apply to the Service's notice of intent to levy. Section 601.506(a) provides that "[a]ny notice or other written communication (or copy thereof) required or permitted to be given to a taxpayer in any matter ... must be given to the taxpayer and ... to the representative ...." However, "failure to give notice or other written communication to the recognized representative of a taxpayer will not affect the validity of any notice ...." Treas. Reg. § 601.506(a)(3). Thus, a person holding a power of attorney for a taxpayer must receive a copy of the notice of intent to levy. See also IRM 5.11.1.2.2.2.

C. Section 6304(a) does not require that a notice of intent to levy be sent to the power of attorney

Section 6304(a) does not require that the Service send a notice of intent to levy to the power of attorney. Section 6304(a) of the Code provides that the Service may not communicate with the taxpayer in connection with the collection of any unpaid tax if the Service "knows the taxpayer is represented by any person authorized to practice before the Internal Revenue Service with respect to such unpaid tax...." Section 6304 is not limited in application to individual taxpayers, but applies to all taxpayers with respect to any unpaid tax, including corporate tax. The congressional intent of section 6304 was to address the concerns regarding abusive or harassing contact with taxpayers. See S. REP. NO. 105-174, at 93 (1998).

We believe that a notice of intent to levy does not have the potential to harass a taxpayer; to the contrary, "strict compliance with this procedure is necessary to effect a valid levy and seizure, in order 'to give the taxpayer a last chance to avoid the drastic consequences of seizure by payment of the tax liability.'" Simpson v. U.S., 815 F.Supp 1444, 1446 (N.D.Fla. 1992) (quoting Potemken, 841 F.2d at 102). Moreover, section 6304 is currently substantially codified in off-Code provisions and is in the Internal Revenue Manual, see IRM § 5184.2; therefore, we believe it does not significantly impact current business practices with regard to notices of intent to levy. See Internal Revenue Service, U.S. Dep't of the Treasury, Pub. No. 10848 (9-1998), IRS Restructuring and Reform Act of 1998 Conduct Provisions (1998). Accordingly, we agree with your position that statutorily required notices, such as the notice of intent to levy, do not come within the purview of section 6304(a).

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[7] A person holding a power of attorney for a taxpayer must be a recognized representative of the taxpayer in accordance with Treas. Reg. § 601.502 et seq.

In sum, we conclude that a notice of intent to levy must be issued to the corporation and a person holding a power of attorney when the corporation has authorized a person to represent the corporation.

LEVY: RETIREMENT PLAN

May 10, 2000

CC:EL:GL:Br1
UILC: 50.29.00-00
64.38.00-00

MEMORANDUM FOR DISTRICT COUNSEL
Attn:

FROM: Michael R. Arner
Senior Technician Reviewer

SUBJECT:

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

LEGEND

City:
Taxpayer:
SSN:
Years: ,
Assessment Amount: $

ISSUE:

Whether the Service can levy upon and collect the assets in a taxpayer's 401(k) pension plan when the taxpayer has an immediate right to elect normal retirement benefits, but instead, elects to defer retirement.

CONCLUSION:

The Service may levy upon the assets in a taxpayer's 401(k) pension plan when the taxpayer has an immediate right to elect normal retirement benefits, but instead, elects to defer retirement. However, the Service may not force the plan administrator to immediately distribute any assets pursuant to the Service's levy until the taxpayer obtains an immediate right to commence receipt of benefits under the plan.

FACTS:

(“taxpayer”) has an unpaid joint income tax liability of approximately $ for the and tax years. The notices of federal tax lien were filed in and . The taxpayer filed a Chapter 7 petition on , and received a discharge on . As a result, the taxpayer’s tax debt was discharged, however, the taxpayer’s property remains liable for the debt secured by the tax liens. [8]

The taxpayer is the Secretary and a Director of (“Company”). The taxpayer does not own any stock in the Company, rather owners of the stock. The taxpayer is covered by the 401(k) Plan (“Plan”), and has approximately $ in his 401(k) account. The Plan provides that the “normal retirement” age is 65 at which time a participant has the option of electing payment from his 401(k) account in the form of an annuity or a lump sum. The Plan also provides that with the consent of the Company’s Board of Directors, a participant may defer his retirement, but during such time the participant is not entitled to receive Plan benefits.

The taxpayer told the revenue officer (“RO”) that he did not elect normal retirement, but instead, elected to defer his retirement. The RO served the Administrative Committee of the Plan (“plan administrator”) with a notice of levy requesting that the funds in the taxpayer’s account be paid in a lump sum to the Service. [9] The plan administrator will not honor the levy. The RO wants to know if the Service can elect normal retirement benefits on behalf of the taxpayer.

LAW AND ANALYSIS:

This is in response to your request that we review the Company Plan to determine if the Service can elect normal retirement benefits on behalf of the taxpayer.

A. Attachment of the Federal Tax Lien

Pursuant to section 6321, a lien arises upon “all property or rights to property” of the taxpayer. I.R.C. § 6321. The federal tax lien attaches to a participant’s interest in an

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[8] I.R.C. § 6325(a)(1) does not require the Service to release valid tax liens when the underlying tax debt is discharged in bankruptcy because the liability for the amount assessed remains legally enforceable. In re Isom, 901 F.2d 744 (9th Cir. 1990). A discharge in bankruptcy prevents the Service from taking any action to collect the debt as a personal liability of the debtor. Id. However, the debtor’s property remains liable for a debt secured by a tax lien that is filed prior to the petition for bankruptcy. Id.

[9] Pursuant to , of the Plan, the Board of Directors of the Company constitutes the Administrative Committee of the Plan. Thus, the .

ERISA-covered plan if the participant has any vested benefit under the plan. Thus, the tax lien attaches to all present rights the taxpayer has under the plan. These may include the participant's present right to future payment and the present right to elect a form of distribution although he has not yet exercised that right.

In the instant case, the Plan is an ERISA-covered plan and the taxpayer is fully vested, thus the tax liens attach to all the present rights the taxpayer has under the Plan. Furthermore, the tax liens survived the taxpayer's bankruptcy case because the liability for the amount assessed remains legally enforceable. See case cited supra note 1. Thus, although the taxpayer's personal liability for the taxes was discharged, his property rights under the Plan, an asset he had at the time he filed the petition for bankruptcy, remain liable for the debt secured by the tax liens. See case cited supra note 1.

