Internal Revenue Service

memorandum

CC:EL:GL:Br1:RMFerguson
GL-120816-97

date: FEBRUARY 17, 1998

to: Assistant Commissioner (Collection) CP:CO

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

subject: Recent Sale of [redacted]

This provides our response to your request dated November 13, 1997, for advice regarding a seizure and sale by the Internal Revenue Service (the "Service") of a [redacted]. The [redacted] has raised questions regarding whether [redacted], and as to whether a previous owner had fraudulently transferred the [redacted] to the taxpayer such that the taxpayer did not have valid title. Accordingly, the [redacted] has informed us that they may now seize the [redacted] from the successful tax sale bidder.

You question, if the [redacted] does seize the [redacted] from the tax sale purchaser, are there procedures which would allow the Service to refund to the buyer the amount paid for the [redacted] while keeping the taxpayer's account credited? You further question the Service's responsibility to the taxpayer and to the buyer in this context. Finally, you ask what would be the best action the Service could take in this scenario.

CONCLUSION

The Service would be legally prohibited from refunding the purchaser the sale proceeds. Policy Statement P-5-36 indicates, however, that in such situations the Service would return the funds. Thus, it appears that this policy statement does not reflect what is legally permissible and should be revoked.

BACKGROUND

The Service seized a reassembled [redacted] in satisfaction of the employment tax liabilities of [redacted] (the "taxpayer"). The Service sold the [redacted] by public auction on [redacted].

Prior to the sale, an employee of the [redacted] contacted our office and your office in the National Office and the field. The employee indicated that he believed that the sale was illegal because the [redacted]. [redacted] ultimately contacted the Chief Counsel on the scheduled date of the sale and told him that there was no legal barrier to the sale. Accordingly, the sale proceeded and the Service sold the [redacted] for $[redacted]. The purchaser also had to pay a $[redacted] mechanic's lien on the [redacted] and $[redacted] in auctioneer fees and other costs related to the sale. The taxpayer's account has been fully satisfied from the sale proceeds. In addition, the Service paid to the taxpayer approximately $[redacted] in excess proceeds.

The [redacted] additionally indicated, however, that he believed the initial transfer of the [redacted] may have been fraudulent and that he was going to contact the [redacted] who may choose to seize the [redacted] from the purchaser. [redacted] subsequently informed us that the [redacted] may not get involved at all because the sale was not illegal. However, the [redacted] may seize the [redacted] from the tax sale purchaser.

DISCUSSION

We find no statutory authority under the Internal Revenue Code (the "Code") which would allow us to refund the purchase price to the tax sale purchaser, should the [redacted] be seized. The Service conducted the tax sale in full compliance with I.R.C. § 6335, which provides the procedural requirements for a sale of seized property. Sales of seized property are additionally governed by Treas. Reg. § 301.6335-1(c)(5)(iii), which states in pertinent part that:

> [o]nly the right, title, and interest of the delinquent taxpayer in and to the property seized shall be offered for sale, ... All seized property shall be offered for sale "as is" and "where is" and without recourse against the United States. No guaranty or warranty, express or implied, shall be made by the internal revenue officer offering the property for sale, as to the validity of the title ... . No claim shall be considered for allowance or adjustment or for rescission of the sale based upon failure to conform to any representation, express or implied.

The doctrine underlying tax sales is caveat emptor. The Service owes no duty to a purchaser at a tax sale and expressly disclaims any duty. The Service's duty of compliance with section 6335 is owed to the taxpayer.

Accordingly, taxpayers have been able to successfully challenge tax sales where the requirements of section 6335 were not strictly followed. See, e.g., Goodwin v. United States, 935 F.2d 1061 (9th Cir. 1991). In cases such as Goodwin, where courts have held sales to be invalid due to some illegal action on the part of the Service, such as failure to comply with section 6335, proceeds have been refunded to purchasers. See, e.g., Sandri v. United States, 67-1 U.S.T.C. ¶ 9425 (D. Mass. 1967) (court ordered refund to purchaser at tax sale of common carrier certificate, as such certificate was not "property" subject to seizure under I.R.C. § 6331). However, we found no cases in which courts have awarded refunds to tax sale purchasers other than as an order inherent to a court's holding that a sale is invalid due to a failure by the Service to comply with the applicable law.

