

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

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to: Associate Area Counsel (Jacksonville, FL)

from: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy, & Summons)

subject: Redacting Social Security Numbers from a Notice of Federal Tax Lien

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

ISSUE

Whether the State of Florida, through the office of the clerk of the circuit court, may redact the Social Security number from a Notice of Federal Tax Lien (“NFLT”)?

CONCLUSION

The Social Security number may not be redacted from a NFLT, as the doctrine of federal preemption bars the state from altering the content of a NFLT.

FACTS

The Service uses Form 668 as the NFLT, which contains an individual's Social Security number.

LAW AND ANALYSIS

On June 24, 2005, the Office of the Attorney General for the State of Florida issued an Opinion addressing the responsibilities of a clerk of the circuit court to redact Social Security numbers from any document filed in the public record, including a NFLT. Fla. AGO 2005-37, 2005 WL 1502082 (Fla. A.G.). The Opinion was based on relatively recent Florida statutory provisions intended to reduce the amount of identity theft. See

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Fl. Stat. § 119.07, et. seq. Florida law provides that on or after January 1, 2006, the Social Security numbers contained in public documents must be kept confidential and exempt from disclosure. In summary, the Opinion at page 4 concluded "that the clerk, when presented with a document that is required by law to contain a Social Security number for recording in the Official Records, must record such document upon payment of the service charges prescribed by law. However, the Social Security numbers contained in the recorded documents are confidential and the clerk is responsible for preventing the release of such information to the public." The manner for redacting Social Security numbers from copies of the original record is left to the discretion of the clerk. The Opinion ended with the conclusion that Social Security numbers contained in NFTLs must be redacted from copies that are made available to the public.

I.R.C. § 6323(f)(3) states, "The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien." (Emphasis added.) Regulations provide that the IRS must file tax-lien notices using "Form 668," which must "identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose." 26 C.F.R. § 301.6323(f)-1(d)(2).

The Supremacy Clause of Article VI of the United States Constitution provides, in part, that federal laws shall be the supreme law of the land. Supreme Court cases have established that state law is preempted under the Supremacy Clause in three circumstances. First, Congress can define explicitly the extent to which its enactments preempt state law. See Spietsma v. Mercury Marine, 537 U.S. 51, 62-3 (2002). Second, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Finally, state law is preempted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements, see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. See United States v. Union Central Life Insurance Co., 368 U.S. 291 (1961) (I.R.C. § 6323(f) preempted state law requiring that NFTL contain a description of the taxpayer's property). See generally Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941)(if preemption exists, state law cannot even complement federal law).

In the present situation, under the first prong of analysis, federal law explicitly preempts state law. As noted above, section 6323(f)(3) provides that the "content" of the NFTL shall be determined by Secretary of the Treasury, "notwithstanding any other provision of law regarding the form or content of a notice of lien." By approving the redaction of a Social Security number from a NFTL, the State of Florida is altering the "content" of

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the NFLT that is available for public inspection. Because sections 6323(f) prohibits any other law, including state law, from determining the “content” of the NFLT, the Opinion erred in concluding that the clerk is required to redact a taxpayer’s social security number from a NFLT.

Additionally, the State of Florida fails the second prong of preemption analysis, because Congress intended that the federal government exclusively occupy the field. Specifically, in the Revenue Act of 1928, Congress amended the predecessor to I.R.C. § 6323(f), to provide, in part, that a tax lien would not be valid until it was filed “in accordance with the law of the State or Territory in which the property subject to the lien is situated.” 45 Stat. 876 (1928). Subsequently, in United States v. Maniaci, 36 F. Supp. 293 (W.D. Mich. 1939), affirmed, 116 F.2d 935 (6th Cir.1940), the Government argued in a suit to foreclose the federal tax lien that the NFLT was validly filed, even though it did not meet the state law requirement that the such notices contain a description of the property encumbered. Both the district court and the Sixth Circuit rejected the government’s argument, reasoning that the NFLT was invalid because the government failed to file the lien in accordance with state law that required a description of the taxpayer’s property. In the Revenue Act of 1942, Congress overruled Maniaci by deleting the phrase “in accordance with the law of the State or Territory in which the property subject to the lien is situated” from the predecessor to section 6323. See H.R. Rep. No. 2333, 77th Cong., 2d Sess. See also S. Rep. No. 1631, 77th Cong., 2d Sess. 248. Accordingly, Congress has made it clear that the federal government exclusively occupies the field as to designating the content of the NFLT.

Finally, the State of Florida fails the third prong of preemption as redaction actually conflicts with federal law. As mentioned above, a NFLT provides the social security number of the taxpayer that is to be available for public inspection. Conversely the Opinion instructs the clerks to redact the social security number from a NFLT so that it will not be available for public inspection. These two positions are irreconcilable; either the social security number is available for public inspection or it is not.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



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Please call (202) 622-3610 if you have any further questions.

cc: SBSE Division Counsel