

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

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to: Cindy Ocmand
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(Small Business/Self-Employed)

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subject: Collection Due Process Rights Under Section 6324(a)(2)

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

ISSUE

Whether collection due process (CDP) rights must be given to a transferee of a taxable estate when the Service seeks to levy or seize property to enforce either the general estate tax lien arising under I.R.C. § 6324(a)(1), or the “like lien” described in section 6324(a)(2)?

CONCLUSION

The transferee is not entitled to CDP rights under either scenario. This is a change from our prior position.

LAW AND ANALYSIS

Section 6324(a)(1) establishes a federal tax lien upon the property included in the gross estate of a decedent for 10 years after the decedent’s date of death. The gross estate includes probate and non-probate property. Non-probate property is the property described in sections 2034-2042. The section 6324(a)(1) estate tax lien remains on all property included in the gross estate unless it is replaced by a section 6324(a)(2) like lien, or attached to other property under section 6324(a)(3). Non-probate property in the hands of a trustee or transferee is encumbered by the estate tax lien and the Service may levy upon the property to collect unpaid estate tax based on the lien. If the transferee transferred the non-probate property to a purchaser or the holder of a

security interest, the section 6324(a)(1) lien is divested from that property and a section 6324(a)(2) like lien is created upon all of the transferee's other property, including after-acquired property. Section 301.6324-1(a)(2)(ii); United States v. Chapel Chase Joint Venture, Inc., 753 F. Supp. 179 (D. Md. 1990).

Section 6324(a)(2) provides another means of estate tax collection. This provision imposes personal liability for any estate tax not paid when due, up to the value of the property received (as of the date of death), on a trustee or transferee who receives on the date of death non-probate property included in the gross estate of the decedent. The personal liability under section 6324(a)(2) is a separate liability of the transferee, not the estate tax liability. See Baptiste v. Commissioner, 29 F.3d 1533, 1541 (11th Cir. 1994). Section 6324(a)(2) does not create a lien upon the transferee's property to collect the personal liability.

The Service possesses two options to collect personal liability from a transferee under section 6324(a)(2). The Service may use the transferee liability procedures provided by section 6901 to assess and collect a transferee liability in the same manner as the estate tax liability. In the alternative, the Service may file a suit under section 7402 in a United States district court. See United States v. Russell, 461 F.2d 605, 606 (10th Cir. 1972); United States v. Degroft, 539 F.Supp. 42, 44-45 (D. Md. 1981).

If there is a section 6324(a)(1) estate tax lien or a section 6324(a)(2) like lien attached to the property against which the Service would like to pursue administrative collection, the Service is not first required to pursue a section 6901 assessment or court proceeding to impose personal liability on a transferee. The IRS can enforce these liens through the use of a levy or seizure issued in the name of the estate against property subject to that tax lien in the hands of the transferee. This action is authorized by section 6331(a) and section 301.6331-1(a).

Under section 301.6330-1(b)(2) Q&A B5, persons who hold property subject to a section 6324(a)(1) lien or section 6324(a)(2) like lien are not entitled to a CDP notice and hearing prior to or after levy. This provision is intended to cover all transferees of property subject to a federal tax lien. The regulation takes the position that the only persons entitled to CDP notices and hearings are "taxpayers." See Section 301.6330-1(a)(3) Q&A A1. This interpretation is based on the legislative history of the IRS Restructuring and Reform Act of 1998, and is consistent with sections 6320 and 6331(a), which Congress contemplated would operate in tandem with section 6330. Transferees are not taxpayers under section 6324; the estate is the taxpayer. Personal liability does not become a "tax" liability for purposes of section 6330 subject to administrative collection action until assessed through the section 6901 procedures. See Section 6901(a). The basis for collection from the transferee's assets is the enforcement of the estate tax lien or the like lien attached to those assets, not the collection of the personal liability. In this circumstance, the transferee is not a "taxpayer" under the CDP regulations. As such, a transferee is not entitled to a CDP notice or hearing when the Service seeks to levy or seize distributed property subject to the estate tax lien. Similarly, a transferee is not entitled to a CDP notice or hearing

when the Service seeks to levy on the transferee's other property subject to the like lien. A CDP notice does need to be given to the taxpayer (estate) before the levy on assets in the hands of the transferee to which the estate tax lien or like lien attaches.

