Lesson 8

LEVIES, SEIZURES, AND SALES

(June 2018)

CONTENTS

I. INTRODUCTION

You have learned that the federal tax lien encumbers the property and rights to property of a taxpayer relating back to the date the federal tax is assessed. You have also learned that filing a Notice of Federal Tax Lien is necessary to perfect the government's tax claim vis-a-vis certain classes of creditors and that some classes of creditors have priority even if a Notice of Federal Tax Lien has been filed. However, the tax lien is not an effective collection tool unless and until the Service takes action to enforce it. There are two ways the Service collects taxes:

- Litigation, which will be discussed in a subsequent chapter, and
- Administrative collection, which is the subject of this chapter.

II. OBJECTIVES

At the end of this chapter, you will be able to:

1) Explain the administrative procedures used to collect federal taxes.
2) Identify the principal documents used in tax collection.
3) Recommend the appropriate administrative collection tool.
4) Determine whether proper procedure has been followed in a particular situation.
5) Determine the applicable period of limitations in which to collect federal taxes.

III. OVERVIEW OF THE COLLECTION FUNCTION

A. Campus Compliance Services (Service Center)

When a tax is assessed without full payment, either from a filed return, from an un-petitioned audit determination, or from a decided Tax Court case, a series of one to four "notice and demand" letters (depending on the amount due and other criteria) are issued to the taxpayer by the Service Center Collection Branch (SCCB). These notices are generated by the computer in cycles of six weeks between each notice. If a taxpayer has still not responded, or has responded inadequately after the third notice, a fourth notice entitled FINAL NOTICE, NOTICE OF INTENT TO LEVY AND NOTICE OF YOUR RIGHT TO A HEARING is generated. The FINAL NOTICE warns that collection by distraint may ensue unless payment of the full amount due is made or Collection Due Process rights are invoked under section 6330 within the next thirty days. See the GL-1 Lesson on Collection Due Process.

Responses received by SCCB during the "notice status" period may result in granting the taxpayer an installment agreement, tracing missing payments, abatement of erroneous assessments and/or penalties or other appropriate actions to resolve or partially resolve the taxpayer's "notice status" account. Accounts which remain unresolved after the thirty-day deadline stated in the FINAL NOTICE are converted to Taxpayer Delinquent Account (TDA) status. With few exceptions, e.g., transferee assessments which are referred directly to the field collection function, TDA status accounts are referred to an Automated Collection System (ACS) call site for personal contact by telephone and possible levy action.

B. Automated Collection System

ACS is an automated, computerized collection system which handles most delinquent tax accounts and conducts delinquent return investigations. It was set up in 1983 and replaced the office collection function in the Area Director's office. ACS files liens and serves levies by mail. From its call sites, it telephones taxpayers to solicit payment and additional levy source information.

C. Revenue Officers

If the TDA remains unsatisfied after referral to ACS and meets priority criteria, which warrant a field investigation, it is forwarded to field collection, where it is assigned to a Revenue Officer ("RO"). Cases that do not meet priority criteria, e.g. low dollar accounts, are held "in queue" by the computer until workload conditions permit the assignment of such cases for field investigation. ROs are the field personnel of the Collection Division (GS-7 through GS-13). ROs usually work in groups in prescribed geographical locations and report to a group manager. They have delegated authority to request information by summons, to file federal tax liens, and to seize property in satisfaction of federal tax debts. RO's inventory usually consists of three types of cases:

> 1. <u>TDAs (Taxpayer Delinquency Accounts).</u> Assessments have been made and taxes are due and owing.
>
> 2. <u>TDIs (Taxpayer Delinquency Investigations).</u> The RO attempts to secure returns that have not been filed.
>
> 3. <u>OIs (Other Investigations).</u> Requests from another Service Area for a RO investigation and report, e.g., investigation of taxpayer's assets or service of summons.

D. Disposition of TDAs

A RO may use several methods to dispose of his inventory of TDAs:

> 1. A payment agreement may be secured from the taxpayer to pay off the account over a period of time.
>
> 2. ROs may seize the taxpayer's property. The Property Appraisal and Liquidation Specialist (PALS) is generally the Service employee authorized to sell the property.
>
> 3. Where administrative collection efforts have been exhausted or are not feasible, the RO may send a civil suit recommendation to Area Counsel requesting, for example, foreclosure of the tax lien against the taxpayer's property.
>
> 4. When there is doubt as to collectability, an offer-in-compromise may be an acceptable method of disposing of the liability.
>
> 5. When there is no collection potential within the foreseeable future, the RO may suspend the account and categorize it as uncollectible using Form 53, hence, the term "53'ing an account." Such accounts may be programmed for follow-up investigation as appropriate, e.g., at the direction of the RO, the computer will reissue a TDA when a taxpayer's AGI reaches a prescribed level or when an unlocatable taxpayer files a return showing a new address.

The difference between an offer-in-compromise and a 53’ed account is that, in the former, a part of the liability is abated. In the latter, collection activity is only suspended. A 53’ed account may be reactivated and collected as long as the statute on collection is open.

6. Sometimes TDAs are referred to Examination Division for reconsideration if it appears to Collection that the taxpayer did not have an opportunity to submit substantiation during examination. In addition, some TDAs may be generated through erroneous premature assessments, even though the taxpayer has timely filed a Tax Court petition. In such cases, the Collection employee contacts Appeals or Counsel, to determine if the assessment may be abated.