Thus, the purchaser in the present case does not have a remedy under section 6335 or any other Code provision. Section 6343 of the Code provides the Service with the authority to return levied property or the proceeds from the sale of such property to the rightful owner of the property, not a subsequent purchaser. The refund provisions of the Code would also seem to be inapplicable because the authority to make a refund is limited to "overpayments." Any "overpayment" in the present case would arguably exist only to the extent of the excess proceeds returned to the taxpayer. In addition, the purchaser would not be entitled to seek a refund under the Code because he is not the taxpayer. See I.R.C. §§ 6401, 6402, 6511(a).

As the purchaser in the present case does not have a right to a refund of the purchase proceeds under the Code, we do not see how he could be compensated by the Service, should the [redacted] be seized. The Supreme Court has held, in OPM v. Richmond, 110 S. Ct. 2465 (1990), that payments of money from the Federal Treasury are limited to those authorized by statute. Other payments are unconstitutional pursuant to the Appropriations Clause of Article 1 of the Constitution. See also Speers, et al. v. United States, 79 AFTR2d 97-3158 (Cl. Ct. 1997) (court held that neither the court nor the Service had the authority to refund interest on employment taxes where the Code was silent); Treas. Reg. § 301.7811-1(c)(3) ("In the absence of an overpayment there is ... no authority under which the ... Service may release sums which have been credited against the taxpayer's liability and deposited into the Treasury ... .") We additionally emphasize that a refund of the full purchase price in the present case would result in a depletion of the Treasury beyond the amount of the credit to the taxpayer's liability, as there were excess proceeds which were returned to the taxpayer.

Policy Statement P-5-36, Returning Money Wrongfully Collected, which was approved on April 8, 1966, provides that:

> [i]f the Service sells property, and it is subsequently determined that the taxpayer has no interest or if the purchaser is misled by the Service as to the value of the taxpayer's interest, immediate action will be taken to refund any money wrongfully collected if a claim is made and the pertinent facts are present. The mere fact that a taxpayer's interest in property turns out to be less valuable than a purchaser expected will not be regarded as giving the purchaser any claim against the Government.

The language of this policy statement is also duplicated in 26 CFR § 601.104(c)(2).

The only document we could locate related to this policy statement is a 1965 opinion written by General Litigation in a case out of the Southeast Region entitled [redacted]. The opinion contains language substantially similar to the language of the policy statement, but does not contain any analysis as to how such payment could be authorized under the Code. The file for this case has been destroyed. We have not found any case in which a court has awarded a purchaser money based upon a claim brought under either the policy statement or the procedural regulation. Cf. Martin v. United States, 97-1 U.S.T.C. ¶ 50,320 (Cl. Ct. 1996) (relief sought under procedural regulation in congressional reference case was denied); Woody v. United States, 86-1 U.S.T.C. ¶ 9196 (Cl. Ct. 1986) (relief sought under procedural regulation was denied).

We recognize that it would be consistent with Service policy, as expressed in P-5-36, to refund the sale proceeds to the purchaser in the present case if the [redacted] is ultimately confiscated by the [redacted]. However, there is no legal authority for the Service to refund the proceeds, despite the valid policy concerns, without authorization under the Code.

