



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL, PENNSYLVANIA
DISTRICT , PHILADELPHIA

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation)

SUBJECT:

LEGEND:

Taxpayer X
Amount \$Y

This is in response to your memorandum of May 12, 1999, regarding the above subject. The questions you have raised concern the application of I.R.C. § 6324(b).

ISSUES:

1. Whether the Internal Revenue Service (Service) has the legal authority to issue a certificate of lien release under section 6325(a).
2. Whether the Service has the legal authority to issue a certificate of nonattachment with respect to a lien pursuant to section 6325(e).
3. Whether the Service has the legal authority to issue a certificate of lien release under section 6326(b).

CONCLUSION:

The donee, X is not entitled to a release of lien pursuant to sections 6325(a) and 6326(b) since the tax liability remains unsatisfied. Also, she is not entitled to have the Service issue a certificate of nonattachment of lien pursuant to section 6325(e).

FACTS:

The facts reflect that ten days prior to her death on August 24, 1986, the decedent, _____, executed a deed which conveyed certain real property in _____ to her daughter _____ and to her two other children. The deed was given to a partnership in which all three children had an interest. Subsequent to _____ death, the property was mortgaged to a local bank and improvements were made to the property. On June 27, 1996, the Service made a jeopardy assessment for gift taxes against the estate of _____ in the approximate amount of \$Y. The Service also made a jeopardy assessment for unpaid estate taxes but that assessment is not relevant here. Neither the decedent nor her personal representative ever filed a gift tax return. On June 27, 1996, the Service mailed to the estate and to X (as donee) a recommendation for jeopardy/termination assessment (Form 2644) and accompanying billing assembly, including a notice of tax due and a demand for payment. Following this, the Service levied upon Ms. X's wages. However, Ms. X subsequently entered into an agreement with the Service which provided that it would cease levying upon her wages if she would extend the 10-year automatic gift tax lien under section 6324(b) for an additional five years.^{1/}

The estate's liability for gift taxes is in litigation in the United States Tax Court, Docket No. _____. The estate's liability for estate taxes is also docketed for litigation in that same court, Docket No. _____.

The government brought suit in federal district court to reduce to judgment, the liability of the donees pursuant to section 6324(b) and to foreclose the tax liens against the subject property.^{2/} Default judgments were entered against the children on January 29, 1999, and an abstract of that judgment was recorded on March 23, 1999, against X in _____. Ms. X currently lives in _____.

^{1/} Note that although there does not appear to be case law for the proposition that the 10-year gift tax lien cannot be extended, cases such as United States v. Cleavenger, 517 F.2d 230 (7th Cir. 1975) and United States v. Potemken, 841 F2d 97 (4th Cir. 1988) hold that the ten-year period provided by section 6324(a) for estate tax liens, is a period of absolute duration and not a period of limitation. However, some courts have held that this time period is limitational and, thus, the ten-year period can be extended. See, United States v. Saleh, 514 F.Supp. 8 (D.N.J. 1980). The statutes providing for the estate tax lien, section 6324(a) and the gift tax lien, section 6324(b) are similar.

^{2/} The government did not finalize the foreclosure claim of the complaint.

The Notice of Federal Tax Lien based upon the jeopardy assessments was filed in on July 29, 1996. At the time this Notice was filed, Ms. X resided in

LAW AND ANALYSIS:

We have reviewed your memorandum of May 12, 1999, and are in agreement with all the conclusions reached therein. Essentially, all the above issues relate to the same basic question, i.e., whether a donee against whom no assessment was made for gift tax liability but to whom notice and demand were sent, is subject not only to the section 6324(b) gift tax lien but also, to the section 6321 general tax lien when an assessment has been made against the donor.

The general tax lien under section 6321 arises upon assessment of the tax and attaches to all property and rights to property of the taxpayer against whom the tax was assessed. In order to insure the Service's lien priority over certain classes of creditors specified in section 6323(a) such as judgment lien creditors, purchasers, holders of security interests and mechanics lienors, it is necessary for the Service to file a Notice of Federal Tax Lien in accordance with section 6323(f). However, the gift tax lien provided by section 6324(b) arises automatically at the time of the gift and extends only to the property received by the donee without the necessity of an assessment against him or her. This "secret" lien is one of ten year duration and is not filed.

In the present case, it appears clear that the automatic ten year gift tax lien under section 6324(b) attached to the property of the donee when the donor failed to pay the gift tax. Section 6324(b) reads as follows:

Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest shall be divested of the lien imposed by this subsection and such lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest.

Treas. Reg. § 301.6324-1(d) states the following:

(d) **Application of the lien imposed by section 6321.** The general lien under section 6321 and the special lien under subsection (a) or (b) of section 6324 for the estate or gift tax are not exclusive of each other, but are cumulative. Each lien will arise when the conditions precedent to the creation of such lien are met and will continue in accordance with the provisions applicable to the particular lien. Thus, the special lien may exist without the general lien being in force, or the general lien may exist without the special lien being in force, or the general lien and the special lien may exist simultaneously, depending on the facts and pertinent statutory provisions applicable to the respective liens.

