

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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CC:PA:03:DKohn

date: October 9, 2009

to: Judith M. Wall
Special Counsel (National Taxpayer Advocate)

from: Mitchel S. Hyman
Senior Technician Reviewer, Branch 3 (Procedure and Administration)

subject: Withdrawal of NFTL After Release

This memorandum responds to your request for our views as to whether a notice of federal tax lien (NFTL) can be withdrawn pursuant to I.R.C. § 6323(j) after the lien has been released pursuant to I.R.C. § 6325(a). This issue arises where the taxpayer fully pays a tax liability after a NFTL is filed. The IRS files a certificate of release of the lien, but the taxpayer then requests that the IRS also file a withdrawal of the NFTL, because a withdrawal will eliminate the adverse impact of the NFTL on the taxpayer's credit history. For the reasons explained below, we conclude that the IRS is not legally prohibited from filing a withdrawal.

ISSUE

Can the IRS withdraw a NFTL, pursuant to section 6323(j), after the tax is fully paid and the lien has been released pursuant to section 6325(a)?

CONCLUSION

The IRS is not legally prohibited from withdrawing a NFTL in this situation. However, whether or not to file post-release withdrawals is a matter of policy and within the IRS's discretion.

DISCUSSION

I.R.C. § 6321 provides that if any person liable for a tax fails to pay the tax after notice and demand, the amount of unpaid tax shall be a lien in favor of the United States upon all property and rights to property belonging to such person. The lien arises at the time the tax liability is assessed and remains on the taxpayer's property until the liability either has been fully paid or is legally unenforceable (typically, due to the expiration of the statute of limitations on collection). I.R.C. § 6322.

The lien that arises upon notice and demand is referred to as the “assessment lien” because it arises upon assessment, notice, and demand, without the need for filing any documents in any public records. It is also referred to as the “secret lien” because there is no public record of the lien. While the assessment lien gives the IRS an interest in the taxpayer’s property that it can enforce through administrative or judicial actions, other creditors such as purchasers and holders of security interests may obtain priority over the IRS unless a NFTL is properly recorded. I.R.C. § 6323(a). The requirements the NFTL must satisfy to afford the IRS priority are set forth in I.R.C. § 6323(f).

The IRS must release the lien, by issuing a certificate of release, not later than 30 days after the underlying liability either has been fully satisfied through full payment of the tax, or is legally unenforceable. I.R.C. § 6325(a)(1). The IRS must also release the lien if the NFTL was erroneously filed. I.R.C. § 6326(b). The NFTL is erroneously filed if the tax was fully paid before the NFTL was filed, or if the tax was assessed in violation of either the deficiency procedures in I.R.C. § 6213 or the automatic stay of the Bankruptcy Code. Treas. Reg. § 301.6326-1(b). Once the certificate of release is issued and is filed in the same office as the NFTL to which it relates, it is conclusive that the tax lien has been extinguished. I.R.C. § 6325(f).

Section 6323(j), which was added to the Code as part of the Taxpayer Bill of Rights 2 in 1996, states that under certain specific circumstances the IRS may withdraw a NFTL and that the provisions of the Internal Revenue Code “shall be applied as if the withdrawn notice had not been filed.” The circumstances are: (A) the filing of the NFTL was premature or otherwise not in accordance with the IRS’s administrative procedures; (B) the taxpayer has entered into an installment agreement pursuant to I.R.C. § 6159 to satisfy the liability for which the lien was imposed; (C) the withdrawal will facilitate the collection of the tax liability; or (D) with the consent of the taxpayer or the National Taxpayer Advocate, the withdrawal of the NFTL would be in the best interests of the taxpayer and the United States. I.R.C. § 6323(j)(1). As reflected by the statutory language “as if the withdrawn notice had not been filed,” the withdrawal results in a loss of the IRS’s priority under section 6323 relative to other creditors. However, it does not affect the underlying tax lien. Treas. Reg. § 301.6323(j)-1(a). Under section 6322, the assessment lien remains in existence until the tax is paid in full or the liability is no longer enforceable, and the IRS may, in its discretion, refile the NFTL where appropriate.

