Office of Chief Counsel
Internal Revenue Service
memorandum

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(Small Business/Self-Employed)
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from: Mitch S. Hyman
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subject: Extended Use of Federal Contractor Levies

You have asked us several questions to assist Field Operations in developing procedures implementing the federal contractor exception provisions in section 6330(f). Section 6330 of the Code generally requires that the Service provide the opportunity for a CDP hearing prior to levy. The exceptions listed in section 6330(f) permit levying first, followed by a post-levy opportunity for a hearing. At the hearing, and on appeal to the Tax Court, taxpayers can raise all relevant issues involving the unpaid tax and the levy, including whether the levy exception properly applies and other issues involving the seizure and sale of any property pursuant to the levy. See, e.g., Zapara v. Commissioner, 652 F.3d 1042 (9th Cir. 2011). See also AOD- 2012-06 (Nonacquiescence generally, but agrees that the taxpayer can raise issues regarding the sale of the levied-upon property at the CDP hearing).

The Small Business Jobs Act of 2010 added new sections 6330(f)(4) and (h)(2) to provide a federal contractor levy exception to the requirement that taxpayers be afforded a pre-levy opportunity for a CDP hearing. See Pub.L. 111-240, § 2104(a) and (b). As previously discussed, this permits the Service to levy before providing a CDP hearing, but requires that a CDP hearing be offered to the taxpayer after the levy is served. The question arises whether the term “federal contractor levy” is limited to levies on payments due to the taxpayer from other federal agencies, typically accomplished through the federal payment levy program (FPLP) under the authority of section 6331(h) (permitting the Service to serve continuous levies on 100 percent of payments due to a vendor of property, goods or services sold or leased to the federal government).

We conclude that the plain language of the statute provides that the Service may levy on any property of a federal contractor (i.e., any levy pursuant to authority found in any subsection of section 6331), not just payments subject to FPLP. But even given the broad scope of the statute, "federal contractor" should be interpreted as meaning a taxpayer who currently has a contract with the government, and not a taxpayer who was in the past a federal contractor but currently is not involved in any contractual relationship with the federal government.

We note, notwithstanding the broad scope of the statute, that the relevant section of SBJA is entitled "Application of continuous levy to employment tax liability of certain Federal contractors" (emphasis added), which suggests that the provision was intended to be limited to FPLP levies. Similarly, the Joint Committee on Taxation's General Explanation of Tax Legislation Enacted in the 111th Congress and the Joint Committee on Taxation's Technical Explanation of the Tax Provisions in Senate Amendment 4594 to H.R. 5297 suggest that the amendments to sections 6330(f) and 6330(h)(2) apply to FPLP levies, not levies against all the property of federal contractors. JCS- 2-11; JCX-47-10. We also note that how a section is entitled "is only a short-hand reference to the general subject matter involved in that statutory section and cannot limit the plain meaning of the text. … Section and subchapter titles cannot alter the plain meaning of a statute; they can only assist in clarifying ambiguity." 73 Am. Jur. 2d, Statutes §100. See also 73 Am. Jur. 2d Statutes § 46 (the title of a statute is not a part of the statute itself). In addition, while JCT explanatory text is entitled to respect, it is not part of the legislative history. Redlark v. Commissioner, 106 T.C. 31 (1996), rev'd on other grounds, 141 F.3d 936, (9th Cir. 1998). Thus, the title of a statutory provision and JCT explanations are not legislative history or dispositive regarding Congressional intent.

[redacted]

We also observe that while section 6330(f)(4) provides an exception to the general rule providing for a pre-levy opportunity for a hearing, it does not preclude the Service from providing pre-levy hearings even where a post-levy hearing would be permissible.

[redacted]

Turning to your specific questions, you ask what criteria the Service could use in determining whether a taxpayer is a federal contractor for purposes of section 6330(f). Developing criteria would only be necessary, of course, if the Service levies on property other than federal payments being paid to a taxpayer for property or services provided to the federal government, since the entitlement to such payments would automatically mean that the taxpayer is a federal contractor. However, if the Service seeks to levy on

other property, we conclude that any criteria that rely on information showing that the taxpayer is currently a federal contractor would be acceptable. This would include any taxpayer who is currently obligated under a contract to provide services, goods, or property (including the use of leased property) to the federal government in exchange for monetary payment and any taxpayer who fulfilled its obligation under the contract but is still awaiting payment. We have concerns with any criteria that has a look-back period, i.e., a past, but not current, contractual relationship.

You also ask whether there is any time limit to the "look back" period that can be used for a "predecessor" determination. Section 6330(h)(2) defines a federal contractor levy as "any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor." Consistent with our conclusion that the taxpayer should be currently a federal contractor for the exception to apply, we believe that reliance on the predecessor language should be limited to situations where the taxpayer has assumed the contractual responsibilities (or the right to payment) of a predecessor entity. There should be no look back period, but the focus should be on whether the taxpayer or the government has obligations under a current contractual relationship.

Finally, you ask whether the IRS may use "federal contractor levies" for the purpose of collecting from Medicare providers/suppliers. We have previously opined that Medicare providers are not federal contractors for the purposes of section 6330(f), just as they are not federal contractors for the purposes of the 100% levy on payments due to a vendor of property, goods, or services sold or leased to the federal government under section 6331(h). A federal contractor must have a contractual relationship with the government whereby the contractor provides goods, property or services to the government. Medicare providers are not providing goods, property or services to the federal government. Rather, they are providing services for patients and getting reimbursed. The Medicare program is administered by the Center for Medicare/Medicaid Services (CMS) division of HHS. Physicians and other health care suppliers enroll in the Medicare program in order to be eligible to receive Medicare payments for covered services provided to Medicare beneficiaries. Participation in the Medicare program means the providers agree to accept assignment of claims for all services provided to Medicare beneficiaries. By such agreement, the providers agree to accept Medicare-allowed amounts as payment in full and to not collect more than the Medicare deductible and coinsurance from the beneficiary. It is, therefore, our view that Medicare providers are not federal contractors under section 6330(f) since they provide services to the beneficiaries, not the government.

If you would like to discuss the foregoing, please contact us at (202) 622-3600.