In prior advice issued by this office in 2001, before the final CDP regulations were adopted by the Department of Treasury, we concluded that a CDP notice must be provided to a transferee when levying based upon the like lien that arises under section 6324(a)(2) upon transfer of non-probate property by the initial transferees described in section 6324(a)(2) to a purchaser or security interest holder. Upon such transfer, the estate tax lien is divested from the transferred property and a like lien arises and attaches to all other property of the initial transferee.

We concluded in 2001 that a levy based upon the like lien was distinguishable from a levy on property received subject to the section 6324(a)(1) estate tax lien because the Service could levy any of the transferor's property, including after-acquired property. In this respect, we concluded that providing CDP rights in the "like lien" scenario would be more justifiable. For example, the transferor may be able to propose collection alternatives regarding which property should be levied. In addition, we reasoned that levies based upon the like lien should be treated consistently with levies based upon transferee assessments under section 6901 and the resulting section 6321 federal tax lien, where the assessed party would be a "taxpayer" entitled to CDP rights. Because section 6901 and section 6324(a)(2) are different mechanisms to collect the same transferee liability, it would arguably be equitable to provide CDP rights in both cases.

We have reconsidered our 2001 advice and now conclude that our prior position was incorrect. We mischaracterized the like lien as a mechanism analogous to transferee liability under section 6901 for the purpose of collecting personal liability of the transferee. Rather, the section 6324(a)(2) like lien is not independent of, and is merely a substitute for, the section 6324(a)(1) estate tax lien. Neither the Code nor the regulations explicitly address this issue, but a plain meaning construction of the phrase supports the conclusion that the like lien of section 6324(a)(2) is identical to the special estate tax lien created in section 6324(a)(1).¹ See Armstrong v. Commissioner, 114 T.C. 94, 101 (2000) (estate lien and like lien are "identical"). See also United States v. Rotherham, 836 F.2d 359 (7th Cir. 1988) (discussing the relationship between the general tax lien of section 6321 and the special estate tax liens created in section 6324(a)(1) and (a)(2)). Accord Beaty v. United States, 90-1 USTC ¶ 60,004 (E.D. Tenn. 1989) and United States v. Warner, 85-2 USTC ¶ 13,641 (S.D. N.Y. 1985).

¹ As a result, the section 6324(a)(1) estate tax lien and section 6324(a)(2) like lien have the same collection statute of limitations period: ten years from the decedent's date of death. The collection statute of limitations for collecting the personal liability of the transferee, on the other hand, under section 6901 or by district court suit, is ten years from the date of assessment of the personal liability or assessment of the estate tax liability, respectively. See Section 6502(a)(1); Degroft, 539 F.Supp. at 44.

The legislative history of section 6324(a)(2) supports this conclusion. Section 315(a) of the Revenue Act of 1926 provided that "[u]nless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent... ." P.L. 68-176. The first sentence of section 315(b) of the Act provided that if property was transferred by a decedent (A) by trust or otherwise, in contemplation of or intended to take effect at or after his or her death, or (B) to a beneficiary under a life insurance contract, and the estate tax is not paid when due, the transferee, trustee or beneficiary "shall be personally liable for such tax, and such property ... shall be subject to a like lien equal to the amount of such tax." *Id.* The second sentence of section 315(b) directed that "[a]ny part of such property described in the first sentence sold by the transferee or trustee to a bona fide purchaser for adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee... ." When the Internal Revenue Code of 1939 was enacted, section 827(a) and (b) of the Code incorporated all of section 315(a) and (b) of the Revenue Act of 1926.² P.L. 76-1.

