

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

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subject: Administrative sale of Firearms Inventory

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

May the Internal Revenue Service ("Service") administratively seize and sell a firearms inventory?

CONCLUSIONS

As a legal matter, we conclude that the Service may administratively seize and sell a firearms inventory. If the Service exercises its discretion to seize and sell a firearms inventory, we recommend that the Service coordinate the sale with the Bureau of Alcohol, Tobacco, and Firearms Division of the Department of Justice ("ATF") so that the applicable statutes and regulations are complied with.

FACTS

In your hypothetical, a gun shop owner has a federal license authorizing the sale of firearms. A federal tax lien has attached to the firearms inventory that has a fair market value in excess of \$10,000. All of the prerequisites in the Internal Revenue Code for a levy on the firearms inventory have been met.

## DISCUSSION

Before addressing the legal issue relating to an administrative sale of a firearms inventory, it would be helpful to consider some of the federal law restrictions on the sale of firearms.

The Gun Control Act of 1968, contained in chapter 44 of Title 18, imposes restrictions on the sale of firearms. A major restriction is section 922(a)(1)(A), which makes it unlawful for any person, except a licensed dealer, to engage in the business of selling firearms at wholesale or retail. Section 921(a)(1) defines a “person” as any individual, corporation, company, association, firm, partnership, society, or joint stock company. 1/ Additionally, section 922(d) makes it illegal even for the licensed dealers to sell firearms to certain individuals. 2/ For example, it would be illegal to sell a firearm to anyone who is a fugitive from justice. 18 U.S.C. § 922(d)(2).

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1/ This section provides, in relevant part, that “[i]t shall be unlawful for any person except a licensed ... dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.”

2/ This section provides, “[i]t shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

- (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) is a fugitive from justice;
- (3) is an unlawful user of or addicted to any controlled substance;
- (4) has been adjudicated as a mental defective or has been committed to any mental institution;
- (5) who, being an alien--
  - (A) is illegally or unlawfully in the United States; or
  - (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa ...;
- (6) who has been discharged from the Armed Forces under dishonorable conditions;
- (7) who, having been a citizen of the United States, has renounced his citizenship;
- (8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--
  - (A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

ATF provides guidance on chapter 44 by both regulations, 27 CFR 478 et. seq., and an Internet web site containing frequently asked questions and answers (“FAQ”). See <http://www.atf.gov/firearms/faq/faq2.htm> (last revised Dec. 27, 2002). In section 478.56(a), the regulation explains that certain persons other than the licensed dealer may continue the dealer’s firearms business. These include a “receiver or trustee in bankruptcy, or an assignee for benefit of creditors.” At the FAQ, question “K1” addresses the actual sale of firearms: “Does an auctioneer who is involved in firearms sales need a dealer’s license?” The answer is that generally speaking, there are two types of auctions: estate-type auctions and consignment auctions. Estate-type auctions would not need a dealer’s license, but consignment-type auctions would require a dealer’s license. Consignment auctions fall more into the category of engaging in a business than estate auctions.

The initial question is whether the Service has the authority to levy on a firearms inventory. The federal tax lien attaches to all of a taxpayer’s property and rights to property. I.R.C. § 6321. To enforce the federal tax lien, the Service may either levy on a taxpayer’s property and rights to property or file suit to foreclose the federal tax lien. United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). I.R.C. § 6334, containing the exclusive list of property exempt from levy, does not shield a firearm inventory from a levy. At most, section 6334(a)(2) exempts from levy firearms for personal use that, in addition with other enumerated items of personal property, do not exceed \$6,250.00 in value. Section 6334(a)(2) does not apply to our situation because firearms held in inventory for sale to the general public are not held for personal use by the owner-taxpayer. Thus, the Service may levy on a firearms inventory.

The next question is whether chapter 44 restricts the Service’s administrative sale of a firearms inventory. Chapter 44 would not appear to apply because it imposes restrictions only on a “person,” which is defined as including any individual, corporation, company, association, firm, partnership, society, or joint stock company. 18 U.S.C. § 921(a)(1). This definition does not include any reference to a government agency. Generally, the definition of a “person” does not include the government, and statutes employing the term “person” will ordinarily not be construed to include a government agency. United States v. Mine Workers, 330 U.S. 258, 275 (1947). When Congress has intended that the term “person” include a government agency, Congress has explicitly listed “government” in the definition of a person. See 49 U.S.C. § 40102 (a)(37) (definition of a “person” explicitly includes a governmental authority). Because

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(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

section 921(a)(1) does not include a government agency in the definition, it appears that chapter 44 does not apply to the Service. <sup>3/</sup>

Regardless of whether Chapter 44 technically applies to the Service, Chapter 44 reflects a Congressional policy that the Service should follow if it decides to administratively sell a firearms inventory. We assume that it would not be unduly burdensome for the Service to comply with the restrictions in chapter 44. As previously mentioned, a primary requirement is that business sales of firearms be conducted by licensed persons, i.e., licensed dealers. <sup>4/</sup> Admittedly, the Service is not a licensed dealer for the sale of firearms. The Service, however, may be able to liquidate the inventory under a right of succession analysis. Specifically, 27 CFR § 478.56(a)(2), an ATF regulation, provides for the sale of firearm inventories by non-dealers who acquire the right to sell by a right of succession. <sup>5/</sup> Pertinent to our collection concerns, successors may include a receiver, a trustee in bankruptcy, or an assignee for the benefit of creditors. In these listed situations, the person continuing the business, which in many situations would be a liquidation of the inventory, would present the license to ATF for endorsement to the new seller. 27 CFR § 478.56(b).