B. Property Subject to Levy

Section 6331(a) authorizes the Service to levy upon "all property or rights to property" of a taxpayer to collect delinquent taxes. I.R.C. § 6331(a). Except for a levy on salary or wages, a levy extends only to property rights and obligations that exist at the time of levy. Treas. Reg. § 301.6331-1. Obligations exist 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.

Accordingly, even if a retirement plan is not in pay status, if a present right to future payment on an obligation exists, the levy reaches that present right. See Rev. Rul. 55-210, 1955-1 C.B. 544 (lien attaches to entire unqualified right to receive future benefits; only one notice of levy needs to be served to effectively reach benefits subsequently payable). [10] Similarly, if a present right to elect distribution exists, the levy reaches that present right. However, this is not to suggest that the Service should attempt to compel the taxpayer to retire so that benefits become payable. Rather, where a taxpayer is retiring or has retired and therefore has the right to receive a distribution, the levy reaches that right, whether or not the taxpayer has elected distribution.

Here, the RO served a notice of levy upon the plan administrator shortly after the taxpayer's birthday. However, the taxpayer has deferred his retirement in accordance to , of the Plan. Pursuant to the taxpayer does not have a right to receive benefit payments until he ultimately retires, [11] and the Service should not attempt to compel the taxpayer to retire. Nevertheless, the taxpayer does have a present

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[10] Levying on the present right to future payment would not require immediate distribution by the plan administrator. Honoring the levy would only be required when the benefits become payable to the taxpayer under the terms of the plan. See IRM Handbook 9.1(2) and 9.2(3).

[11] of the Plan is ambiguous, in any case, this is our interpretation of the section.

right to future payments. The notice of levy served by the RO reaches that right, and it is not necessary that a second notice of levy be served. However, the plan administrator is not required to honor the levy until the benefits become payable to the taxpayer under the terms of the Plan, i.e., when the taxpayer retires. [12]

C. Spousal Consent

Careful consideration must be given where the Service seeks collection from a retirement plan that, absent waiver, requires benefits to be paid in the form of a joint and survivor annuity. In these cases, the Service may only levy upon that joint and survivor annuity, and may not elect another form of benefit for collection purposes without the consent of a spouse. See I.R.C. § 417. This rule is the same regardless of whether the tax liability is a separate liability of the plan participant or a joint tax liability.

In this case the taxpayer is married, and , of the Plan requires that benefits be paid in the form of a joint and survivor annuity unless a participant's spouse consents to a waiver. At this time, it is unknown whether the taxpayer's wife has consented to a waiver. Assuming she has not, the Service must obtain her consent before electing a lump sum distribution on behalf of the taxpayer. [13] Otherwise, the Service must effect collection through the joint and survivor annuity.

D. Course of Action

In sum, a levy on the taxpayer's 401(k) pension plan is appropriate since he is not cooperating and there are no other viable sources for collecting his tax liability. The RO should explain to the plan administrator that when the taxpayer retires any benefit payments due should be turned over to the Service. If the plan administrator fails to honor the levy when the benefits become payable then we suggest an action to enforce the levy, or a lien foreclosure action if the plan administrator has a good faith belief that there may be a claim against the taxpayer's retirement benefits superior to the federal tax lien.

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[12] This case is distinguishable from a similar case, Chief Counsel Advisory number 199936041, where we concluded that the Service could levy and collect the assets in a taxpayer's pension plan. In that case the taxpayer was no longer working and he had a present right to receive early retirement benefit payments. The levy reached that right even though the taxpayer had not elected distribution. In this case, however, the taxpayer has deferred retirement and thus does not have a present right to receive normal retirement benefit payments. Instead, the levy reaches his present right to future payments that become payable when he ultimately retires.

[13] The Internal Revenue Manual provides that the Service should use discretion in levying on the income from retirement plans and that the corpus of a plan (as contrasted with income from the plan) should be levied upon only in flagrant cases. See IRM 5.11.6.1 and 5.11.6.2 respectively. Flagrant circumstances exist in this case because the taxpayer has a history of sheltering assets from the reach of the Service.

BANKRUPTCY; OFFER IN COMPROMISE

March 27, 2000
GL-610467-99
UILC: 17.00.00-00

MEMORANDUM FOR DISTRICT COUNSEL, INDIANA

FROM: Kathryn A. Zuba
Chief, Branch 2 (General Litigation)

SUBJECT: Offers-in-Compromise - Effect of Bankruptcy on Processability

This memorandum responds to your memorandum dated January 10, 2000. You ask that we pre-review your memorandum to Acting Chief, Special Procedures Branch, Indiana District. This document is not to be cited as precedent.

We agree with your conclusion that the Service can return as nonprocessable an offer in compromise that has not been accepted or rejected as of the date of the filing of the taxpayer's bankruptcy petition. As you discussed, Service procedures provide that offers based on doubt as to collectibility or effective tax administration from taxpayers in bankruptcy are nonprocessable. IRM 5.8.3.1, IRM 5.8.10.2.1, IRM 5.9.4.7. See also Treas. Reg. 301.7122-1T(e)(5). However, with respect to taxpayers who file for bankruptcy after appealing a rejected offer, we disagree that Appeals must consider appeals of rejected offers even though the taxpayer has filed bankruptcy. Because Service procedures provide that offers from taxpayers in bankruptcy are nonprocessable, the appeal of a rejected offer is rendered moot by the bankruptcy filing. The offer can therefore be returned as nonprocessable.

Your memorandum also raises the issues decided in In re Mills, 240 B.R. 689 (Bankr. S.D. W.V. 1999), and In re Chapman, 1999 Bankr. LEXIS 1091 (S.D. W.V. June 23, 1999) concerning the Service's discretion with regard to offers in compromise from taxpayers in bankruptcy, and the impact of the automatic stay on the investigation of such an offers. We are currently in the process of developing our litigating position with regard to the issues raised in Mills and Chapman. We will respond to you in a detailed supplemental memorandum after our final position is reached.

Summons; Decedent's Estates

June 22, 2000
GL-802351-00
CC:EL:GL:Br3

MEMORANDUM FOR

FROM: Lawrence H. Schattner, Chief
Branch 3 (General Litigation) CC:EL:GL:Br3

SUBJECT: Estate Tax Summons

This memorandum responds to your request for advice on how to issue a third- party summons in a particular estate tax audit.