E. Locating assets

1. Data may be obtained from taxpayers through financial statements.

2. Public records, such as automobile records, grantor/grantee indices, court dockets, etc., may reveal assets.

3. Third-party information obtained through the use of:
Summons. I.R.C. §§ 7602 and 7609.

4. Demand to Exhibit Books and Records. I.R.C. § 6333.

5. Other sources: e.g., prior years' tax returns, previous collection history.

F. Internal Revenue Manual - Part V, Collection

Part 5 of the Internal Revenue Manual (I.R.M.) sets forth the procedures that should be followed by the Collection Division. The IRM contains specific directions for the various functions of the Collection Division. Counsel is well advised to be aware of these procedures. Particularly helpful are sections 5.10, Seizure and Sale Handbook, 5.11 Notice of Levy Handbook, and 5.17 Legal Reference Guide for Revenue Officers (LRG). The LRG is complemented in each state by the Local Law Sections, which set forth relevant state law. Additional Collection Division guidelines are contained in collection policy statements numbered P-5-1 through P-5-134, found in IRM 1.2.14, Policy Statements for the Collecting Process.

IV. ENFORCED ADMINISTRATIVE COLLECTION

A. Levies and Judicial Proceedings

The exercise of the right to a Collection Due Process (CDP) hearing may eventually lead to litigation. Most taxpayers, however, do not exercise their rights to a CDP hearing; so the Service may proceed with an administrative levy. The Service prefers administrative levies to judicial proceedings because levies are (1) less expensive, (2) less time-consuming, and, (3) as a policy matter, the Service prefers to litigate as a last resort.

B. Levy in General

1. Nature and purpose

A levy is an administrative means of collecting taxes by seizure of the taxpayer's property to satisfy his delinquent taxes. It is a summary, extra-judicial remedy of self-help for the purpose of compelling payment of the tax debt. See United States v. National Bank of Commerce, 472 U.S. 713, 720-21 (1985) (levy is a provisional remedy that protects the Government against diversion or loss while such claims are being resolved). See also Air Operations International Corp. v. United States, 2002-1 U.S.T.C. P 50,423 (S.D. Fla. 2002) (after a levy a third party cannot perfect a security interest in levied-upon funds). A levy is analogous to, but something more than, an attachment, garnishment, or other similar creditor's remedy. In addition to reaching the taxpayer's property, the levy also reaches any property transferred to a third party that is subject to a federal tax lien. See Han v. United States, 944 F.2d 526 (9th Cir. 1991); United States v. Donahue Industries, Inc., 905 F.2d 1325 (9th Cir. 1990).

At common law a levy of execution consists of acts by which an officer, such as a sheriff, sets apart or appropriates a judgment debtor's property for the purpose of satisfying a judgment obtained against him. After judgment is entered against the debtor, the judgment creditor causes a writ of execution to issue from the clerk of the court against the debtor. An officer, such as a sheriff, then levies the execution against the debtor's property. Levy at common law is defined as the seizing and setting aside of specific property so that it can be sold. To effect a levy, the executing officer must put the property out of the power of the debtor by exercising actual or constructive possession of it. At common law, distraint is defined as the seizing of a chattel of a wrongdoer and taking it into the possession of the party injured. Levy of execution may be distinguished from distraint in that the former is effected by a disinterested officer of the court, whereas, the latter is a method of self-help in which the creditor himself seizes the debtor's property. The provision authorizing the collection of internal revenue taxes by levy dates from 1866. United States v. O'Dell, 160 F.2d 304 (6th Cir. 1947).

Today, there is no distinction between a levy and seizure. Section 6331(b) provides that a levy "includes the power of distraint and seizure by any means." Note, however, that purely for administrative convenience, the IRM distinguishes between a levy and a seizure. A levy refers to taking a taxpayer's funds or right to funds from a third party, e.g., levy on a bank account. A seizure refers to taking a taxpayer's property that must be sold, e.g., the Service seizes the taxpayer's car and then administratively sells it. See IRM 5.11.1.2.

2. Authority

Section 6331(a) provides the authority for the RO, as a delegate of the Secretary, to collect delinquent taxes by levy.

3. Conditions precedent

The person whose property is seized must:

a) Be liable for the tax (an assessment and notice and demand have been made), but no judgment need be rendered by a court.

b) Neglect or refuse to pay the tax within 10 days after notice and demand.

c) Have been given 30 day written notice of the Service's intention to levy. I.R.C. § 6331(d)(2). But see section 6331(d)(3).

d) Have been given a CDP notice prior to the first levy for each taxable period. I.R.C. § 6330. But see section 6330(f).

e) Have equity in the property. See section 6331(f) (no uneconomical levies, i.e., the value of the property must exceed the sale expenses).

4. Additional Restrictions on Levy

Additional restrictions on levy are discussed in E. Levy Procedure, 1. Pre-seizure Considerations.

5. 30-Day Period and Jeopardy

A levy made before the expiration of the section 6331(d) 30-day period after issuance of written notice of the Service's intent to levy , as well as a levy made prior to notice and demand, is invalid.   However, if the Service determines that collection is in jeopardy, a levy may be made before expiration of the 30-day period. Section 6331(d)(3). In effect, the Service makes a notice and demand for immediate payment. Chief Counsel must approve in writing a jeopardy levy before it is made. I.R.C. § 7429(a)(1)(A). The Service must still provide the taxpayer with a notice containing the same CDP information and providing the right to a hearing as is contained in the pre-levy notice within a reasonable time of the levy (i.e., post-levy CDP notice). Section 6330(f); Treas. Reg. § 301.6330-1(a)(2)(ii).