As stated earlier, the general tax lien is imposed by section 6321. That Code section provides that “If **any person liable to pay any tax** neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon **all** property and rights to property, whether real or personal, belonging to such person.” (Emphasis added). The lien arises automatically and relates back to the date of assessment. I.R.C. § 6322. There does not appear to be a requirement in section 6321 or elsewhere that the person liable to pay the tax be the same person against whom the assessment was made.

The demand referenced in section 6321 is the demand the Service is required to make of the taxpayer pursuant to section 6303. That section requires the Service, “as soon as practicable, and within 60 days, after the making of the assessment of a tax pursuant to section 6203, to **give notice to each person liable for the unpaid tax**, stating the amount and demanding payment thereof.” (Emphasis added). Pursuant to the language of section 6321, an argument could be made that Ms. X as donee, would qualify as “any person liable to pay any tax” and, thus, would be subject to the section 6321 general tax lien. However, based upon the decision of the Tax Court in Ripley v. Commissioner, 102 T.C. 654 (1994), we do not believe that Ms. X is subject to the general tax lien. In that case, the court held that it wasn’t necessary for the Service to make a transferee assessment pursuant to section 6901(a) or otherwise assess the petitioner to establish the general tax lien prior to taking steps (including levy and seizure) to enforce the special tax lien under section 6324(b). Thus, we are of the view that in order to establish the section 6321 general tax lien, the Service must first make an assessment.

We note that the obligation imposed upon a transferee by sections 6324(a)(2) and 6901(a), although not considered a tax liability, is an independent personal obligation which may be collected in a manner similar to that used in collecting tax liabilities. Baptiste v. Commissioner, 29 F.3d 1533 (11th Cir. 1994). Although that

case involved the collection of estate rather than gift tax liabilities, the rationale set forth therein would probably apply to the collection of gift tax liabilities under section 6324(b) since the language of sections 6324(a)(2) and 6324(b) similarly impose personal liability upon the party receiving the property, whether he or she be called a “transferee” or a “donee.” See also, United States v. Russell, 461 F.2d 605 (10th Cir. 1972) and Phillips v. Commissioner, 283 U.S. 589 (1931).

Based upon the rationale of the above-cited court decisions as well as the language contained in section 6324(b), there should exist little doubt that X, the donee here, is personally liable for the unpaid gift tax and that her property, for the ten-year period following the date of the gift from the decedent, was automatically subject to the lien provided by that Code section. It is also clear that while her liability as a donee is considered a personal liability rather than a tax liability, the Service may use its levy and seizure procedures to enforce the tax lien provided by section 6324(b). Ripley, *supra*; See also Fillman v. United States, 90-2 U.S.T.C. ¶ 60,041 (USDC ED Ark., 1990). However, although we are of the view that the levy and seizure procedures applicable to the section 6324(b) lien would normally not apply to the section 6321 general tax lien in that the section 6324(b) lien covers only the property the donor transferred to the donee while the general tax lien covers all a taxpayer’s property, an exception would apply in the present case since the property received by the donee here, was mortgaged subsequent to her having received that property. Section 6324(b) provides that when property of a donee is transferred to a holder of a security interest, the gift tax lien is divested of the property and “such lien, to the extent of the value of such gift, shall attach to all the property . . . of the donee . . .” In other words, the bank that now holds the mortgage on Ms. X’s property, holds it free and clear of the gift tax lien but that lien has been transferred to all her other property. Thus, we believe that it would not be unreasonable for the Service to advocate the position that all her property is subject to the gift tax lien by virtue of the statutory language contained in section 6324(b) to the extent of the value of the property that was gifted to her.

As stated earlier, in the present case the statute of limitations for the ten year automatic gift tax lien was extended and will not expire until August 24, 2001. A notice of transferee liability was not issued to the donee since the government decided to reduce the donee’s personal liability to judgment. However, following the jeopardy assessment, a Notice of Federal Tax Lien was properly filed in _____, against the estate. We believe that this Notice of Federal Tax Lien correctly identifies Ms. X as a donee who is liable for the gift tax. Although no transferee gift tax assessment has been made against her which would give rise to the section 6321 general tax lien, all of Ms. X’s property, as just stated, including after-acquired property, is, nevertheless, now subject to the gift tax lien as a result of her having transferred the gifted property to a holder of a security interest.

A search of the public records will now reveal a Notice of Federal Tax Lien that shows Ms. X's name as donee which would be an indication that her property is subject to the section 6324(b) lien. We do not believe that this could result in confusion and possibly injury to Ms. X as required by section 6325(e), to justify the issuance of a certificate of nonattachment.

Section 6325(e) reads as follows:

If the Secretary determines that, because of confusion of names or otherwise, any person (other than the person against whom the tax was assessed) is or may be injured by the appearance that a notice of lien filed under section 6323 refers to such person, the Secretary may issue a certificate that the lien does not attach to the property of such person.

In conclusion, the section 6321 general tax lien against the donor should not be released pursuant to sections 6325(a) and 6326(b) of the Code since the gift tax liability still remains unsatisfied. X, the donee, is not entitled to be granted a certificate of nonattachment of that lien pursuant to section 6325(e), to clarify that the Notice of Federal Tax Lien filed on July 29, 1996, in _____, _____, does not apply to her property, since that Notice, (Form 668(Y) does in fact cover all her property.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

NONE

If you have any further questions, please do not hesitate to call us on 202-622-3610.