Issue

May the Service redact certain portions of the description of the records sought in the copies of the summons given to persons entitled to notice of the summons under section 7609(a)?

Conclusion

No. Section 7609 does not authorize the Service to redact the description of the records in the copies of the summons given persons entitled to notice of the summons under section 7609(a). As an alternative, however, you could consider issuing multiple summonses and limiting the information requested to documents relating to a particular third party, so long as each summons describes the records sought with reasonable certainty as to enable the summoned party to respond.

Background

A Service employee ("the examiner") is examining an estate tax return. In response to an Information Document Request, the estate provided some documents and withheld other documents. The estate provided a cursory privilege log for the withheld documents which gives the date and a brief description of each withheld document. Most of the descriptions identify either or both of the persons who wrote or received the documents. All of the documents relate to a series of transactions engaged in or contemplated by the decedent with a variety of other people and all are in the hands of the decedent's attorney.

The examiner wishes to issue a summons to the decedent's attorney for the documents described in the estate's privilege log. The examiner plans to attach the privilege log to the summons. The examiner understands that he must send a notice of the summons to each of the persons identified in the summons, including all the persons identified in the privilege log. He understands that he must attach a copy of the summons to each notice, but is concerned that each noticee will thereby learn information about the other noticees (and likewise have information disclosed to the other noticees) which information each noticee would prefer remain private. Therefore, the examiner does not wish to disclose all the documents requested to each of the persons identified in the privilege log. The examiner asks whether he may redact the portions of the privilege log that do not obviously pertain to each person.

Analysis

The authority to issue summonses is generally contained in section 7602(a)(2), which authorizes the Service to require the summoned party to "produce such books, papers, records, or other data...as may be relevant or material" to the examination. As seen by the use of the plural for "books, papers, records," the plain language of section 7602(a)(2) authorizes the Service to use a single summons to request multiple documents relating to multiple parties and such has been the Service unchallenged practice from the earliest days of tax administration.

The procedure for issuing a summons to persons other than the taxpayer is governed by section 7609, which provides that any person identified in the summons is entitled to notice (i.e. is a noticee). I.R.C. § 7609(a). Noticees are entitled to petition courts to quash the summons. I.R.C. § 7609(b). The legislative history behind section 7609's original enactment is pretty clear that the underlying purpose of the statute is to give persons who might have a privacy interest in the records an opportunity to protect that privacy interest before the records are turned over to the Service. H. Rep. 94-658 306-307 (Nov. 12, 1975).

Section 7609(a) provides that the notice given to noticees "shall be accompanied by a copy of the summons which has been served." While the copy of the summons given to noticees need not be an attested copy,[14] it must still be a copy. In light of the legislative history, we are loathe to read into the word "copy" an authorization to redact the description of records. The statute's purpose is to give the noticees an idea of what records are being sought so they can try to prevent disclosure to the Service. Therefore, we believe section 7609 authorizes giving the entire unredacted description of the records sought to all noticees.

We note, however, that the examiner might consider issuing multiple summonses, limiting the information requested in each summons to documents which identify only one particular person. That is, the examiner wishes to issue a summons to a single third party, the decedent's attorney, seeking specific documents, some concerning person A, others concerning person B, person C, person D. Nothing in sections 7602 or 7609 prohibits issuing four summonses, each one identifying only one person (other than the summoned party) in the summons. Thus, the examiner could in the first summons describe only records that relate to person A, in the next summons describe only records that relate to

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[14] We note that while the copy of the summons served on the summoned party must be an attested copy, per section 7603, the copy of the summons given to the noticees need NOT be an attested copy, according to the majority of the circuits addressing this issue. See Kondik v. U.S., 81 F.3d 655; (6th Cir. 1996), Fortney v. United States, 59 F.3d 117, 120 (9th Cir. 1995); Codner v. United States, 17 F.3d 1331, 1333-34 (10th Cir. 1994). But see, Mimick v. U.S., 952 F.2d 230 (8th Cir. 1991) (*dicta*).

person B, etc. However, the examiner must be sure that each summons meets section 7603's requirement that the records sought are described with "reasonable certainty" and that the taxpayer receives a copy of each summons and that the description of the documents sought is not redacted in any copy of the summons attached to notice given under section 7609(a).

While we believe the Code permits multiple summonses, we normally encourage using only one summons to request all the information in the summoned party's possession. Using multiple summonses forces both the Service and the taxpayer to participate in multiple proceedings to quash and, unless the actions are consolidated, forces the taxpayer to incur additional litigation expenses. We think the examiner's concerns here support issuing multiple summonses in this particular case, but we stress that the examiner needs to make careful and thorough documentation in his case history of the facts which give rise to his concern.

Offer in Compromise; Taxpayer-Controlled Entity

May 16, 2000

CC:EL:GL:Br2
GL-700697-00
UILC: 17.37.00-00

MEMORANDUM FOR DISTRICT COUNSEL, ARKANSAS-OKLAHOMA DISTRICT

FROM: Kathryn A. Zuba
Chief, Branch 2 (General Litigation)

SUBJECT: Rejection of Offer in Compromise

This memorandum responds to your request for advice dated February 17, 2000. This document may not be cited as precedent by taxpayers.

ISSUE:

Whether the Commissioner may reject a taxpayer's offer in compromise on the basis that a professional corporation wholly-owned by the taxpayer has failed to come into compliance with the filing and payment requirements of the Internal Revenue Code.

CONCLUSION:

The decision to compromise a case under section 7122 of the Internal Revenue Code is discretionary on the part of the Commissioner. Rejecting a taxpayer's offer of compromise because entities within the control of the taxpayer are not in compliance with the filing and payment requirements of the Code is a permissible exercise of that discretion.

BACKGROUND:

The taxpayer submitted an offer in compromise for Year A, Year B, and Year C income taxes, Form 941 employment taxes for the first, second, and third quarters of Year C, and a trust fund recovery penalty for the second quarter of Year B. The revenue officer assigned to the case recommended rejection of the offer on the grounds that the taxpayer's solely-owned professional corporation has not paid its employment taxes for the third quarter of Year D, nor made any tax deposits for the fourth quarter of Year D.

The Service has a policy of requiring current compliance with the tax laws before it will consider a taxpayer's offer to compromise. All tax returns must be filed before an offer is considered "processable." See IRM 5.8, Offer in Compromise Handbook, Section 3.3(4). In addition, taxpayers with employment tax responsibilities must demonstrate current compliance with the tax laws by timely filing all returns and timely depositing taxes for two consecutive quarters. Id.