Section 827(b) was subsequently amended by the Revenue Act of 1942. Section 827(a) and (b), as amended by the Revenue Act of 1942, was the predecessor to current section 6324(a)(1) and (a)(2). *See Armstrong v. Commissioner*, 114 T.C. 94, 101 (2000). Section 411 of the Revenue Act of 1942 amended section 827(b) to eliminate "and such property ... shall be subject to a like lien equal to the amount of such tax."³ P.L. 77-743. The second sentence was amended to add a specific reference to the estate tax lien provided in section 827(a) but otherwise remained unchanged: "Any part of such property sold ... shall be divested of the lien provided in section 827(a) and a like lien shall then attach to all property" of the transferee. *Id.* The Senate report describing changes made to the 1939 Code explains that the reference to the estate tax lien imposed by section 827(a) in the second sentence made the reference to like lien in the first sentence unnecessary, and therefore the reference to the like lien was eliminated. S. Rep. No. 69-52, Part 1, page 38. The reference to the like lien in the first sentence would only be unnecessary if such lien was identical or equivalent to the section 827(a) general estate tax lien. If the like lien eliminated from the first sentence of section 827(b) was identical or equivalent to the section 827(a) estate tax lien, then it is reasonable to conclude that Congress intended the like lien attached to all of the transferee's property, described in the second sentence of section 827(b), also to be identical or equivalent to the estate tax lien. Accordingly, the like lien described in section 6324(a)(2) on all of the transferee's property is for the collection of the estate tax, rather than the transferee's personal liability.

Under this analysis, the section 6324(a)(2) like lien is for the in rem collection of the estate tax from property subject to the lien, and not for collection of the transferee's personal liability. The estate tax lien shifts to other property, but the estate remains the only taxpayer. The transferee under section 6324(a)(2) is not the taxpayer, but is holding property subject to the tax lien for collection of another person's (the estate's)

² Section 827(b) was also amended to add other pieces of non-probate property to the existing list.

³ Section 411 of the Revenue Act of 1942 also amended section 827(b) to replace the list of non-probate property with citations to newly added Code provisions describing the non-probate property.

taxes. Under the CDP regulations, the transferee would not be a “taxpayer” entitled to CDP rights.

We recognize that the section 6324(a)(2) like lien is different from other types of tax liens because it attaches to property other than that transferred by the taxpayer estate, including wages, bank accounts and after-acquired property. It is true that the transferor, if given CDP rights, would be able to propose alternatives to collection from certain types of property. However, although not entitled to CDP rights, such party would be entitled to collection appeal program (CAP) rights to propose collection alternatives and raise any other issues pertaining to the levies or proposed levies. IRM 8.24.1.2 (10-01-2012). For other issues that could be raised in CDP, such as the underlying tax liability, it would be counterintuitive to offer CDP rights to a non-taxpayer. If the estate tax were assessed from the estate tax return, for example, nothing would preclude the transferee given CDP levy rights from contesting that estate tax liability. See section 6330(c)(2)(B). Furthermore, a transferee has the ability to prevent imposition of the like lien by not selling or encumbering the estate assets prior to satisfaction of the estate tax.

It is possible that a party in possession of non-probate property subject to the estate tax lien may not be aware of this unrecorded lien and may, therefore, also be unaware of the imposition of the like lien upon the sale or further encumbrance of the non-probate property. In this respect, the party whose property is subject to a like lien is really no different than a purchaser of or holder of security interest in probate property encumbered by an unrecorded estate tax lien who is unaware of that lien. See section 6324(a)(3); United States v. Vohland, 675 F.2d 1071, 1075 (9th Cir. 1982) (estate tax lien remained attached to probate property sold to purchaser without notice of lien when fiduciary of estate had not received a section 2204 discharge at time of sale). It is not disputed that a purchaser or security interest holder under those circumstances would not be entitled to CDP rights prior to or after levy.

For these reasons, a transferee of non-probate property is not entitled to a CDP notice or hearing prior to or after levy upon property subject to either the section 6324(a)(1) estate tax lien or the section 6324(a)(2) like lien. Under the CDP regulations, parties holding property subject to a federal tax lien are not “taxpayers” entitled to CDP rights. As this is a change from our prior advice in 2001, [REDACTED]

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