Our understanding is that before enactment of section 6323(j) in 1996, the IRS did not issue withdrawals of NFTLs. The legislative history of section 6323(j), as reflected in the report of the House of Representatives submitted with the bill that contained the version of section 6323(j) that was enacted, reflects Congress’ understanding that the IRS did not have any general authority to withdraw a NFTL prior to the enactment of section 6323(j). Specifically, the report states that a notice of federal tax lien can only be withdrawn¹ if the notice was erroneously filed or if the underlying lien had been paid

¹ While the House Report uses the term “withdraw” in this context, it is obviously referring to “release” under section 6325.

or become unenforceable. It then adds that “[t]he Committee believes that it is appropriate to give the IRS discretion to withdraw a notice of lien in other situations as well.” In the Explanation of Provision section, the report states that “[t]he bill allows the IRS to withdraw a public notice of tax lien prior to payment in full by the indebted taxpayer without prejudice, if the Secretary determines that” one of the four listed criteria is met. H.R. Rep. No. 104-506 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1155-1156.

The present issue arises because of the favorable treatment that credit reporting agencies give to a withdrawal of a NFTL versus a release. When credit reporting agencies receive a notice of the withdrawal of a NFTL, they delete any references to the tax lien in the taxpayer’s credit history.² In contrast, when the credit reporting agencies receive a release of a lien, while they note the filing of the release in the taxpayer’s credit history, the filing of the release does not operate to remove the references to the tax lien from the taxpayer’s credit history. In fact, typically a released NFTL remains noted in the taxpayer’s credit history for seven years from the date of the release.³ The seven-year period arises from the Fair Credit Reporting Act, which provides that tax liens can remain on a credit report no more than seven years after payment. See 15 U.S.C. § 1681c(a)(3). Thus, even though a taxpayer has fully paid the tax and a certificate of release has been filed, the fact that the NFTL was filed in the first place can adversely affect the taxpayer’s credit history for years after the tax is paid. In contrast, if the IRS files a withdrawal of the NFTL, from a credit rating standpoint it is as if the NFTL was never filed.

Your office has informed us that in the past the IRS was receptive to taxpayer requests for withdrawal of NFTLs after releases to assist in improving taxpayers’ credit ratings. However, several years ago this practice stopped based on our office’s prior legal conclusion that NFTLs could not be withdrawn after the underlying liens were released. This position is reflected in the Internal Revenue Manual (IRM), which states that a

² In September 2009 we participated in conference calls with senior representatives of the three major credit reporting agencies. All the representatives confirmed that when a NFTL is withdrawn, the original reference in the credit history to the federal tax lien is removed “as if it didn’t happen.” One representative stated that the reason the withdrawal is treated differently from the release is that a withdrawal indicates that the lien was “filed in error,” and is essentially the IRS’s statement that a lien did not exist, whereas a release reflects only that a lien has been satisfied.

³ A representative of one of the credit reporting agencies informed us that the agency retains references to any unpaid tax liens for 10 years. A representative of another credit reporting agency informed us that that agency plans to soon change its business practice of removing references to released liens from credit histories seven years from the date of release, to seven years from the date of filing of the NFTL. He said he expects this practice to take effect within 60 days.

request for withdrawal of a NFTL will be rejected when the lien already has been released. IRM 5.12.3.37. The reason provided in the IRM is that “issuing the certificate of withdrawal after the certificate of release may cause confusion for the person receiving the documents because the withdrawal certificate states that the underlying lien remains in effect while the lien release states it has been released.” IRM 5.12.3.37(3).⁴ The current version of IRM 5.12.3.37 has existed since September of 2006. Immediately prior to that time, the IRM set forth the same reasoning for not issuing a certificate of withdrawal after the lien has been released. See IRM 5.12.3.35 (2005). The 2004 version of the IRM similarly states, “If a release has been issued there is no NFTL to withdraw.” IRM 5.12.3.26.1(3)(2004). Prior to 2004, there was no mention in the IRM of withdrawals after releases.