The district follows the Service procedure of returning offers to taxpayers as "not processable" if the foregoing compliance requirements have not been met. In addition, the district has adopted a practice of not accepting an offer from a taxpayer if that taxpayer is the sole shareholder of a corporate entity which is not in compliance with its separate filing and payment requirements under the Code. Pursuant to a request from the district, you have asked our views on whether the Service can condition the acceptance of an offer from an individual taxpayer on current compliance by a corporation owned by that individual.

DISCUSSION:

The Secretary's authority to compromise tax cases is contained in section 7122 of the Code, which states: "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." I.R.C. § 7122(a) (emphasis added). Treasury regulations issued pursuant to that section likewise state: "The Secretary may exercise his discretion to compromise an civil or criminal liability arising under the internal revenue laws . . . ." Treas. Reg. § 301.7122-1T(a)(1). The Secretary's authority to compromise is, thus, discretionary.

The Secretary has delegated his compromise authority to the Commissioner, and the Commissioner has redelegated that authority to various officials within the Service. See Delegation Order No. 11. An implicit part of this delegation of authority is the responsibility to exercise sound judgment and discretion when deciding whether a taxpayer's compromise proposal should be accepted. Although the Service's general policy is to accept offers which reasonably reflect what the Service could expect to collect by other means, the "ultimate goal" of the compromise program is reaching agreements which are "in the best interest of both the taxpayer and the Service." Policy Statement P-5-100. Thus, acceptance of such an offer still requires a judgment that compromise is the best resolution of the case and will advance the overall goals of the compromise program. The

Commissioner's policy goes on to make clear that realizing the reasonable collection potential in specific cases is just one of the objectives to be achieved by an effective offer in compromise program: "Acceptance of an adequate offer will also result in creating for the taxpayer an expectation of and a fresh start toward compliance with all future filing and payment requirements." Id.

Consistent with these policy goals, the Service has adopted a policy of requiring that all past delinquencies be included in a compromise agreement, and that all delinquent returns be filed prior to consideration of an offer. See Form 656, Offer in Compromise (Rev. 1-2000). Coming into current compliance is the first step toward the "fresh start" that all parties are hoping can be achieved. The Service expects taxpayers to demonstrate that they are now ready and able to meet their continuing obligations to file returns and pay taxes.

The facts you have provided indicate that the taxpayer is the sole shareholder of a corporation with outstanding tax obligations. The district is apparently equating non-compliance by this corporation with non-compliance by the taxpayer herself. We assume that the district has made a determination that the taxpayer exercises a degree of control over the corporate entity such that she has the power and ability to either bring the corporation into compliance or demonstrate that no deposits or returns are required. The district has implicitly concluded that full compliance by the taxpayer includes meeting the obligations of the corporate entity which she has established for use as a vehicle for conducting her business affairs. We conclude that rejection in this case is a reasonable exercise of the discretion and judgment the district is charged with exercising in its administration of the compromise program.

You are correct that Collection's current offer in compromise procedures do not clearly state that rejection is permissible in this case. However, the appropriate question is not whether rejection is permissible, but whether acceptance is mandatory. Although the Service has made a concerted effort to achieve a degree of uniformity in the evaluation of offers, the acceptance decision remains discretionary. The Service's procedures do not create the presumption that all offers will be accepted, nor do they presume rejection as the likely conclusion. Rather, each proposed compromise should be evaluated and considered on its own merits, and accepted or rejected as dictated by the facts and circumstances of the particular case.

We will inform the Office of Special Procedures that this issue has arisen so that they can advise the field as they deem appropriate.

Collection Due Process; Installment Agreement

ILM 200034030
CC:PA:CBS:Br2
GL-502418-00

July 7, 2000

UILN: 61.03.00-00
6330.00-00

MEMORANDUM FOR NEW JERSEY DISTRICT COUNSEL

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

SUBJECT: Waiver of Right to Receive a Termination Letter

This responds to your request for advice in the above referenced matter, submitted to our office via electronic mail on April 10, 2000. This opinion is advisory in nature and should not be cited as precedent.

ISSUES:

1. Can a taxpayer authorize the Service to levy on a specific property of the taxpayer to collect taxes subject to an installment agreement and still retain his or her Collection Due Process rights under I.R.C. § 6330.

2. Can a taxpayer waive the prohibition on levy set forth in I.R.C. § 6331(k)(2).

CONCLUSION:

1. No. The taxpayer must exercise his or her right to a section 6330 Collection Due Process (CDP) hearing prior to the issuance of the first levy.

2. Yes. As long as the taxpayer has waived or exercised his or her CDP rights under section 6330, the taxpayer may waive the restriction on levy set forth in section 6331(k)(2) and may permit the Service to levy upon a specific property while the installment agreement is still in effect.

BACKGROUND:

You were asked by the New Jersey Collection division to draft two collection waivers for use by taxpayers paying their tax liabilities in installments pursuant to section 6159 of the Code. The first of the two waivers would allow the taxpayer to authorize the Service to levy on a specific item or piece of property (i.e., a selected account receivable) during the time the Service is prohibited from levying by operation of section 6331(k)(2). The other waiver would remove the prohibition on levy set forth in section 6331(k)(2) in its entirety.

In addition, the New Jersey Collection division also inquired whether a taxpayer may authorize the Service to levy on a specific item or piece of property prior to receiving its

CDP notice as required by section 6330 and before exercising or waiving its rights to a CDP hearing for that particular year and tax.

LAW & ANALYSIS:

Generally, unless the statute provides otherwise, a taxpayer may waive rights granted to the taxpayer by the Internal Revenue Code. In order to be valid, a waiver must be knowing and voluntary. Thus, before a taxpayer is asked to waiver any of his or her rights under either section 6330, 6331, or 6159, the taxpayer should be informed of his or her rights and of the consequences of a waiver of those rights.

Prior to the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), the Service was generally prohibited from levying upon the taxpayer's property to collect the tax liability that was the subject of an installment agreement. See Treas. Reg. § 301.6159-1(d). The Service could and sometimes would, however, provide that a levy would be served during the pendency of an installment agreement. Id. Furthermore, provided the Service complied with all other provisions of the Code, the Service could levy upon the taxpayer's property immediately following the termination of the installment agreement.