6. Effect of levy

a) Section 6331(b) provides that, except as provided in section 6331(e), with respect to continuing effect on salary and wages, a levy shall extend only to property possessed and obligations existing at the time of the levy. Section 6331(h) provides for continuing levy on some federal payments.

b) Levy on the taxpayer or serving of a Notice of Levy upon a third party in possession of the taxpayer's property results in a seizure of property or rights to property in possession of either party at the time of service. If the taxpayer (or the third party) acquires property subsequent to the service of the levy (or the notice of levy), a second levy (or notice of levy) must be served to reach that subsequently acquired property.

Example: A Notice of Levy served on a bank will reach only the balance in the account at the time of service, plus interest accruing on the seized funds. Subsequent levies are required to reach subsequent deposits. Contrast this to the continuing effect of a levy on salary and wages under section 6331(e) or on certain federal payments under section 6331(h).

c) Similarly, a levy reaches only obligations which are in existence at the time the levy is made. Obligations are in existence when the liability of the obligor is fixed and determinable even though the right to receive payment is deferred. See Treas. Reg. 301.6331-1(a) (obligations must be fixed and determinable). See also Tull v. United States, 69 F.3d 394 (9th Cir. 1995). Where a taxpayer has an unqualified fixed right to receive a stream of payments (i.e., under a contract), the levy reaches any payments due at the time of levy, as well as any subsequent payments as they become due. Rev. Rul. 55-210, 1955-1 C.B. 544.

Example: On January 1, taxpayer sold his $100,000 yacht subject to an agreement that the buyer remit the purchase price on January 31. Levy is made on the buyer on January 10. The levy reached the right of the taxpayer to receive the entire $100,000, but the buyer need not pay over the money until January 31. See Treas. Reg. § 301.6331-1(a)(1).

7. Exemptions From Levy

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 USTC P 50355 (E.D.Mo. 2008); United States v. Cleveland, 24-2 USTC P 50421 (N.D.Ill. 1994); Leining v. United States, 97-1 USTC P 50, 254 (D. Conn. 1996); I.R.C. § 6334(c).

Section 6334 prohibits the seizure of (1) the taxpayer's principal residence without jeopardy or prior approval from a U.S. District Court Judge or Magistrate, and (2) tangible personal property or real property (except rental property) used in the trade or business of an individual taxpayer, without the prior written approval of an Area Director or Assistant Area Director or the collection of tax is in jeopardy.

See section 6334(a)(13)(B)(i) and (ii); section 6334(e).

The exempt amounts for personal effects and books and tools of the trade in paragraphs (2) and (3) of section 6334(a) are indexed for inflation. The exempt amounts are published in an annual cost-of-living adjustments revenue procedure. See, e.g., Rev. Proc. 2017-58, 2017-45 I.R.B. 489, 2017 WL 5070223.

8. Successive Levies and Continuous Levies

Section 6331(c) permits successive levies to be made on the same property or any other property or rights to property until the liability is fully satisfied. Policy Statement P-5-28 permits successive levies unless hardship would result.

With respect to levies on salary or wages (but not on other income), section 6331(e)(1) provides that such levies have a continuing effect so that successive levies are not necessary. See U.S. v. Moscowitz, Passman & Edelman, 603 F.3d 162 (2nd Cir. 2010)(draws made by law firm's managing partner, which were checks managing partner wrote from firm to himself on weekly basis, were salary and wages); Mission Primary Care Clinic v. I.R.S., 370 Fed.Appx. 536 (5th Cir. 2010)(medical clinic's periodic payments to physician and his corporation were advance payment of wages or salary for the provision of medical services subject to continuous levy); U.S. v. Jefferson-Pilot Life Insurance Company, 49 F.3d 1020 (4th Cir. 1995)(commissions of an independent contractor were salary and wages); Meehan v. Commissioner, 122 T.C. 396 (2004) (taxpayer’s severance pay is wages for purposes of section 6331(e)).

“Continuing or continuous levy” means that the levy will reach salary or wages not earned at the time of the levy. This is distinguishable from a levy that reaches a fixed right to future payments. See Rev. Rul. 55-210, 1955-1 C.B. 544. Section 6331(h) also provides for a continuous levy on certain federal payments. The levy attaches up to 15% of the payment (and up to 100% in the case of vendors of goods or services sold or leased to the federal government.) Authority to make such levies has not been delegated to the field. These levies are made electronically between the Service and the Bureau of the Fiscal Service, a Treasury department authorized to disburse federal funds.

A continuous levy must be released after the collection statute of limitations has run under section 6502. However, a levy on a fixed and determinable right to payment which includes payments to be made after the expiration of the collection statute does not become unenforceable and need not be released. Treas. Reg. § 301.6343-1(b)(1)(ii).

9. Erroneous Release

If a certificate of release or nonattachment of lien is erroneously or improvidently issued and is subsequently revoked pursuant to section 6325(f)(2), the right to levy upon property which was subject to levy before the issuance of the erroneous release or nonattachment remains, but subject to the intervening rights of third parties. But, in American Acceptance Corp. v. Glendora Better Builders, Inc., 550 F.2d 1220 (9th Cir. 1977), served notices of levy were never honored. The Service did not enforce the levy judicially. It erroneously released the lien, and a writ of garnishment was served before the lien was reinstated. The Ninth Circuit held that the levy had priority over the writ of garnishment, because it operated as a seizure, citing Phelps v. United States, 421 U.S. 330 (1975).