We believe that the Service's administrative sale of a firearms inventory is similar to sales by a receiver, bankruptcy trustee or assignee for the benefit of creditors. In all of these situations, the taxpayer loses possession of his property, and the firearms inventory is liquidated to satisfy a debt. Thus, the Service should also be able to claim the benefits of a successor, even though the Service is not listed as a successor in the regulation.

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<sup>3/</sup> The Service also does not meet the definition of being "engaged in the business," as the definition requires that a person be conducting the sale of firearms for a profit. 18 U.S.C. § 921(a)(21)(D). The Service is not a profit making enterprise.

<sup>4/</sup> Section 921(a)(11) defines a dealer, in part, as "any person engaged in the business of selling firearms at wholesale or retail."

<sup>5/</sup> Section 478.56 explains the right of succession as follows:

(a) Certain persons other than the licensee may secure the right to carry on the same firearms or ammunition business at the same address shown on, and for the remainder of the term of, a current license. Such persons are:

(1) The surviving spouse or child, or executor, administrator, or other legal representative of a deceased licensee; and

(2) A receiver or trustee in bankruptcy, or an assignee for benefit of creditors.

(b) In order to secure the right provided by this section, the person or persons continuing the business shall furnish the license for that business for endorsement of such succession to the Chief, National Licensing Center within 30 days from the date on which the successor begins to carry on the business.

(Emphasis added.)

To be prudent, however, if the Service anticipates seizing a firearms inventory, the Service should contact ATF as soon as possible and advise ATF that it intends to seize the taxpayer-owner's license and present it to ATF for endorsement. ATF concerns are better addressed prior to the levy, rather than after a levy.

We recommend that ATF should be advised of the following points. First, the Service does not intend to sell the license; rather, the Service's intends to sell the firearms inventory. Second, as the FAQ suggests for certain sales, the Service would hire a licensed auctioneer-dealer to sell the firearms inventory. Such dealers can ensure that the many firearm sale requirements are met. Finally, the Service should advise ATF that it intends to auction the firearms inventory in a bulk sale to only licensed dealers, which should reduce ATF concerns that the sale would lead to firearms being transferred to a prohibited class of individuals.

You have raised a question as to whether section 922(d) restrictions on the sale of firearms (excluding certain individuals from purchasing firearms) conflicts with I.R.C. § 6335(e)(2)(A) requirements that the Service conduct a public sale. In other words, has the Service conducted a public sale if it sells levied upon property to only qualified bidders. We conclude that such sales do not violate the public sale requirement.

In our opinion, when Congress used the terms "auction" and "sale" in section 6335(e)(2)(A), Congress intended that the Service follow the established rules for sales. One of the well established rules is that an illegal sale is void. 17A Am. Jur. 2d Contracts § 224 (2004). Depending on the type of sale, a sale to certain members of the public would be an illegal act. To avoid illegal acts, Congress knew that the Service would have to screen purchasers and sell the property only to qualified purchasers. For example, Congress never intended that the Service sell cases of cigarettes to minors, because such illegal sales would be void. Accordingly, selling a firearms inventory to only a qualified bidder does not conflict with the public sale requirement in § 6335(e)(2)(A).

We finally note that whether the Service should seek an administrative sale of a firearms inventory is ultimately a policy decision for the Service. <sup>6/</sup> The Service could

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<sup>6/</sup> The Service's current policy is not entirely clear. IRM 5.10.2.7(1) provides that a firearms inventory of substantial value may be seized. IRM 5.10.2.7(5), however, provides that the Government should file suit to foreclose the federal tax lien on such property. The manual, thus, suggests that the levy can be used to hold the firearms inventory until a judgment is recovered in a federal tax lien foreclosure suit. A levy, however, cannot be used as a form of prejudgment attachment. Section 6335(e)(1)(D) mandates that levied upon property must be released to the owner if it is not sold. The Government would have to follow section 6335(e)(1)(D) even if the Government plans to foreclose the federal tax lien. See United States v. National Bank of Commerce, 472 U.S. 713,720 (1985) (explaining that a levy and a lien foreclosure suit are separate collection tools). We are currently assisting the Service in clarifying the Service's policy and are currently revising this IRM provision.

place restrictions on such administrative sales, or forego such sales and, instead, seek to foreclose the federal tax lien with a judicial sale of the property. If the Service decides to seek an administrative sale, we recommend that the Service work closely with ATF to ensure that the applicable requirements are met. As a practical matter, ATF may be of great assistance in an administrative sale. For example, ATF may be able to provide the Service with a list of auctioneers who are licensed dealers.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call \_\_\_\_\_ if you have any further questions.

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