The enactment of RRA placed additional notice and process requirements on the Service relating to both levies and installment agreements. First, section 6330 of the Code requires the Service to provide, at least 30 days before the first levy, a Collection Due Process (CDP) notification and the opportunity for an independent hearing and possible subsequent appellate court review to persons whose property the Service intends to levy for the payment of tax.[15] The taxpayer is entitled to only one CDP notice per tax per each taxable period and can exercise his or her right to a hearing only before the first levy. The taxpayer may not wait until the subsequent levy before exercising his or her rights under section 6330.

Additionally, section 6331(k)(2) prohibits levies during an installment agreement. Specifically, section 6331(k)(2)(C) prohibits levies during the time an installment agreement is in effect. Section 6331(k)(2)(D) further prohibits levies during the thirty days after an installment agreement is terminated and provides that the prohibition on levy continues if an appeal remains pending at the end of that thirty day period. Consequently, the Service must now wait a minimum of sixty days from the issuance of the termination letter under section 6159(b)(5) before it can levy upon the taxpayer's property to collect the tax subject to the installment agreement.[16]

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[15] This requirement applies to levies initiated after January 19, 1999.

[16] Note that the Service has made an administrative decision not to levy for 90 days after the mailing of the termination letter (CP 523) required by I.R.C. § 6159(b)(5)(A). See IRM 5.14.8.4(3).

While section 6330 does not explicitly provide for a waiver of CDP rights, this office has previously concluded that a taxpayer may waive his or her right to a CDP hearing within the 30-day period prescribed by section 6330(a)(2) after receiving the required CDP notice. The taxpayer may not, however, waive the notice itself. This is because in order for the taxpayer to knowingly and voluntarily waive his or her right to a CDP hearing, the taxpayer must first be aware of that right and the consequences of a waiver.[17]

Assuming that the taxpayer in your hypothetical has received the required CDP notice and has either waived or exercised his rights to a CDP hearing prior to entering into the installment agreement, that taxpayer may then authorize the Service to levy on its asset or assets while the installment agreement is in effect. We strongly recommend, however, that such waivers be specific (i.e., limited to a particular asset) and not general. A policy and/or practice of obtaining unrestricted waivers of the section 6331(k)(2) prohibition on levies may be perceived as an attempt to circumvent the explicit language of the statute. Furthermore, in the rare situation where the taxpayer desires the Service to levy on more than one asset, the taxpayer can and should execute a separate waiver for each levy. This will ensure that the Service does not take any collection action not intended or authorized by the taxpayer. This will also ensure that taxpayers will not experience a hardship as a result of an unexpected levy causing them to default the installment agreement. If the New Jersey Collection division, nonetheless, feels it necessary to obtain a wholesale waiver of section 6331(k)(2) prohibition on levy, we recommend that they discuss this issue with the Assistant Commissioner (Collection) and obtain their concurrence.

In addition, a waiver of the section 6331(k)(2) prohibition on levy must be separate from the waiver of the CDP rights. The waiver should clearly state the asset to be levied upon and if applicable, the time frame for effectuating the levy. While the taxpayer may execute such a waiver at any time, the Service may not request such waiver as a condition of entering into the installment agreement. Finally, regardless of whether the taxpayer executes or wishes to execute a waiver of section 6331(k)(2) prohibition on levy before or after the taxpayer defaults on the installment agreement, the taxpayer must still be

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[17] Similarly, while the taxpayer may waive the 30-day period set forth in section 6159(b)(5)(A) or the right to an independent administrative review set forth in section 6159(d), the taxpayer may not waive its right to the termination letter required by section 6159(b)(5). Furthermore, the date an installment agreement is terminated, currently determined only in reference to the termination letter, is a very important date for many reasons, some of which may not be initially evident. For example, the date of termination determines the first date the Service may levy upon the taxpayer's property to collect the tax previously subject to the installment agreement. I.R.C. § 6331(k)(2). Likewise, the date the installment agreement is terminated is also used to determine the proper rate of interest under section 6651. Accordingly, it is imperative that before an installment agreement is terminated, the taxpayer is given a termination letter as required by section 6159 of the Code.

provided with a notice of termination before the Service terminates the installment agreement. I.R.C. § 6159(b)(5).

Summary Assessment; Tax Credits; Refunds

July 21, 2000

SCA 200034028
CC:EL:GL:BR3
WTA-N-110702-00
UILC: 28.00.00-00

MEMORANDUM FOR SOUTH TEXAS DISTRICT COUNSEL
ATTN: JERRY HAMILTON

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

SUBJECT: RECOVERY OR REVERSAL OF ERRONEOUS REPARATION TAX CREDIT – SIGNIFICANT SERVICE CENTER ADVICE

This responds to your memorandum dated May 24, 2000. This document is not to be cited as precedent.

ISSUE

Where the Service receives a return claiming a refund on the basis of a "black investment taxes ..." credit on Form 2439, Notice to Shareholder of Undistributed Long-term Capital Gains, used in connection with an interest in a regulated investment company (RIC) or real estate investment trust (REIT), is the proper means of recovery:

(1) If the refund was not made, to:

(a) reverse the credit,
(b) assess the overstated credit as a I.R.C. § 6201(a)(3) erroneous income tax prepayment credit, or
(c) determine a deficiency?

(2) If the refund was made, to:

(a) assess the overstated credit as a section 6201(a)(3) erroneous income tax prepayment credit,
(b) refer for the government to bring an erroneous refund suit under I.R.C. § 7405, or
(c) determine a deficiency?

CONCLUSION

The claim for a tax credit for reparations due to slavery is without merit.

(1) If a refund was not made, the credit should be reversed on the grounds that deemed paid provisions do not apply and the credit was not paid. An overstated credit reported on Form 2439 is subject to section 6201(a)(3) and can be summarily assessed. However, an assessment under section 6201(a)(3) is not needed since the Service has the money and does not need to use the administrative collection procedures such as levy. Also, assessment under section 6201(a)(3) requires more steps than reversal of the credit. A deficiency cannot be determined because the unpaid credit does not enter into a redetermination of the tax. See, I.R.C. §6211(b)(1).

(2) If a refund was made, the overstated credit should be summarily assessed under section 6201(a)(3). A referral for the government to bring an erroneous refund suit under section 7405 could be made but takes more time and more resources. A deficiency cannot be determined since the refund was not made on the basis of a redetermination of tax within the meaning of I.R.C. 6211(b)(1),(2) but was made on the basis of a claimed excess of payments.