We have requested advice from General Legal Services regarding whether the sale proceeds may be returned to the tax sale purchaser in the present case if the [redacted] is confiscated by the [redacted], where such refund would be consistent with Service policy, despite a lack of authority under the Code. A copy of their response, dated February 2, 1998, is attached. To summarize, General Legal Services concludes

that the authority to refund money to the purchaser is dependent upon the existence of authority under the Code for such a remedy. As previously discussed, there is no such authority. 1/

Accordingly, the Service would be legally prohibited from refunding the purchase proceeds to the tax sale purchaser in this case. Therefore, the policy statement should be revoked and the procedural regulation changed. As a final note, you question the availability of other options. If it is established that the [redacted] is the rightful owner of the aircraft, the [redacted] would be entitled to bring a claim for the sale proceeds pursuant to I.R.C. § 6343(b), as discussed above. The [redacted] could also judicially recover the proceeds through suit for wrongful levy, pursuant to I.R.C. § 7426. The [redacted] could then use those proceeds to compensate the purchaser upon seizure of the [redacted]

Thank you for seeking our assistance on this matter. Please contact Robin Ferguson, who may be reached at 622-5722, if you have any questions or comments.

JOYCE E. BAUCHNER

Attachments:
1. Memorandum dated February 2, 1998
2. Memorandum dated January 30, 1998

cc: National Director, Collection Field Operations CP:CO:C
Attn: Stuart Sporn

1/ We note that we additionally requested views from the Procedural Branch of Field Service as to the effect upon the taxpayer's account if we were to conclude that we had the authority to refund the purchase price. A copy of their response, dated January 30, 1998, is attached. We additionally requested their views as to whether their office had ever taken the position that such refund was authorized by the refund provisions of the Code. Their memorandum concludes that their office has never taken the position that the refund provisions would authorize such refund. Their memorandum further concludes that there would be no authority to reduce the taxpayer's account upon such refund to the purchaser and no deficiency for the taxpayer would be created.

Internal Revenue Service

memorandum

CC:F&M:GLS-2181-97
CASE No. GLS-122914-97
EGG:ETewel

Date: FEB - 2 1998

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

From: Chief, Ethics and General Government Law Branch CC:F&M:GLS

Subject: Refund to Tax Sale Purchaser

This is in response to your request for assistance regarding IRS authority to refund the purchase price paid for property at a tax sale, should the property be seized from the purchaser by another Government agency. As discussed below, in our opinion, the authority to refund money to the purchaser is dependent upon the existence of authority under the Internal Revenue Code for such a remedy.

You have indicated that following the seizure of a reassembled [redacted] in satisfaction of employment tax liabilities of [redacted] Counsel was contacted by a [redacted] employee who suggested the tax sale of the [redacted] would be illegal. Subsequently, after the [redacted] advised that there was no legal barrier to the sale, the sale took place as scheduled. The sale proceeds were applied to the taxpayer's account, and approximately $[redacted] in excess proceeds remaining after expenses of the sale have been paid to the taxpayer. The [redacted] subsequently advised Counsel that it may seize the [redacted] from the tax sale purchaser. You have asked for our advice as to whether under these circumstances, despite the absence of a specific remedy for the purchaser under the Code, there is authority for IRS payment to the purchaser, should the property be seized by the [redacted]

You have advised us that pursuant to Treas. Reg. § 301.6335-1(c)(5)(iii), the Service owes no duty to a purchaser at a tax sale, and no guaranty or warranty is made as to the validity of title transferred from the taxpayer to the purchaser. In addition, while there is specific authority at I.R.C. § 6343 for the return of levied upon property, or the proceeds from the sale of such property, to the rightful owner of the property upon the filing of an administrative claim, and at I.R.C. § 7426 for a judicial remedy for the rightful owner, no provision is made in the Code or implementing Treasury regulations for the IRS to refund the purchase price paid by the purchaser of wrongfully levied upon property. You have further advised that Policy Statement P-5-36, duplicated in the Service's Statement of Procedural Rules at 26 C.F.R. § 601.104(c)(2), provides that the Service will take immediate action to refund any money wrongfully collected if a claim is made and it is determined that the taxpayer has no interest in the property or the purchaser has been misled by the Service as to the value of the taxpayer's interest. While P-5-36 implies Service recognition of an administrative remedy

for the purchaser of wrongfully levied upon property, your research indicates no cases in which a court has relied on this provision as authority to order a refund to a tax sale purchaser, and you are concerned as to the absence of any specific Code authority for such a remedy.[1] Accordingly, you have requested our advice as to the legal authority behind the Policy Statement and whether there is other authority for refunding the purchase price of the seized aircraft, including both the amounts previously credited to [redacted] tax account and the surplus proceeds distributed to [redacted]

