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From:

Sent: Tuesday, April 09, 2013 10:01:00 AM

To:

Cc:

Subject: FW: Military retirement

Hi --my reviewer concurs in my response below. Let me know if you want to discuss:

for review:

This is an informal at this point. I am unaware of anything unusual about levying on military retirement benefits or any other case where we have had problems. As noted below, there are IRM procedures which address military retirement levies.

Here is the general summation of why these benefits would be subject to levy under the IRC:

All property and rights to property belonging to the taxpayer, as well as any property or rights to property to which the general and estate tax liens attach, may be levied upon except that property which is specifically enumerated in section 6334. Note that the exemptions from levy under section 6334 do not apply to the section 6331(h) levy. State laws or federal laws limiting the amount that may be seized are ineffective against the federal levy. Treas. Reg. ' 301.6334-1(c). The property subject to levy may be real or personal, tangible or intangible, and may be levied upon in any sequence. The Service may levy on Social Security retirement benefits. See Acevedo v. United States, 2008-1 U.S.T.C. ¶ 50, 355 (E.D. Mo. 2008); Leining v. United States, 97-1 U.S.T.C. ¶ 50, 254 (D. Conn. 1996); I.R.C. § 6334(c).

Section 6334(c) provides that, notwithstanding any other law of the U.S., no property/rights to property are exempt from levy other than property specifically exempted under section 6334(a). There are no exemptions under section 6334(a) for retirement benefits. I found a couple of cases which provide that military pensions are not exempt from levy. See Melechinsky, 83-1 USTC 9373, Bushong, 91-2 USTC 50,411.

The exemption to levy found under section 6334(a)(6), specifically "annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code" is not a reference to military retirement pay in general, which is clear when you see what the annuity is as defined under 10 USC 1434. Accordingly, that section does not exempt military retirement pay.

The law is also clear that in response to levy, there are only 2 valid defenses:

The Supreme Court recognized in United States v. National Bank of Commerce, 472 U.S. 713, 721-22 (1985), that there are only two valid defenses to a third party's refusal to surrender property upon demand.

- a) The party is not in possession of nor obligated with respect to property or rights to property of the taxpayer; or
- b) At the time of service of Notice of Levy, the property or rights to property were subject to attachment or execution under judicial process. I.R.C. § 6332(a).

Finally, under section 6332(e), the levied party is not liable to the taxpayer in connection with compliance with the levy.

At any rate, the 5 CFR provision they cite as authority does not seem to be directly applicable. Section 582.101 subjects salary to "legal process". Section 102(2) exempts retired military from this. But under 102(3), federal tax levies do not appear within the scope of the "legal process" they describe--mentions tax levies from a state or local (not federal) government, court garnishment orders, etc. In other words, a federal tax levy does not appear to be the type of "legal process" this provision exempts retired military members from.

The attached OLC opinion which holds that TSP accounts are not exempt from levy may also be useful reading.

Let me know if you would like to discuss. I told _____ that, since this is just an informal, we should be able to get back to him by next week.

Attachment: Applicability of Tax Levies under 26 U.S.C. § 6334 to Thrift Savings Plan Accounts, 2010 WL 2516025 (O.L.C.) (May 3, 2010)