FACTS

Service Centers have received a number of refund claims for overpayments based on claimed slavery reparation credits. You forwarded with your request for advice a return for one taxpayer, with taxpayer identifiers redacted, as an example of the scheme. In the example, taxpayer filed a Form 1040, U.S. Individual Income Tax Return, for taxable year 1998. The claimed standard deduction and exemptions reduced the taxable income to zero. With the return, taxpayer submitted a Form 2439 on which the RIC or REIT was identified as "black investment taxes Dept. of Treasury Washington DC". On line 2 of Form 2439 and on line 63, Other Payments (the box for Form 2439 is checked), of Form 1040, $40,000 is shown as the tax paid by the RIC or REIT. You ask how the Service should deal with the claim for refund based on the alleged credit both where a refund was not made and where a refund was made. You refer to: G.C.M. 34508, Service Center Program to Correct Obviously Unallowable Items Appearing on Tax Returns, and General Litigation advisory TL-N-1004-98, Period for Making an I.R.C. § 6201(a)(3) Assessment, and ask whether these documents have an effect on our ultimate conclusion. Our views are stated below.

SLAVERY REPARATION CREDIT NOT ALLOWABLE

Some African-Americans have been misled to believe they could file tax claims with the Service for slavery reparations payable by the United States government to descendants of slaves. [18] The Internal Revenue Code does not provide for a credit or refund premised

[18] One source for this erroneous belief is a magazine article, Forty Acres and a Mule, by L.G. Sherrod, Essence (April 1993, p. 124). That title refers to a statutory

on slavery of African-Americans. Thus, the assertion of a slavery reparation credit is without merit. The Service stated a consistent conclusion in Fact Sheets (FS) #94-6 (October 1994) and #96-8 (July 1996) which responded to prior attempts to obtain a refund on this meritless basis.

Refund Not Made

If refund is not made in respect of a taxpayer's refund claim based on an alleged slavery reparation credit, the Service can reverse the credit. The Congressional committee reports which accompanied section 6201(a)(3) when it was enacted indicate that the Service already had the authority to administratively reverse overstated withholding credits except

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proposal in the 1860s to grant former slaves 40-acres and a mule and allegedly vetoed by President Andrew Johnson. However, it does not appear that such a proposal was passed by Congress. President Johnson twice vetoed a proposal to rent confiscated or abandoned land to freedmen for a period of time, with an option to buy the land, on the ground that it involved a taking without due process of law. S. Ex. Doc. No. 25 (as to bill S. 60), 39th Cong., 1st Sess., at page 5 (February 19, 1866), and H. Ex. Doc. 146 (as to bill H. 613), 39th Cong., 1st Sess., at page 4 (July 16, 1866). Approaches regarding slavery that were implemented in the 1860s took a different form. First, the Act of April 16, 1862, 12 S.L. 376, and the Act of June 19, 1862, 12 S.L. 432, abolished slavery in the District of Columbia and the territories of the United States. Second, Congress adopted a joint resolution favoring, and President Lincoln proclaimed, a standing offer of financial incentives to states to enable immediate or gradual elimination of slavery. Joint Resolution, April 10, 1862, 12 S.L. 617; Proclamation 13, May 19, 1862, 12 S.L. 1264, and Proclamation 16, September 22, 1862, 12 S.L. 1267. Third, by the Act of July 11, 1862, Congress implemented a Treaty with Great Britain for the suppression of the African slave trade. Fourth, the Act of July 17, 1862, 12 S.L. 589, abolished slavery in states in insurrection, and provided for confiscation of property used for purposes of treason, rebellion or insurrection, but authorized the President to grant pardons or amnesty to former confederates with restoration of all rights of property except slaves. Sections 7 and 8 of the Act of July 17, 1862 required an in rem proceeding under the supervision of the Attorney General to transfer title to confiscated or abandoned land. [General Sherman's Special Field Order No. 15 (1865) (establishing 40-acre tracts for former slaves accompanying him on the march across Georgia) could not transfer title.] Fifth, the terms for surrender at Appomattox indicated that former confederate military personnel could return to their homes. Sixth, President Andrew Johnson exercised the pardon authority of section 13 of the Act of July 17, 1862, and directed the Freedmen's Bureau to order the return of property (but not former slaves) to the pardoned former confederates. Seventh, declaration of ratification of the Thirteenth Amendment on December 18, 1865 abolished slavery. Eighth, declaration of ratification of the Fourteenth Amendment on July 28, 1868 extended rights of citizenship to all persons born in the United States. [Lack of citizenship prevented former slaves from, for example, taking advantage of the Homestead Act of May 20, 1862, 12 S.L. 392].

when the Service had made a refund or had applied a credit. S. Rep. No. 1622, 83d Cong., 2d Sess., at page 572 (1954); H. Rep. No. 1337, 83d Cong. 2d Sess., at page A404 (1954).

In your example, the taxpayer asserts that the alleged withholding by the RIC or REIT should be treated as a deemed payment by the taxpayer-shareholder under I.R.C. §§ 852(b)(3)(D)(ii) or 857(b)(3)(D)(ii). The taxpayer filed with his Form 1040 a Form 2439 on which an RIC or REIT was identified as "black investment taxes Dept. of Treasury Washington DC" and $40,000 is shown as the tax paid by the alleged RIC or REIT. A Form 2439 is intended for issuance by a RIC or REIT to report to the shareholder and to the Service the shareholder's share of long-term capital gains retained by the RIC or REIT and income tax paid by the RIC or REIT in respect of the capital gains. The retained capital gains are reported on the shareholder's return, and the shareholder claims the taxes paid by the RIC or REIT as a deemed payment. The grounds for reversal of the credit are that: there is no statute that provides for the alleged credit, the deemed payment provisions do not apply because the alleged RIC or REIT does not exist and the Treasury Department did not issue the Form 2439, and the Service did not receive the alleged prepayment.

In our view, reversal is the preferred remedy as it is the most efficient in terms of the Service's resources. The Service does not need to resort to a summary assessment under section 6201(a)(3), which requires further steps and documentation. In the circumstances of the example, upon reversal of the credit the account will show zero liability and zero payments. The deficiency procedures do not apply since the correct tax liability is zero and the claimed credit does not enter into the determination of a deficiency. See, section 6211(a),(b)(1).