We have reevaluated our legal position and now conclude that as a legal matter, the IRS can file a certificate of withdrawal after a lien release. An important goal of section 6323(j) is to improve the taxpayer’s credit history in situations where collection is not at risk, in order to assist the taxpayer in ultimately paying off his tax liability. For example, the withdrawal is negotiated as part of an installment agreement, or to enable the taxpayer to obtain a loan to continue operating a business. Thus, the normal rule is that the tax debt, and the underlying assessment lien, remain in existence despite the withdrawal. However, this does not mean that a NFTL cannot be withdrawn where the assessment lien has been extinguished by a release. Since withdrawal under section 6323(j) only withdraws the NFTL without affecting the lien, there is no logical reason why a NFTL cannot be withdrawn after a release. As the IRM notes, withdrawal following release may result in confusion, but this confusion in itself does not constitute a reason for deeming withdrawals following release legally prohibited. Moreover, the source of the confusion is that the withdrawal form that states that the underlying lien continues to exist. This can be remedied by either manually crossing out the language referring to the underlying lien, or by creating a new withdrawal form for post-release withdrawals.

We also conclude, consistent with the legislative history, that the IRS does not have any general authority to withdraw a NFTL but instead withdrawal must be authorized by one of the specific provisions of section 6323(j). Our understanding is that taxpayers seek post-release withdrawals in order to improve their credit. This reason alone would not support a withdrawal under the first three subelements of section 6323(j)(1). Assuming the NFTL was properly filed at the outset, there is no ground for withdrawal under

⁴ A copy of the form the IRS uses in withdrawing a NFTL, Form 10916(c), is attached to this memorandum. The form states: “The withdrawal of this [NFTL] does not affect the statutory lien provided by IRC section 6321; it simply relinquishes any lien priority obtained by the Internal Revenue Service when the notice was filed.”

subsection (A).⁵ Subsection (B) is not applicable since the tax is paid and so there will be no installment agreement. Since the tax is already collected, the withdrawal will not facilitate collection within the meaning of subsection (C).

We conclude that withdrawal would be authorized by subsection (D), assuming that withdrawal is in the best interests of both the taxpayer and the United States. Based on the credit reporting agencies' practice of deleting the references to the NFTL from the taxpayer's records after a withdrawal, withdrawal would obviously be in the best interests of the taxpayer. The more difficult question is whether withdrawal would be in the best interests of the United States when the tax lien has been released. While withdrawal will not necessarily enhance the United States' interests, since the tax at issue is paid, it will not adversely impact the United States' interests. In the absence of a definition of "best interests" in the Code or regulations, we believe that this term can be broadly defined so as to permit withdrawal where the NFTL has been released but the taxpayer nonetheless needs the NFTL withdrawn to improve his credit. In the general sense, withdrawal can be said to be in the United States' best interests insofar as the improvement in the taxpayer's credit history assists him with future tax compliance.

Whether or not to file a withdrawal under section 6323(j)(1)(D) is within the IRS's discretion. In making this decision, several realities must be considered. 




⁵ We note that the IRS can assist some taxpayers without withdrawing NFTLs when the NFTL is discovered to have been erroneously or improvidently filed, even if the discovery occurs after the lien has been released. The IRM provides that if it is determined that an already released NFTL was filed erroneously, improvidently, or inadvertently and would have been withdrawn under I.R.C. § 6323(j)(1)(A) if the lien had not already been released, the IRS will provide the taxpayer with Letter 544, "Letter of Apology – Improvident/Erroneous Filing of Notice of Federal Tax Lien." IRM 5.12.3.37(2). According to representatives of two of the credit reporting agencies, a Letter 544 is tantamount to the withdrawal of the NFTL, in that it results in the removal of any reference to the lien in the taxpayer's credit report.



In conclusion, the IRS may file a withdrawal of a NFTL after the release of the underlying lien, but whether to do so as a general matter, and in specific cases, is a matter of policy and within the discretion of the IRS. We are also providing this memorandum to Collection Policy.

Please direct any questions on this matter to Debbie Kohn in Branch 3 (Procedure and Administration) at 202-622-3600.

cc: Frederick W. Schindler, Director, Collection Policy (Small Business/Self Employed)
attn: Jonathan F. Munroe, Program Analyst

Attachment:

Form 10916(c), Withdrawal of Filed Notice of Federal Tax Lien.