10. Property of Third Parties

The property of a third party may not be levied upon to enforce the liability of the delinquent taxpayer. See Stuart v. Willis, 244 F.2d 925 (9th Cir. 1957), where the property of a joint venture could not be seized to satisfy the tax liability of one of the joint venture members. See also Rev. Rul. 73-24, 1973-1 C.B. 602 (partnership property cannot be seized in satisfaction of tax liability assessed against individual partner).

11. Transferred Property

Property subject to a federal tax lien that has been transferred by the taxpayer may be levied upon in the hands of the transferee or any subsequent transferee. Section 301.6331-1(a)(1). But see provisions of sections 6323 and 6324(a)(2) and (b) for protection of certain transferees against the federal tax lien.

12. Custodia Legis

As a general rule, when property to which the federal tax lien attaches passes into the control or custody of a court, a levy is not used to enforce collection of taxes since it would interfere with the court's processes.

a) However, when the court proceeding has progressed to such a point that retention of the property is no longer necessary to the exercise of the court's power or jurisdiction, or the court grants permission to levy, assets may be seized. Section 301.6331-1(a)(3). When a court merely has possession of the taxpayer's property, as opposed to jurisdiction over it, a levy may be made upon the officer of the court. For example, money held by a U.S. Marshal for safekeeping as a result of the taxpayer's arrest, which is to be returned to the taxpayer at a later date, is subject to levy in the hands of the Marshal. See Simpson v. Thomas, 271 F.2d 450 (4th Cir. 1959).

b) Where the taxpayer's debtor is in bankruptcy and the taxpayer has filed a claim in the proceeding, there is no prohibition upon serving the trustee to reach the distribution the taxpayer is entitled to receive in the proceeding. Beam v. IRS, 192 F.3d 941 (9th Cir. 1999).

C. Pre-bankruptcy Seizures

Whiting Pools v. United States, 462 U.S. 198 (1983), held that when the Service has not sold property as of the petition date, the Service must turn over the property if the debtor provides adequate protection. See information on bankruptcy on the PA/handbooks page on the CC website.

D. Distinction Between a Levy and a Setoff

A levy is not a setoff. A levy is an administrative action under section 6331. A setoff is an entirely different remedy. A setoff is "[a] debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor." Black's Law Dictionary (10th ed. 2014). The Supreme Court has opined that "[B]roadly speaking [setoff] represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by businessmen in making book entries whereby one mutual debt is applied against another.... Such counterclaims can be asserted as a defense or by the voluntary act of the parties because it is grounded in the absurdity of making A pay B when B owes A." Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528-529 (1913).

Previously, the Government argued that a Service levy on another federal agency constituted a setoff by the United States of the debt owed to the taxpayer. United States v. Warren Corp., 805 F.2d 449 (1st Cir. 1986). Most courts rejected that argument. Capuano v. United States, 955 F.2d 1427 (11th Cir. 1992); Arford v. United States, 934 F.2d 229 (9th Cir. 1991). The Service's current position follows the majority view, agreeing that a levy is not a setoff. See Treas. Reg. § 301.7426-1(a)(1)(ii).

E. Levy Procedure

1. Pre-seizure Considerations

a) Policy Statement P-5-34 prescribes that seizures of personal or business assets should be undertaken only afteralternative, voluntary collection efforts have been considered. Policy Statement P-5-47 provides that the Service must file a Notice of Federal Tax Lien prior to a levy on property in possession of the taxpayer.

b) Section 6331(f) prohibits uneconomical levies, i.e., the expected sale expenses would exceed the anticipated sale proceeds.

c) Section 6331(g) prohibits a levy on taxpayer's property on any date that taxpayer is required to appear in response to a summons, except in jeopardy situations.

d) Section 6331(i)(1) prohibits a levy during the pendency of taxpayer's refund case in federal district court for a divisible tax. Exceptions to this prohibition exist in 6331(i)(3), e.g., jeopardy.

e) Section 6331(j) provides for an investigation of the status of the taxpayer's property prior to any levy on property that must be administratively sold—e.g., verifying the taxpayer's liability or thorough consideration of alternative collection methods.

f) Section 6331(k) prohibits levies during the pendency of, and for a period following rejection of, the taxpayer's offer-in-compromise or installment agreement, as well as during the period the installment agreement is in effect and for a period following its termination, with certain exceptions.

2. Writ of Entry Procedure--Levy on assets located on private premises.

a) The Supreme Court held in G.M. Leasing v. United States, 429 U.S. 338 (1977), that a warrantless entry into a corporation's business premises to seize property subject to a tax lien violated the corporation's right to privacy under the Fourth Amendment. As a result of this decision, before seizing assets located on private residential or business premises, ROs must either secure the taxpayer's written consent to enter or obtain a writ of entry from the federal district court.

b) If the taxpayer will not give his consent, the RO cannot proceed with the seizure until a writ of entry is obtained, unless he observes situations that the Supreme Court in G.M. Leasing described as "exigent circumstances." Such circumstances exist when it is obvious that the taxpayer is placing his assets beyond the reach of the Service.

c) Writ requirements:

(1) The Service must show the court that there is "probable cause" for the writ to issue. See Matter of Carlson, 580 F.2d 1365 (10th Cir. 1978). There is a split among the federal appellate circuits as to the probable cause standard for obtaining a writ of entry. The Ninth Circuit maintains that the showing be one of probable cause equivalent to that required for a criminal search warrant. United States v. Condo, 782 F.2d 1502 (9th Cir. 1986). In other circuits, the courts have allowed a lesser showing of probable cause. United States v. Shriver, 645 F.2d 221 (4th Cir. 1981) (holding that judges are simply to determine whether the application and supporting affidavit showed probable cause to enter, search for, and levy upon personal property in aid of summary collection of assessed and unpaid taxes); In re Carlson, supra.

