

ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

CC:EL:GL:RJSchuman
TL-N-2653-97

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District Counsel, Brooklyn CC:NE:BRK

Chief, Branch 1 (General Litigation) CC:EL:GL:BR1

Significant Service Center Advice Request
Return of Levied Property

This is in response to your recent request for advice concerning the Service's obligation to return levied upon property when the taxpayer enters into an installment agreement. Your memorandum states that such agreements are entered into at Service Centers by telephone when the balance due is under a certain amount.

Section 501 of TBOR2 amended I.R.C. § 6343 in pertinent part to provide for the return of the taxpayer's property in certain cases. Subsection (d) of that Code section provides as follows:

If (1) any property has been levied upon, and (2) the Secretary determines that -

(A) the levy on such property was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the levy was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the return of such property will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the Taxpayer Advocate, the return of such property would be in the best interest of the taxpayer (as determined by the Taxpayer Advocate) and the United States,

the provisions of subsection (b) shall apply in the same manner as if such property had been wrongly levied upon,

except that no interest shall be allowed under subsection (c).

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The issue you have raised as result of your visitation to the Brookhaven Service Center this pas April, concerns whether the Service is required, in situations where an installment agreement exists, (1) to return property received pursuant to a levy when the property was received prior to the date the parties entered into the installment agreement and (2) whether the Service is required to return property which is received after the date of the installment agreement but in response to a levy issued prior thereto.

It is our view that in either of the above situations, unless the oral agreement reached on the telephone with the Service Center provides otherwise, it is discretionary with the Service as to whether to return the levied upon property. Subsection (b) of section 6343, to which subsection (d) refers, provides that "property may be returned at any time," (emphasis ours). The word "may" should not be interpreted to mean "shall," absent some overriding Congressional intent. Because there is nothing to indicate that "may" has lost its customary meaning, there is no mandatory requirement that property be returned at all. However, to facilitate the collection of taxes through the use of installment agreements, TBOR2 gave the Service discretionary authority to return property seized by levy.

Under the law prior to the addition of section 6343(d), the Service was able to return levied upon property to a taxpayer only when the taxpayer had fully paid the liability for which the levy was served. In enacting that Code section, Congress took into consideration that there existed situations where the Service was not authorized to return levied upon property even though it believed that doing so would be equitable and in the best interests of the taxpayer and the Government. For example, if the Service entered into an installment agreement and in contradiction to the terms thereof, the Service levied on property, the Service was prohibited from returning the property to the taxpayer. However, although under current law, that property can be returned to the taxpayer, the legislative history of section 6343(d) is silent as to when it can be returned or as to whether there should be a difference in cases where levied upon property is received prior to, or subsequent to, the installment agreement. See H.R. Rep. No. 104-506, 104th Cong., 2d Sess. (1996).

Your memorandum also stated that the Service Centers might wish to issue guidelines as to how and when they should exercise their discretion in returning levied upon property in

either of the situations discussed above. In doing so, they may wish to consider the following questions that could surface as a result of the enactment of section 6343(d).

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1. Does the 9 month limit apply to the return of property to the taxpayer under section 6343(d)?
2. Is a claim from the taxpayer required?
3. If the time limit does apply, what action must occur within the 9-month period on a refund initiated without a claim from the taxpayer, if such claim is not required?

With respect to question number one, the 9-month time period applies to the amount of money levied upon or received from an administrative sale under section 6343(b). (Section 6343(b) also provides that the specific property levied upon may be returned at any time.) The plain wording of section 6343(d) incorporates section 6343(b): "the provisions of subsection (b) shall apply in the same manner as if the property had been wrongly levied upon, except that no interest shall be allowed under subsection (c)." Section 6343(b) provides that "[a]n amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of the levy." The period of 9 months from subsection (b) is incorporated by reference into subsection (d).

As to the second question, section 6343(d) does not explicitly answer this question. As stated above, section 6342(d) incorporates section 6343(b) by reference. Section 6343(b) does not require a taxpayer to file a claim. The claim requirement exists under Treas. Reg. § 301.6343-2(b), which provides in part, that "[a] written request for the return of property wrongfully levied upon must be addressed to the district director (marked for the attention of the Chief, Special Procedures Staff) for the Internal Revenue District in which the levy was made." Because section 6343(d) does not explicitly incorporate the regulation, we are forced to consider whether Congress implicitly intended that the regulation be incorporated.

On the one hand, in support of the position that a taxpayer must file a claim for relief under section 6343(b), it could be argued that Congress carefully reviewed section 6343(b) and the regulation under it. After this careful review, Congress intended that the procedures under section 6343(d) follow the procedures under section 6343(b), which would include Treas. Reg. § 301.6343-2(b) and the requirement that a claim be filed. In fact, if Congress implicitly

incorporated the regulation, it expedited the relief to be provided to taxpayers because procedures for relief would exist as of the effective date of the amendment, i.e., the procedures in section 301.6343-2(b) which require that a claim be filed.

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On the other hand, section 6343(d) simply states: "the provisions of subsection (b) shall apply." If Congress had intended to incorporate the provisions of Treas. Reg. § 301.6343-2(b), there would have been a reference in either the statute or the legislative history. Also, the plain wording of section 6343(d) provides for relief if the "Secretary determines that" relief is appropriate. The Secretary's determination is not qualified by a prerequisite that a claim be filed.

Although there is no clear answer, the better interpretation is that a claim from a taxpayer is not required for relief under section 6343(d). In other words, the Service may determine that relief is appropriate without a taxpayer filing a claim. This conclusion, however, does not preclude a taxpayer's claim. In fact, in many situations, a taxpayer's claim would assist the service in making a determination. We think that Congress intended that the Service draft regulations under section 6343(d) that would be akin to the regulations under section 6343(b) so as to allow the filing of claims. The regulations to be drafted under section 6343(d) will clarify the Service's authority to unilaterally make determinations and a taxpayer's option to file a claim.

As to the third question, without a claim from the taxpayer, the Service must initiate a determination within the 9-month time period to return the money after the expiration of the 9-month period. The Service does not have to complete the determination within the 9-month period, i.e., the Service does not have to return the money within the 9-month period.

Analogous support for our position exists in Treas. Reg. § 301.6343-2(a) (2) which extends the 9-month period under section 6343(b): "When a request described in paragraph (b) of this section is filed for the return of property before the expiration of 9 months from the date of the levy, an amount of money may be returned after a reasonable period of time subsequent to the expiration of the 9-month period if necessary for the investigation and processing of such request." Given the traditional extension of the 9-month period for claim situations, a similar extension of the 9-month period should apply where the Service makes a

determination within the 9-month period but returns the money after the expiration of the period.

We trust that the foregoing will be helpful to you in rendering assistance to the Service Center. If you need further assistance, please do not hesitate to contact Ray Schuman on 202-622-3610, to whom this matter is assigned.

ALAN C. LEVINE

cc: Arlene A. Blume, TSS Supervisor, CC:DOM:FS
Executive Office of Service Center Operations T:S
Executive Office of Customer Service Operations T:C