Our office does not have any information concerning the issuance of Policy Statement P-5-36. We requested the historical materials retained by the Chief Counsel Library in connection with the inclusion of the Policy in the Policies Handbook, IRM 1218. The Policy, approved April 8, 1966, was added to the Handbook on November 22, 1973, along with the other Collection-generated Policies numbered P-5-29 through P-5-37. However, the Manual Transmittal contains no discussion of Policy P-5-36, and there were no materials concerning the Policy P-5-36 in the file associated with the Manual Transmittal.

As we recently advised, while we have no jurisdiction over substantive questions as to the Service's legal obligations to tax sale purchasers, the proper appropriation out of which payments to purchasers are made depends on the account in which the levy sales proceeds previously had been deposited. *See* GLS-1871-97, dated November 20, 1997 (copy attached). To the extent that such sales proceeds were previously credited as internal revenue collections, we advised that a court-ordered refund to the purchaser would be payable out of accounts comprising the permanent and indefinite refund appropriation, authorized at 31 U.S.C. § 1324 (and the taxpayer's tax-due account appropriately adjusted). Similarly, *assuming IRS authority to refund the purchase price in the absence of a court order*, payment to the purchaser would be made out of the refund appropriation, to the extent Durango's tax accounts were previously credited by the sale. You have indicated a specific concern with regard to refunding the purchaser's payment of the excess proceeds that have been paid to the taxpayer. In connection with an owner's claim under I.R.C. § 6343, when a tax sale cannot be canceled, Collection procedures provide for payment to the owner out of the Collection Operating Appropriation in order to make full restitution to the rightful owner to the extent that tax account credits are insufficient to satisfy the owner's claim. IRM 5721.2:(5).[2] Similar treatment of payment to the purchaser with regard to the excess proceeds could also be considered, if it is determined that such

[1] Collection guidance concerning P-5-36 refers to the tax refund provision, I.R.C. § 6402, as authority for payment to the purchaser. *See* IRM 56(15)6:(3). However, since the purchaser is not the taxpayer, you have advised that the Code's tax refund provisions do not provide authority for payment to the purchaser.

[2] To our knowledge, GLS advice was not obtained in connection with these procedures. Such payments are apparently routinely characterized by Collection as necessary expenses of the Collection function, not otherwise provided for.

payment is authorized.[3] We would be glad to provide further advice if needed regarding the proper appropriation to be charged.

We understand your request as also soliciting our views as to whether there is authority, apart from the Code, for an IRS refund of the sales proceeds to the purchaser, if the property is seized by the [redacted] Under 31 U.S.C. § 3702, the agencies have authority, delegated by OMB, to settle administrative claims arising out of their activities, except as otherwise provided. However, the claims settlement statute is jurisdictional, and there must be separate substantive statutory authority for agency payment of a claim under section 3702. No claim may be paid, absent waiver of sovereign immunity. Since the Code governs the terms of a tax sale and the purchaser's legal relationship with the Service, we do not believe there is a basis for a remedy against the Service apart from the Code in this situation. Your office may wish to consider whether in conjunction with the [redacted] legal authority to seize the plane, the [redacted], as rightful owner, could submit an administrative claim to the Service under I.R.C. § 6343, for funds to make payment to the purchaser. Such a determination is within the jurisdiction of your office.

If you have any questions concerning this memorandum, please contact Eva B. Tewel at (202) 401-4944.