(2) The Service must show that it has the right to levy and to seize

the assets of the taxpayer. The Declaration should allege proper assessment, notice and demand, and refusal or neglect to pay the tax and should contain a statement of statutory authority under sections 6201, 6203, and 6303. The Declaration should explain why the RO believes that the premises to which entry is sought contains property that is subject to levy, e.g., personal observation. There is no *de minimis* rule or set amount of expected recovery that must be met before a writ will be sought. There is no need for a particularized description of the things to be seized.

(3) The Fourth Amendment protects "people not places." The Service needs a writ when the place to which it seeks entry is one in which the taxpayer has a "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347 (1967).

In Oliver v. United States, 466 U.S. 170 (1984), the Supreme Court held that individuals have no legitimate expectation that open fields will remain free from warrantless intrusions by government officials. Accord, California v. Ciraolo, 476 U.S. 207 (1986).

(4) Revenue Officers should be advised that despite this "open fields" exception (which may or may not apply to Service seizures), they should seek Counsel's advice in all but the most obvious of situations. Note: ROs are effectively immunized from personal liability by acting in accordance with Area Counsel's legal advice prior to seizure.

(5) Examples of places where a writ is necessary: locked file cabinets, cash registers, luggage, and briefcases.

(6) Vehicles located on public property, such as a street or road, may be seized without a writ. If the vehicle is parked in an unobstructed, unenclosed, unfenced driveway or front yard, it may be seized without a writ. See Commercial Credit Corp. v. United States, 78-1 USTC P 9113 (M.D.N.C. 1977) (seizure of car in a credit agency's parking lot). Distinguish between a trespass, which may be necessary to seize property and which may be consistent with an executing officer's duties and an invasion of constitutionally protected privacy, which GM Leasing said the Service could not do without writ.

(7) Writs are used to seize property, not for searching or seizing evidence. ROs should issue a summons to obtain collection information.

d) Use of Contempt of Court Provisions. Where a writ of entry has been obtained, but cannot be executed and the property cannot be seized because of the threat of violence from the taxpayer, a contempt order may be obtained for interfering with the execution of the writ.

3. Service of Levy

A levy includes the power of distraint and seizure by any means. The Service has interpreted the phrase "by any means" to include service of the notice of levy by fax. Section 301.6331-1(c) specifically provides for the service of notice of levy by mail.

4. Seizure

To effect a seizure of the taxpayer's property, the RO must exercise dominion and control (actual or constructive) over it. Actual seizure is accomplished by physical possession of the thing to be seized. The RO must take custody of and remove tangible personal property when it is subject to removal. Where the property cannot be removed and actual possession is not possible, the RO must take steps to evidence constructive possession of the property, such as tagging it and making an inventory of it, posting notices of seizure, and padlocking the property so as to exclude the taxpayer. As a policy matter, the Service does not evict taxpayers from their seized residence. Eviction proceedings must be brought by the tax sale purchaser.

5. Demand

a) Section 6332(a) requires that a person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made, must surrender, upon demand, such property or rights to property of the taxpayer, except that which is subject to attachment or execution under any judicial process. This demand is contained in the Notice of Levy. However, when there is no response to the Notice of Levy within 10 days after service, a Final Demand For Payment, Form 668-C, is usually issued as an administrative practice, although it is not a statutory requirement.

b) Life Insurance Special Rule. Section 6332(b) provides a special rule for seizing life insurance and endowment contracts. <u>See</u> <u>United States v. Metropolitan Life Insurance</u>, 874 F.2d 1497 (11th Cir. 1980); <u>United States v. Prudential Insurance Co. of America</u>, 461 F.2d 208 (5th Cir. 1972).

(1) Demand: Made by service of Form 668-A (almost always by mail). Payment due 90 days after service.

(2) Amount of payment: equal to the largest policy loan that the taxpayer-insured could have requested. In addition, the company

must pay the Service any advances after actual Notice of Levy.

(3) Other remedies: The right of the Service to foreclose (to receive cash surrender value) is explicitly preserved. Section 6332(b)(3).

c) Levy on bank. Section 6332(c) provides that a bank should surrender any deposits levied upon following service of the Notice of Levy only after 21 days following service of levy. Interest earned during that 21-day period should be remitted to the Service.

6. 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. Section 6332(a).

A lien priority argument is not a defense to a levy. Virgin Islands Bureau of Internal Revenue v. Chase Manhattan Bank, 312 F.3d 131, 138 (3d Cir. 2002) (court did not consider bank’s lien priority claim because a lien priority argument is not a defense to a levy); Rev. Rul. 2006-42, 2006-35 IRB 337. This is because the levy is only a provisional remedy, which protects the government’s interest while claims to the subject property are resolved.

