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From:

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To:

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Subject: Nominee situations

Hi . Here are some quick thoughts about your question on nominee liens where a TP transferred title to his principal residence to his girlfriend right before the Service made an assessment for the TFRP.

Generally, we'd issue a levy before asking DOJ to file a lien foreclosure suit because as a general rule the administrative collection remedies available to the Government are adequate. IRM 5.17.4.8.2.1 (08-01-2010) *Administrative Collection Devices Are Not Feasible or Adequate*, at (1). But the fact that the asset is a principal residence means the Service can't simply levy. And the fact that the asset is being held by a nominee may override the preference for an administrative remedy. Of course, if at any point a taxpayer indicates that he or she wants to cooperate and become compliant, the TP may be willing to transfer the residence back into his or her name.

The government may bring the usual suit to foreclose a FTL on a principal residence under IRC § 7403. But, to administratively seize a principal residence, the government must obtain a court order under IRC § 6334(e). IRM 25.3.2.4.5.2 (06-01-2010) *Suit Referrals Involving a Principal Residence*. An Area Director must approve a recommendation to bring either action. IRM 25.3.2.4.5.2 at (3). The narrative report for the recommendation should explain why one option is being recommended over the other. IRM 25.3.2.4.5.2 at (2). The procedures for preparing a seizure recommendation package for Area Director approval and for preparing the suit recommendation package are in IRM 5.10.2.18 (07-03-2009), *Judicial Approval for Principal Residence Seizures*.

The section 6334(e)(1) proceeding is generally commenced in the same manner as suits by the government to collect taxes; i.e., an RO's recommendation is forwarded to Area Counsel. The same information required to be provided in a lien foreclosure recommendation must be provided in a section 6334(e)(1) proceeding recommendation. IRM 5.17.4.9 (08-01-2010) *Proceeding to Seize a Principal Residence*, at (4). DOJ will rely on that information in drafting its complaint if it decides to bring suit. IRM 5.17.4.8.3 (08-01-2010) *Preparing Recommendation to Institute an Action to Foreclose Tax Liens*, at (2).

In considering which is the better option to recommend, note that when there are issues related to ownership or a nominee situation, then a suit recommendation to foreclose the FTL (and/or to reduce the tax claim to judgment) may be the appropriate action. IRM 5.10.2.18 (07-03-2009) *Judicial Approval for Principal Residence Seizures*, at (2).

The FTL extends to property held by the nominee of the taxpayer, but still it's desirable to prepare an individual NFTL for the nominee. IRM 5.17.2.3.5 (12-14-2007) *Effect of Errors in Notice of Federal Tax Lien*, at (2). See also IRM 25.3.2.4.1 (06-01-2010) *Preliminary Actions (re: Procedures for IRS Employees Initiating Suits)* ("Request approval for and file nominee lien notices as needed prior to suit referral to protect the government's interest during the pendency of the action.")

The NFTL in a nominee situation is identical to the standard NFTL, except that the nominee is identified as the name of the taxpayer. Since the FTL only attaches to property actually owned by a taxpayer, it will only reach the property of the nominee that he or she holds for the taxpayer. Therefore, the nominee NFTL will usually contain a notation on its face that the lien is filed to attach specifically to certain

identified property. IRM 5.17.2.5.7.2 (12-14-2007) *Nominee Liens* at (3). The taxpayer, and not the nominee, is given CDP notification [Treas. Reg. § 301.6320-1(a)] and may have a CDP hearing [Treas. Reg. § 301.6320-1(b)]. A nominee may have a hearing under the Collection Appeals Program.

An RO is direct to request Area Counsel advice before filing a nominee lien [IRM 5.12.2.6.5 (10-30-2009) *Preparing Nominee Liens*, at (4)], and to request Area Counsel direction regarding enforcement of the lien [IRM at (5)]. To those IRM directives, here's some background on nominee situations. Whether a nominee situation exists depends first on whether the taxpayer holds a beneficial interest in the property under local law. [The second step isn't necessary to get into; i.e., whether that interest is property under section 6321 (or 6331). See Drye v. U.S., 528 U.S. 49, 52 (1999).] Where state law is undeveloped on the issue of nominee ownership, the Federal courts have relied on a relatively well-defined body of Federal common law. Dalton v. Commissioner, 135 T.C. 393, 406 (2010) lists 8 factors; Spotts v. U.S., 429 F.3d 248, 253 (6th Cir. 2005) lists 12 factors. See also IRM 5.17.2.5.7.2 (12-14-2007) *Nominee Liens*, with a similar list taken from the factors used by courts.

Even though state law might not explicitly refer to a nominee doctrine, some courts will consider state law variants that, in effect, make the same determination. In this regard it might be useful to look at Dalton, 135 T.C. at 407 to get a feel for how complex the question may become - the Service had concluded that state law was silent on the nominee doctrine, but the Tax Court disagreed. Note that we disagree with the opinion and the case is on appeal to the 1st Circuit (# 11-2217). (The Tax Court exercised jurisdiction in Dalton, a CDP case, to decide the nominee interest issue as it pertained to the rejection of an OIC on the basis that it didn't take account of the taxpayers interest in property held by a nominee.) In any event a court will expect that state law was fully considered before applying the federal common law test. See Fourth Investment LP v. U.S., (Not Reported in F.Supp.2d) (S.D.Cal., 2010). And it may be that there's no real difference between the federal common law and state law. See U.S. Isaacson, Slip Copy (D.N.H. July 15, 2011) at FN 3. (The parties disagree over whether federal or state law governs the nominee analysis, but the court didn't need to resolve the issue because federal and state law "are so similar that the distinction is of little moment.) Finally, note that we disagree with Dalton's treatment of fraudulent conveyance law as a variant on the nominee doctrine; fraudulent conveyance concerns the circumstances surrounding the transfer and not factors going to whether the taxpayers have a beneficial interest.