Stuart W. Endick

STUART W. ENDICK

Attachment as stated

[3] It is our understanding that you have requested advice from IT&A concerning recovery of the excess proceeds from the taxpayer.

Internal Revenue Service

memorandum

CC:F&M:GLS-1871-97
GLS-119905-97
EGG:FInserra

date: NOV 20 1997

to: Chief, Branch No. 1 (General Litigation) CC:EL:GL:Br1

from: Chief, Ethics & General Government (General Legal Services) CC:F&M:GLS

subject: Reimbursement Appropriation for Improper Distraint Sales

This responds to your request for advice concerning what appropriation should be used to refund (with interest) the purchase price of property paid by a levy sale purchasers "where the levy sales were held to be invalid" due to improper notice under I.R.C. § 6335.[1] Assuming the levy sale amounts were deposited in a General Refund Receipt Account for Taxes [0100], the proper appropriation accounts to use for this purpose would be Refunding Internal Revenue Collections (indefinite)[20x0903] and Refunding Internal Revenue Collections, Interest (indefinite) [20x0904]. A similar issue was raised in 55 Comp. Gen. 625 (1976), which we address below.

In 55 Comp. Gen. 625 (1976), the Comptroller General examined whether a fine paid for violation of a wagering tax, which was subsequently found to be unconstitutional as applied and ordered to be refunded by a U.S. District Court, should be refunded out of the account Refund of

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[1] Since your question goes to the proper account to use, we do not reach the question of entitlement, and have assumed for purposes of providing an answer that a lawful obligation or right to pay the purchaser principal and interest exists. In this regard, we note that while the IRM identifies circumstances in which tax refunds may be paid to parties other than the taxpayer on account of error, see, e.g., 3(17)(79)3.9(Manual refunds for Erroneous Receipt of Funds from the State Income Tax Levy Program), 3(17)(79)3.(11) (Refunding Money Wrongfully Collected by Seizure and Sale), refunds to levy purchasers based on ineffective notice to the taxpayer is not specifically addressed. We express no comment on, and have no jurisdiction over the question of, whether a levy made bad by ineffective notice to the taxpayer may be presumed to necessarily void the sale or oblige the Service to refund the purchase price to the purchaser (with interest) or attempt to reclaim the property for benefit of the Service or the taxpayer. Compare P-5-36 (policy of refunding in those cases in which property is sold and it later develops the taxpayer had no interest or the purchaser incurred a loss because of being misled by the Service as to the value of the taxpayer's interest).

Moneys Erroneously Received and Covered [20 x 1807].[2/] The refund account there being considered, which is now governed by 31 U.S.C. § 1322(b)(2), was found not to apply by its terms. The general rule for that account, articulated by the Comptroller General in several decisions, is that it may only be considered for use where collections erroneously covered as miscellaneous receipts are involved and the refund is "not properly chargeable to another appropriation." "When the amount subject to refund can be traced as having been erroneously credited to an appropriation account the refund claim is chargeable to said appropriation whether it be lapsed or current, or reimbursable or nonreimbursable." 55 Comp. Gen. at 627. Although the IRS assumed that the fine amount had been deposited as miscellaneous collections, it was unclear in what exact account the fine amount had been deposited, and the Comptroller General simply regarded it as an internal revenue collection deposited pursuant to 26 U.S.C. § 7809(a)(as opposed to a miscellaneous receipts deposit made pursuant to the more general 31 U.S.C. 3302(b)) . Accordingly, it found that Refunding Internal Revenue Collections (indefinite)[20x0903], the account generally contemplating refunds of amounts initially collected as taxes, to be the proper account from which to make the refund, since the fine was treated as an internal revenue collection.

Accordingly, in the absence of any indication that the sale amount was placed in an account other than a General Fund Receipt Account for Taxes [0100] (e.g., an escrow account or in another separate account), 20x0903 would appear to be the proper account to use, with interest paid from 20x0904, the associated interest account.

Should you have any questions or concerns regarding this memorandum, please phone Frank Inserra of my office at (202) 401-4944.