7. Saved harmless

A person levied upon who honors the levy by paying over or delivering property pursuant to the levy is discharged from any obligation or liability to the taxpayer and any other person with respect to the property or rights to property surrendered. Section 6332(e). Similarly, when a person incurs personal liability for failure to honor a levy and subsequently pays the liability, that person, too, is discharged from any obligation or liability to the delinquent taxpayer or other person. However, if the party levied upon mistakenly surrenders property of a third person, not the taxpayer’s, that party is not relieved of liability to the third person, unless that party made a good faith determination that the delinquent taxpayer had an “apparent interest” in the property. Treas. Reg. § 301.6332-1(c)(2). When the person levied upon is uncertain whether the property belongs to the taxpayer or to a third party, the usual response is to bring an interpleader suit under 28 U.S.C. § 2410.

Furthermore, section 6332(e) does not shield the levied-upon party from suit for alleged acts that occurred prior to the levy and the payment to the Service. In United States v. Triangle Oil, 277 F.3d 1251 (10th Cir. 2002), after the Service levied on Triangle Oil and received dissolution proceeds, the taxpayer sued Triangle Oil for fraud, breach of contract, and breach of fiduciary duty occurring prior to the levy. The district court held that the taxpayer lacked standing to assert its state law claims, because the Service had stepped into the shoes of the taxpayer. The Tenth Circuit reversed the district court, reasoning that since the taxpayer "still retained ownership of whatever remained of its interest in the joint venture, we fail to see why it should be prevented from exercising the rights attached to that property, e.g., a right to an accounting, simply because the Service has chosen not to exercise any of those related rights." Id. at 1256. The government's position was that, if the taxpayer recovered any additional payments from the suit, the funds should be remitted to the Service.

8. Failure to honor the levy

If a person levied upon refuses to honor the levy, a suit to enforce a levy may be brought against him under section 6332(d). In addition, the person may be subject to a 50 percent penalty for failing to surrender the property without reasonable cause. See Section 6332(d)(2); United States v. Donahue Industries, 905 F.2d 1325 (9th Cir. 1990); United States v. Sterling National Bank & Trust Co. of New York, 494 F.2d 919 (2nd Cir. 1974); United States v. Key Bank, 94-2 U.S.T.C. ¶ 50,629 (N.D.N.Y. 1994). In United States v. Henshaw, 388 F.3d 738 (10th Cir. 2004), the Tenth Circuit held that the government was not limited to an action under section 6332(d), but could also bring an action for tortious conversion under common law. There is no statute of limitations for a suit to enforce a levy. United States v. Weintraub, 613 F.2d 612 (6th Cir. 1979).

The 50 percent penalty pursuant to I.R.C. § 6332(d)(2) is not applicable in cases where a bona fide dispute exists concerning the amount of the property to be surrendered pursuant to a levy or concerning the legal effectiveness of the levy. Treas. Reg. § 301.6332-1(b)(2). United States v. Sterling National Bank & Trust Co., of New York., 494 F. 2d 919, 923 (2nd Cir. 1974) (citing S. Rep.No.1708, 89th Cong., 2d Sess. (1966), in 3 (1966) U.S. Code Cong. & Admin. News pp. 3722, 3740) (a person has a reasonable cause in refusing to comply with a levy if there was a "bona fide" dispute over the Service's legal right to levy upon the property involved). See also, United States v. Citizens and Southern National Bank, 538 F.2d 1101, 1107 (5th Cir. 1976).

9. Setoff

A problem frequently encountered when serving a Notice of Levy upon a third-party debtor of the taxpayer is the third party's claim that he has a right to set off against the taxpayer. The claim of setoff is most frequently asserted by banks and, to a lesser degree, by the taxpayer's employer. For non-bank cases, if the tax lien arises before a third party acquires the right of setoff, or a levy is made before a setoff is made, a Notice of Levy reaches all the taxpayer's property in the hands of the third party undiminished by any setoff. Bank of Nevada v. United States, 251 F.2d 820 (9th Cir. 1957), cert. denied, 356 U.S. 936 (1958); United States v. Sterling National Bank & Trust Co. of New York, 494 F.2d 919 (2d Cir. 1974); United States v. First National Bank of Arizona, 348 F. Supp. 388 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972).

Section 6323(b)(10) provides a superpriority to a bank's secured interest in a bank account, as long as the bank lacked actual notice and knowledge of the federal tax lien. Section 9-109 of Article 9 (UCC) allows a security interest to be created in personal property. Section 9-109(d)(13) excludes consumer deposit accounts from the scope of Article 9. Thus, a bank may obtain a security interest in a non-consumer deposit account, i.e., a business bank account. Section 9-314 provides that a security interest in a business deposit account may be perfected only by control. Under section 9-104(a)(1), a bank automatically has control when the bank maintains the business deposit account. Section 9-104(b) provides that a depositor's right to withdraw from the deposit account does not eliminate the bank's control. In short, in many situations banks will qualify for a superpriority under section 6323(b)(10). If the bank honors the levy, the bank may then file a wrongful levy suit to recover the amount of its superpriority. Note, however, that a superpriority is not a defense to levy, Virgin Islands Bureau of Internal Revenue v. Chase Manhattan Bank, 312 F.3d 131, 138 (3rd Cir. 2002), and a superpriority does not extend the period for filing a timely wrongful levy action. Thus, if a bank has not resolved the levy prior to the expiration of the period for filing a wrongful levy suit, it may be in a predicament: the bank's section 6323(b)(10) superpriority is no defense to a levy and the bank has no wrongful levy claim that can be asserted in court. See Rev. Rul. 2006-42, 2006-35 IRB 337.