Refund Made

If refund is made in response to a taxpayer's refund claim based on an alleged slavery reparation credit, the Service can make a summary assessment under section 6201(a)(3) of the overstated credit. See the Congressional Committee reports cited in the preceding section.

By its terms, section 6201(a)(3) allows the summary assessment of erroneous income tax prepayment credits where there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax. For purposes of applying section 6201(a)(3), the overstatement occurring by reason of the allegation of credit under section 852 or 857 can be treated as an allegation of an overstated advance payment within the meaning of sections 852 and 857. See also, Treas. Reg. §§ 1.852-4 and 1.852-9. Unlike the credit provision in section 31 for withholding taxes, or unlike the deemed time of payment provision in section 6513, there is no statutory connection between the sections 852 or 857 designation procedures and withholding or estimated taxes. Without a connection, a penalty for failure to pay estimated tax would apply. The regulations provide the connection by treating the deemed paid amount as an advance payment of tax

imposed by Chapter 1 of the Code and within the prepayment categories addressed by section 6513(a). See, e.g., Treas. Reg. § 1.852-9(c)(2)(i). Since the deemed paid amount avoids the estimated tax penalty by being treated as an advance payment under section 6513(a), which includes the prepayment categories specified in sections 6201(a)(3) and 6513(b), it is appropriate to treat the advance payment as an estimated tax payment for purposes of section 6201(a)(3). Thus, even though as concluded in the preceding section the deemed payment provisions of sections 852(b)(3)(D)(ii) or 857(b)(3)(D)(ii) do not apply to the alleged credit, the overstatement of the advance payment credit on line 63 of Form 1040 can be summarily assessed under section 6201(a)(3).

Summary assessment is the preferred remedy as it enables collection, and enables protection of the Service's right to collect, at the earliest time. A recommendation could be made that the government bring a suit to recover an erroneous refund under section 7405. However, generally the government cannot take collection action premised on the suit until a judgement is obtained, thus subjecting to delay the time when collection, and protection of the government's right to collect, occurs. Also, the deficiency procedures do not apply. The claim for refund of the reparation credit is based on overpayment of a tax and not redetermination of a tax, and a prepayment credit cannot be considered in the determination of a deficiency. See, section 6211(a),(b)(1); S. Rep. No. 1622, 83d Cong., 2d Sess., at page 572 (1954); H. Rep. No. 1337, 83d Cong. 2d Sess., at page A404 (1954).

Other Matters

G.C.M. 34508 addresses the application of the math error provisions of I.R.C. §6213(b), including to Form 2439 circumstances, and holds that not all apparently patent errors fall into the definition of math errors. However, in a memorandum from the Acting Chief Counsel dated May 18, 1972, it was concluded that G.C.M. 34508 does not apply to claims of prepayments which in fact were not made. Thus, G.C.M. 34508 does not apply to the instant memorandum which addresses a meritless claim in a nonpayment circumstance.

TL-N-1004-98 addresses an assessment under section 6201(a)(3), concluding that it is an assessment of a tax, and addresses the statute of limitations for making a section 6201(a)(3) assessment, concluding that the I.R.C. § 6501 periods should be applied. In regard to a text statement that "[i]ncome tax returns or claims for refund sometimes show overstated amounts for income tax prepayment credits for income tax withheld at the source or for amounts paid as estimated income tax," footnote 1 indicates that "[t]he credits referred to are provided by I.R.C. §§ 31(a)(1) and 6315." While we were trying to describe an ordinary circumstance, the text statement tracks the language of section 6201(a)(3) and, therefore, the footnote is unduly narrow as it fails to include all credits that fit within I.R.C. § 6513, such as the credits provided by I.R.C. §§ 33, 852(b)(3)(D)(ii) and 857(b)(3)(D)(ii).

Offer in Compromise; Unenrolled Return Preparer; Appeal

CC:EL:GL:Br2:ICPlucinski
GL-810114-99

May 1, 2000

UILN: 17.31.00-00
ILM 200034001

MEMORANDUM FOR SOUTHERN CALIFORNIA DISTRICT COUNSEL

FROM: Kathryn A. Zuba
Chief, Branch 2 (General Litigation)

SUBJECT: Unenrolled POA Before Appeals: Offer in Compromise

This responds to you request for advice, dated December 6, 1999, in the above referenced case. This document is not to be cited as precedent.

LEGEND:

Taxpayers
Years 1 - 8
Date A
Date B

ISSUES:

1. Can an unenrolled return preparer with a valid Power of Attorney sign an appeal of a rejected offer in compromise (OIC) on behalf of a taxpayer?

2. Is the statute of limitations for collection set forth in I.R.C. § 6502 suspended as a result of such an appeal?

CONCLUSIONS:

1. An unenrolled return preparer is not authorized to sign an appeal of a rejected offer in compromise on behalf of a taxpayer. However, the Office of Appeals has made a decision to consider such appeals as "pending" and to allow the taxpayer to perfect the appeal during the appeal process.

2. Because such an appeal is considered "pending" for purposes of I.R.C. § 6331(k)(1)(B), the statute of statute of limitations under I.R.C. § 6502 remains suspended during the appeal process.

BACKGROUND:

According to your request for advice, the facts relevant to this inquiry are as follows. The taxpayers, , were assessed additional income taxes for Year 3 through 7.

The taxpayers executed a Form 2848, Power of Attorney (POA), authorizing an unenrolled return preparer to represent them before the Service for the years at issue. The unenrolled return preparer is not an attorney, certified public accountant (CPA), enrolled agent, or an enrolled actuary as defined in Treasury Circular No. 230 (31 C.F.R. Part 10). See also 26 C.F.R. § 601.502.

The taxpayers submitted an offer in compromise for the Years 1, 2, 5, 7, and 8, on the grounds of doubt as to collectibility. In a letter dated Date A, the Service rejected the taxpayer's offer because the amount offered was less than the Service's maximum collection potential. The rejection letter contained instructions on how to protest the rejection of the offer to the Office of Appeals. In relevant part, the rejection letter provided as follows:

> You must sign the [protest], stating that it is true, under penalties of perjury as follows:
>
> > Under penalties of perjury, I declare that I have examined the facts stated in this protest, including any accompanying documents, and to the best of my knowledge and belief, they are true, correct and complete.
>
> If your representative prepares and signs the protest for you, he or she may substituted a declaration stating:
>
> > 1. That he or she submitted the protest and accompanying documents, and
> >
> > 2. Whether he or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

A copy of the rejection letter containing the above language was also sent to the unenrolled return preparer. In a letter dated Date B, the unenrolled return preparer, appealed the rejection of the taxpayers' offer in compromise. The appeal was not signed by the taxpayers.[19]

[19] Please note that in addition to the appeal not being signed by the taxpayer it also included years for which the unenrolled return preparer did not have a valid Power of Attorney.