/s/ Stuart W. Endick

STUART W. ENDICK

2/ The Comptroller General did not address the question of entitlement to refund in this decision because a Court had ordered the refund.

Internal Revenue Service

memorandum

CC:DOM:FS:PROC
NMGalib
GL-120816-97

1998 FEB -3 PM 2:35
GENERAL LITIGATION DIVISION

date: JAN 30 1998

to: Assistant Chief Counsel (General Litigation) CC:EL:GL
Attn: Robin Ferguson

from: Acting Senior Technician Reviewer, Procedural Branch
(Field Service) CC:DOM:FS:PROC

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subject: Recent Sale of [redacted]

This is in response to your request for our assistance on the effect on a taxpayer's account if the proceeds from a tax sale are refunded to a tax sale purchaser. You have indicated that an [redacted], purportedly owned by the taxpayer, was sold to a third party at a tax sale. Subsequently, you discovered that the [redacted] when sold to the taxpayer. As a result, the taxpayer may not have had valid title. Moreover, the [redacted] may seize the [redacted] from the tax sale purchaser. You are considering refunding the purchase price to the tax sale purchaser.

You have asked whether our office has ever taken the position that a refund to a tax sale purchaser is authorized by the refund provisions of the Code. We have never issued formal advice relating to this issue. We have also checked with several managers, and there is no recollection of having addressed this issue informally. We have no other way of checking on this information. We note, however, that the government, in *Bonnett Enterprises, Inc. v. United States*, 889 F. Supp. 208 (W.D. Pa. 1995), successfully argued that a tax sale purchaser's action for refund against the United States was not a tax refund suit within the meaning of 28 U.S.C. § 1346(a)(1). The court held that "plaintiff's suit raises a contractual claim against the United States which is not for the refund of taxes, and therefore exclusive jurisdiction exists in the Court of Federal Claims."

Extrapolating from this decision, we would make the argument that the refund to a tax sale purchaser could not be made under the authority of I.R.C. § 6402(a). If the purchaser's claim for refund were for a refund under I.R.C. § 6402(a), the purchaser

would be able to sustain an action for refund in district court under 28 U.S.C. § 1346(a)(1). If a purchaser cannot sustain such an action, the refund of the purchase price cannot be the equivalent of a tax refund.

You have also asked for our views on whether, if the Service refunded the purchase price to the purchaser, the taxpayer's account would remain credited or whether there would be a deficiency in the taxpayer's account. We have found no authority for reducing the taxpayer's account by the amount refunded to the purchaser, and a deficiency in the taxpayer's account would not arise when the amount is refunded.

A deficiency is defined as the excess of the correct tax over:

> (1) the sum of
>
> > (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
> >
> > (B) the amounts previously assessed (or collected without assessment) as a deficiency, over--
>
> (2) the amount of rebates, as defined in subsection (b)(2), made.

I.R.C. § 6212(a). A "rebate" is defined as "so much of an abatement, credit, refund, or other payment, as was made on the ground that the tax imposed . . . was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made." I.R.C. § 6212(b)(2). The amounts previously collected (I.R.C. § 6212(a)(1)(B)) are not reduced even if money is refunded to the purchaser. As noted above, there is no mechanism for changing the taxpayer's account to reflect amounts refunded to the purchaser. Therefore, we cannot take any action with regard to the purchaser that would create a deficiency for the taxpayer.

As an alternative possibility, however, we have briefly considered a matter that is within your jurisdiction. We think that the money may be collected from the taxpayer through a suit for erroneous refund brought within two years of the date of the tax sale. Because the [redacted], the taxpayer did not have an interest in the [redacted] and, therefore, the taxpayer cannot reap the benefits of the proceeds of the sale.

Please contact Nancy M. Galib at 622-7950 if you have any questions.

Susan F. Poe

SUSAN F. POE
Acting Senior Technician Reviewer
Procedural Branch
(Field Service)