Of course, if the deposit account is a consumer account or a bank had actual notice and knowledge of the federal tax lien, then no superpriority exists under section 6323(b)(10). In this situation, the bank must honor the levy without any further recourse against the Service. Moreover, if section 6323(b)(10) does not apply and funds are deposited in the taxpayer's account after the levy and the bank makes a setoff, the Service can still recover the funds under the argument that the bank has funds encumbered with the federal tax lien. United States v. Donahue Ind., 905 F.2d 1325 (9th Cir. 1990); United States v. Cache Valley Bank, 866 F.2d 1242 (10th Cir. 1989); United States v. Bank of Celina, 721 F.2d 163 (6th Cir. 1983).

Employer's Right of Setoff. If the taxpayer assigns future wages to his employer to secure a debt owed to the employer, a Notice of Levy will reach only accrued wages due the taxpayer in excess of the amount to be setoff at the time of service of the levy. See Rev. Rul. 73-365, 1973-2 CB 407.

10. Examination of books and records

Section 6333 provides authority to examine the books and records of any person upon whom a Notice of Levy has been or is about to be served to determine the extent of property subject to the levy. As a practical matter this section is successfully used only with cooperative parties who desire a written records request for their protection. Where a section 6333 production request is ignored or contested, the appropriate Service response is to issue a summons to obtain the necessary information.

F. After the Levy

1. Notice of seizure

a) Section 6335(a) requires that as soon as practicable after the seizure the taxpayer shall receive written notice that the property has been seized. The date when the Notice of Seizure is given is the date on which the levy is considered made. I.R.C. § 6502(b). This is critical when the statute of limitations for collection is about to expire. When the Service levies on money, there will be no sale of the money; so a Notice of Seizure is not given. In such situations, courts have held that the date of the levy is the date that the notice of levy is served. See, e.g., United States v. Donahue Indus., 905 F.2d 1325 (9th Cir. 1990). In addition, failure to adhere to the notice requirements of section 6335 may lead to a suit to enjoin the sale of the seized property or a suit against the purchaser in state court.

b) Form 2433, Notice of Seizure, is used to comply with this requirement. The Notice states the sum demanded and lists the personal or real property seized. Notice must be given to the taxpayer personally, or may be left at his usual place of abode, or may be mailed to the last known address if the taxpayer is not readily located. Courts have held the Service to strict compliance with the notice requirements of section 6335(a). Goodwin v. United States, 935 F.2d 1061 (9th Cir. 1991). See also Kulawy v. United States, 917 F.2d 729, 734-35 (2nd Cir.1990) ; Reece v. Scoggins, 506 F.2d 967, 970-71 (5th Cir.1975); Aqua Bar & Lounge, Inc. v. United States, 438 F.Supp. 655, 658 (E.D.Pa.1977).

Where a detailed inventory of the property seized cannot be quickly given to the taxpayer, a notice phrased in general terms is recommended. For example, the notice may provide "All other property of [taxpayer] seized on the premises of [Address] on [date and time]. A supplemental notice of seizure providing a detailed itemization of this property will be given as soon as a detailed inventory is completed."

2. Custody of property

After seizure, the United States is considered to have custody of Service-seized property. When seized property is in the custody of the United States, it is generally not subject to attachment, garnishment, or levy of execution by reason of sovereign immunity. Thus, an action in replevin against the United States to recover seized property will not lie. 28 U.S.C. § 2463.

However, 28 U.S.C. § 2463 does not prohibit a court action to litigate the claims to property illegally seized or to enjoin the seizure of property belonging to a party other than the taxpayer. See I.R.C. § 7426 regarding wrongful levy suits.

> a) Before sale. The Service exercises control and possession over seized personal property. When the property seized is realty, the taxpayer or his tenant generally remains in possession. The Service is responsible for the protection and preservation of personalty until it is sold. There is no statutory authority for the government to purchase insurance to protect its interest. However, in unique circumstances, the government may purchase insurance.
>
> b) After sale. Service custody of seized property ceases once the sale takes place. Possession of personal property may be retained as security for the purchase price; but inasmuch as the government is merely acting as the buyer's agent, the cost of caring for the property and risk of loss are borne by the purchaser. With respect to real property, state law determines whether the taxpayer or the purchaser is entitled to possession during the redemption period.
>
> c) Benefits from the property. During the time the United States has custody of the seized property, the property may produce income. Although one can argue that a seizure of property necessarily includes a seizure of its fruits, a Notice of Levy should also be served on the payor of the benefit to ensure that the Service receives the income the seized property produces. For example, when stocks have been seized, and before sale a dividend is declared, a Notice of Levy should be served upon the issuer of dividend. When rental realty is seized, a Notice of Levy should also be served on the tenant to insure that the rent is paid to the Service. If the rental realty is subsequently acquired or "bid in" by the government at a sale under section 6335, entitlement to rents during the redemption period provided by section 7506(d) is a matter of state law and must be referred to Area Counsel.

Be aware that section 106 of the National Historic Preservation Act (16 U.S.C. 470(f)) applies to any administrative seizure and sale of historic property (registered historic property or property that is eligible for registry) by the Service. See IRM 9.7.4.7.4.

