Internal Revenue Service

memorandum

CC:EL:GL:Br1:WRyan
GL-248365-96

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to: Taxpayer Advocate C:PRP
Assistant Commissioner (Collection) CP:CO
National Director of Appeals C:AP

from: Assistant Chief Counsel (General Litigation) CC:EL:GL

subject: Lien & Levy Provisions of Taxpayer Bill of Rights 2 (TBOR 2)

This responds to the questions you raised in your memorandum dated, October 2, 1996, which relate to section 501 of TBOR 2. (Copy of memorandum attached.) In pertinent part, section 501 amends I.R.C. § 6323 to provide for the withdrawal of a notice of lien in the following language:

> The Secretary may withdraw a notice of a lien filed under this section and this chapter shall be applied as if the withdrawn notice had not been filed, if the Secretary determines that --
>
> > (A) the filing of such notice 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 lien was imposed by means of installment payments, unless such agreement provides otherwise,
> >
> > (C) the withdrawal of such notice will facilitate the collection of the tax liability, or
> >
> > (D) with the consent of the Taxpayer Advocate, the withdrawal of such notice would be in the best interest of the taxpayer (as determined by the Taxpayer Advocate) and the United States.
>
> Any such withdrawal shall be made by filing notice at the same office as the withdrawn notice. A copy of such notice of withdrawal shall be provided to the taxpayer.

Also, section 501 amended I.R.C. § 6343, in pertinent part to provide for the return of the taxpayer's property in certain cases:

> 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,
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> 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).

We will address your questions in the order in which you raised them in different subsections.

Best Interest Determination

Q1. "Does the statute envision one determination by the Taxpayer Advocate or two determinations: the taxpayer's best interest determined by the Taxpayer Advocate and the government's best interest determined by the Secretary's designee?"

A1. The section requires two determinations: one determination by the Taxpayer Advocate or the designee of the Taxpayer Advocate and one determination by the Secretary's designee. Our conclusion that the statute requires two determinations, only one of which is to be made by the Taxpayer Advocate, rests on the plain wording of sections 6323(j)(1)(D) and section 6343(d)(2)(D). Both sections use the conjunction "and" in discussing the "best interest" test.

As a general rule, "the word 'and' is to be accepted for its conjunctive connotation rather than as a word interchangeable with 'or' except where strict grammatical construction will frustrate clear legislative intent." Bruce v. First Federal Savings & Loan Association, 837 F.2d 712, 715 (5th Cir. 1988). See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word that Congress used.") In sections 6323(j)(1)(D) and 6343(d)(2)(D), the strict grammatical interpretation of "and" as a conjunction indicates that two separate determinations are to be made. First, such an interpretation will not frustrate any clear legislative intent. Second, the statute only uses the parenthetical "(as determined by the Taxpayer Advocate)" when satisfying the first determination with regard to the best interest of the taxpayer. However, please note that nothing in the statute prohibits the Secretary from designating the Taxpayer Advocate as the official responsible for determining the best interest of the United States.

Q2. "Does the statute require that the Taxpayer Advocate determine the taxpayer's best interest in all situations [or may the Taxpayer Advocate delegate that power to Collection]? For example, [assuming a delegation of the Taxpayer Advocate's power to a Collection employee] if the Service agreed with the taxpayer's request, would there still be a need to involve the Advocate? Could we set procedures that called for input of the Advocate only in decisions that were against the taxpayer [assuming a partial delegation of the Taxpayer Advocate's power]?"

A2. The Taxpayer Advocate may delegate the power to determine the "best interest" of the taxpayer to Collection. However, please note that even under such a delegation, the Taxpayer Advocate is determining the "best interest" of the taxpayer in all cases. Since the Collection employee to whom the power has been delegated must make a determination as to the "best interest" of the taxpayer under the authority vested in the Taxpayer Advocate, the employee will be wearing the hat of the Taxpayer Advocate. The Taxpayer Advocate cannot disavow this employee who represents the office of the Taxpayer Advocate, even though the employee actually works for Collection. Finally, the Taxpayer Advocate may limit the designated power to determine the "best interest" of the taxpayer so that a decision against a taxpayer by his designee would require a formal input from the Taxpayer Advocate, i.e., the employee in Collection has not been delegated the power to determine the "best interest" of the taxpayer when Collection has already made a negative determination.

Taxpayer Assistance Orders (TAO's)

Q3. "Can a TAO requiring withdrawal of a notice of lien or return of levied funds be issued without the finding that one of the four statutory conditions [contained in sections 6323(j) or 6343(d)] exists?"

A3. A TAO cannot override the statutory requirements in sections 6323(j) and 6343(d). "[I]t is a commonplace of statutory construction that the specific governs the general." Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2037 (1992). In this question, the TAO is a general power; whereas, sections 6323(j) and 6343(d) are specific statutory provisions. Thus, specific provisions of sections 6323(j) and 6343(d) prevail over general provisions such as a TAO.

Installment Agreements and Notices of Lien

Q4. "Is the withdrawal of the notice of lien mandatory when an installment agreement is in effect and does not provide for the filing of the notice?"

A4. The withdrawal of the notice of lien is never mandatory. The opening sentence of section 6323(j)(1) provides that "the Secretary may withdraw a notice of a lien." 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 withdrawal requirement for the notice of lien.