The local Office of Appeals is inclined to return the taxpayers' appeal and to request that the appeal be resubmitted by the taxpayers or a person authorized to represent the taxpayers before the Office of Appeals. The Office of Appeals believes that an offer signed by an unenrolled return preparer or another person not authorized to practice before the Office of Appeals is invalid and thus, that the statute of limitations on collection is not suspended during the time such an appeal is "pending" with the Office of Appeals.

LAW & ANALYSIS:

Issue 1:

Treasury Department Circular No. 230, codified in 31 C.F.R. Part 10, sets forth rules governing the practice of taxpayers' representatives before the Internal Revenue Service (Service). Only certain individuals are authorized to practice before the Service. 31 C.F.R. § 10.3. These are attorneys, certified public accountants (CPA), enrolled agents, and enrolled actuaries.[20] Id.

An unenrolled return preparer is any individual, not otherwise eligible to practice before the Service, who wishes to exercise the privilege of limited practice before the Service. See Rev. Proc. 81-38; 31 C.F.R. Part 10, Section 10.7. The acts which an unenrolled return preparer may perform under a Power of Attorney are limited to representation of a taxpayer before revenue agents and examining officers of the Examination Division in the offices of District Director with respect to the tax liability of the taxpayer for the taxable year or period covered by a return prepared by the unenrolled return preparer. 26 C.F.R. § 601.502(a)(5)(iii); 31 C.F.R. § 10.7(c)(viii). See also Internal Revenue Manual Handbook HB 12(16)0, part 280 (4/2/93).

Initially, the Department of Treasury issued its Regulations authorizing limited practice by unenrolled return preparers to relieve the burden on taxpayers who, because they have not sought professional representation, would otherwise have to personally appear before revenue agents to resolve disputes at the Examination level, and to facilitate the resolution of tax disputes at the lowest possible level. See News Release A-447 (Feb. 16, 1959). The authority of unenrolled return preparers has remained limited to practice at the Examination level. Consequently, an unenrolled return preparer may not represent or correspond as the taxpayer's representative before either the Collection division, the Office of Appeals, the Taxpayer Advocate, or the officials in the National Office. See Rev. Proc. 81-38, as printed in Publication 470 (Rev. 1-82). Moreover, an unenrolled return preparer is generally prohibited from signing any documents on behalf of a taxpayer. See Form 2848, Power of Attorney and Declaration of Representative. These include, but are not limited to, waivers of the statutory period of limitations on assessment or collection, and closing agreements with respect to a tax liability or specific matter. Rev. Proc. 81-38.

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[20] Enrolled actuaries are authorized to practice before the Service with respect to only certain issues. See 31 C.F.R. § 10.3(d).

An unenrolled return preparer, therefore, may not execute an offer in compromise on behalf of a taxpayer or represent the taxpayer before the Collection division of the Service. Likewise, he may not represent or correspond as the taxpayer's representative before the Office of Appeals. Thus, while an unenrolled return preparer with a valid Power of Attorney may attend Appeals conferences with the taxpayer as a witness, or to help explain how a return was prepared, he may not advocate or sign any documents on behalf of a taxpayer. This includes an appeal of a rejected offer in compromise.

While the Service's current procedures governing appeals of rejected offers in compromise require the taxpayer or a recognized representative to sign an appeal of a rejected offer in compromise, we have been informed by the Office of Appeals that it is the Appeal's administrative policy to consider an appeal even if the signature requirement has not been met.[21] In other words, if an appeal is filed on behalf of a taxpayer by an individual with a valid Power of Attorney, i.e., an individual whom the taxpayer designated to act as an attorney-in-fact on the taxpayer's behalf, the Office of Appeals will consider such an appeal and will allow the taxpayer to cure the defect during the appeal process. Once the taxpayer cures the defect by signing the appeal, the appeal will be considered on its merits by the Office of Appeals.

Issue 2:

While the Service prescribes the mode for filing an appal of a rejected offer in compromise, the statute prescribes the time frame during which an appeal must be filed in order for the statute of limitations on collection to be suspended by operation of section 6331(k)(3). The statute of limitations on collection is suspended during the period the offer in compromise is pending with the Service, and if such offer is rejected for 30 days thereafter. The period continues to be suspended if an appeal of a rejection of the offer is filed within 30 days from the date of the rejection. I.R.C. § 6331(k)(1)(B). Thus, while the Office of Appeals may consider a taxpayer's appeal of a rejected offer in compromise even if such appeal is filed outside of the 30-day period prescribed by the statute; the statute of limitations on collection is not suspended unless the appeal was filed within 30 days of the rejection of the offer.

In the present case, the letter rejecting the taxpayers' proposed offer in compromise is dated Date A. The appeal filed on the taxpayers' behalf by the unenrolled return preparer is dated Date B. Accordingly, the collection period is not suspended and the Service may levy on the taxpayers' assets to collect the unpaid taxes. Furthermore, since the taxpayers

[21] It is evident from your inquiry that this policy has not been adequately communicated to the appeals officers in the field offices. Accordingly, we will work with the National Office of Appeals on revising the Internal Revenue Manual and other necessary documents to clearly provide when an appeal is considered "pending" for purposes of I.R.C. § 6331(k)(1).

did not file an appeal within the prescribed time period, the Office of Appeals is not required to consider the taxpayers' appeal.

HAZARDS & OTHER CONSIDERATIONS:

[Portion redacted]

Thus, even if the appeal of the rejected offer in compromise was timely under the statute, the collection period would not be suspended with respect to the years not covered by the Power of Attorney.

In conclusion, we recommend that Form 2848, Form 656, and the applicable Internal Revenue Manual provisions be revised to clearly provide the limited scope of the authority of an unenrolled return preparer. In addition, Service personnel and taxpayers should be advised of the taxpayers' right to be represented and of the limits of that representation, and that those rights and limits must be respected both by the taxpayers and the Service. This advice was coordinated with the Office of the Associate Chief Counsel (General Legal Services).