Q5. "Can the Service file a notice of lien while an installment agreement is in effect?"

A5. There is no prohibition with respect to the filing of a notice of tax lien while an installment agreement is in effect. We note that Treas. Reg. § 301.6159-1(d)(3) provides that, unless otherwise provided by the installment agreement, the Service may take actions to protect the interests of the Government with regard to the unpaid tax liability to which the installment agreement applies. Such actions include filing or refiling notices of federal tax lien. The installment agreement (Form 433-D) does not contain any provision that would prevent the Service from filing a notice of federal tax lien while the agreement is in effect. Thus, the Service may file a notice of tax lien while an installment agreement is in effect.

Q6. "If [the Service can file a notice of lien while an installment agreement is in effect], is any special notice, time frame, or appeal right under I.R.C. § 6159(c), added by TBOR 2, involved?"

A6. TBOR 2 does not add any special notice, time frame, or appeal rights under I.R.C. § 6159(c) with respect to the filing of a notice of federal tax lien while an installment agreement is in effect. Section 201 of TBOR 2 added a new subsection to the Code, I.R.C. § 6159(b)(5), which provides that the Service may not take any action under paragraph (2), (3), or (4) of section 6159(b) unless certain notice is first provided to the taxpayer. Section 6159(b)(2) gives the Service the authority to terminate an installment agreement if the information provided to the Service by the taxpayer was inaccurate or incomplete, or if the Service believes the collection of the tax to which the agreement relates is in jeopardy. Section 6159(b)(3) allows the Service to alter, modify, or terminate an installment agreement if the Service makes a determination that the financial condition of the taxpayer has significantly changed, provided that proper notice is given to the taxpayer. Finally, section 6159(b)(4) allows the Service to alter, modify, or terminate an installment agreement if the taxpayer fails to make the required payments under the agreement, or if the taxpayer fails to provide requested financial information. Since none of these sections applies to the filing of federal tax liens, new I.R.C. § 6159(b)(5) does not apply to the filing of a notice of federal tax lien while an installment agreement is in effect.

Section 202 of TBOR 2 added a new section, I.R.C. § 6159(c), which requires the Service to establish procedures for conducting an administrative review of terminations of installment agreements under this section for taxpayers who request such a review. Since new I.R.C. § 6159(c) only applies to terminations of agreements, it does not affect the filing of a notice of federal tax lien.

Q7. In addition to the questions presented in the materials you sent to us, Phil Marti of Collection has requested that we consider whether section 6159(b)(5) applies in the situation where the Service incorrectly checks the box on the installment agreement which indicates that a notice of tax lien has not been filed, and the Service later discovers that a notice of tax lien had actually been filed at the time the installment agreement was entered into. He stated that he is concerned that under the provisions of the new notice requirements of section 6159(b)(5) the Service may not correct its mistake unless notice of such action is provided to the taxpayer not later than 30 days before the date of the action, since this correction may be viewed as altering or amending the installment agreement under section 6159(b).

A7. Section 6159(b)(5) does not apply in such a situation. The mistake made by the Service and its subsequent correction does not substantively change the operative terms or provisions of the installment agreement. Also, the action taken by the Service (i.e., checking the appropriate box), is not an action taken by the Service that is described in paragraphs (2), (3), or (4) under section 6159(b), which is necessary for section 6159(b)(5) to take effect. At most, the Service is correcting a clerical error that does not fall within the scope of section 6159(b)(5). However, the Service should inform the taxpayer of its mistake and subsequent actions to correct the installment agreement. 1/

Time Limit for Return of Property

Q8. "Does the 9 month limit apply to the return of property to the taxpayer under this provision [section 6343(d)]?"

A8. The 9-month time period applies to the return of 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 such 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 such levy." The period of 9 months from subsection (b) is incorporated by reference into subsection (d).

Q9. "Is a claim from the taxpayer required?"

A9. Section 6343(d) does not explicitly answer this question. As stated above, section 6343(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

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1/ It is the policy of the Service to notify taxpayers in the event the Service intends to file notices of tax lien, even though there is no statutory requirement to do so. IRM 5355.11(2); IRM 5355.12(1); Policy Statement P-5-47 of IRM 1218. This is done to give the taxpayers one last chance to pay the unpaid tax liability before the notice is filed. Thus, as a practical matter, even though the installment agreement may indicate that a notice of tax lien has not been filed, the taxpayer would most likely be aware of the fact that a notice had been filed if that were the case.

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(d), 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.

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.

Q10. "If the time limit does apply, what action must occur within the 9 months on a refund initiated without a claim from the taxpayer, if such claim is not required?"

A10. Without a claim from the taxpayer, the Service must make a determination within the 9-month time period to return the money. If the determination is made within the 9-month period, the Service may return the money after 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.

If you have any questions as to our answers, we would look forward to discussing the matter with you. The attorney assigned to this project is Walter Ryan, and he may be reached at 622-3610.

JOYCE E. BAUCHNER

Attachment:
Memorandum dated October 2, 1996

cc: Assistant Regional Counsel (GL)
Associate Chief Counsel (Enforcement Litigation)