3. Redemption

Once property is seized, it must be sold and the proceeds applied to the taxpayer's liabilities. See I.R.C. §§ 6335 and 6342. However, several things may happen to make a sale unnecessary: (1) redemption prior to sale; (2) release of levy; and (3) return of seized property. See Lesson 12 for further discussion of redemption.

Redemption before sale. Section 6337(a) permits the person whose property has been seized to redeem both real and personal property at any time before its sale by paying the taxes due and any expenses incurred in connection with the seizure and contemplated sale.

Redemption after sale. Section 6337(b); Treas. Reg. §301.6337-1. The taxpayer loses the right to redeem personal property after it is sold. However, real property may be redeemed within 180 days from the date of sale by any person having an interest in it. The right to redeem goes to the first qualified party exercising it. In Silver Bell Industries v. United States, 76-1 USTC P 9432 (10th Cir.1976), the taxpayer's attempted redemption was ineffective because the amount required to redeem was mailed on the last day of the redemption period, but was not received until after the period had expired. The amount required to redeem is the purchase price together with interest thereon at the rate of 20 percent per annum. This amount is to be paid directly to the purchaser. If the purchaser cannot be located in the county where the realty is situated, the redemption price is paid to the Area Director for the benefit of the purchaser. See Guthrie v. Curnett, 417 F.2d 764 (10th Cir. 1969).

4. Release of levy and return of property to taxpayer

a) Section 6343(a) requires a release of levy if:

(1) the liability for which such levy was made is satisfied or becomes unenforceable by reason of lapse of time,

(2) the release will facilitate collection of the liability,

(3) the taxpayer has entered into an installment agreement to satisfy the liability (unless the agreement provides otherwise),

(4) if the levy is creating an "economic hardship" due to the financial condition of the taxpayer, or

(5) the fair market value of the property exceeds the liability and release of the levy on a part of the property could be made without hindering the collection.

Section 301.6343-1 further explains these conditions. The Tax Court held in Lindsay Manor Nursing Home v. Commissioner, 148 T.C. No. 9 (2017) that this regulation permissibly limits economic hardship relief to individuals.

In Vinatieri v. Commissioner, 133 T.C. 392 (2009), the Tax Court held that respondent's Office of Appeals abused its discretion in a CDP hearing by upholding a proposed levy that would cause taxpayer an economic hardship under section 6343(a)(1)(D)). In addition, section 6343(e) requires the Service to immediately release a wage levy upon agreement with the taxpayer that the tax is not collectible.

b) Section 6343(d) authorizes the Service to return levied property if:

(1) the levy was premature or otherwise not in accordance with administrative procedures;

(2) an installment agreement is made for a liability included on the levy, unless the agreement provides otherwise;

(3) returning the property facilitates collection; or

(4) with the consent of the taxpayer or the National Taxpayer Advocate (NTA), returning the payment is in the best interests of the taxpayer (as determined by the NTA) and the government. Under section 301.6343-3(d), if the IRS makes a levy in violation of the law, it is in the best interest of the United States and the taxpayer to release the levy and the IRS will return to the taxpayer any property obtained pursuant to the levy.

Note that the taxpayer is requesting the return of the property; this is not a wrongful levy situation.

The provisions of section 6343(b) apply to section 6343(d) in the same manner as if the property had been wrongfully levied—e.g., the nine month or two year limitation for return of money—except that no interest is allowed under subsection (c).

5. Wrongful levy

Section 6343(b) authorizes the administrative return of property or money to its rightful owner when the Area Director determines that the property has been wrongfully seized. Section 7426 authorizes any person (other than the person against whom is assessed the tax out of which the levy arose) who claims an interest in the property to bring a wrongful levy suit.

On December 22, 2017, the nine-month period provided under section 6343(b) for making administrative claims and provided under section 6532(c) for bringing a wrongful levy action was extended to two years. The amendment to sections 6343 and 6532 applies to levies made after the December 22, 2017 enactment date and levies made on or before the enactment date if the nine-month period has not expired under section 6343. Pub.L. 115-97, Title I, § 11071(c) , Dec. 22, 2017, 131 Stat. 2092.

The statute of limitations for a quiet title action under 28 U.S.C. § 2410 is generally six years. 28 U.S.C. § 2401(a). The third party cannot bring a quiet title action, with its longer limitations period, as section 7426 is the exclusive remedy for third persons claiming a senior interest in property seized by the Service . Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910 (8th Cir. 1998); Winebrenner v. United States, 924 F.2d 851 (9th Cir. 1991); United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980). Similarly, while there is no incentive to do so since the 2017 amendment extending the nine month period to two years, the third party still cannot seek redress through a refund claim filed under 28 U.S.C. § 1346(a)(1). EC Term of Years Trust v. United States, 550 U.S. 429 (2007). Wrongful levy suits are discussed in the GL-1 Lesson on Judicial Proceedings related to Collection.

a) Section 6343(b) provides that the Area Director may return:

(1) The property that was seized.

(2) An amount of money equal to amount of money seized.

(3) An amount of money equal to that received by the United States from a sale of the property. See section 6343(c) for payment of interest with respect to the money returned.

b) Time limitations regarding wrongfully seized property.

(1) Specific property (including identifiable money; coin collections) in possession of the United States may be returned anytime. Section 6343(b).

(2) An amount equal to the amount of money seized or received from the tax sale may be returned anytime before expiration of nine months or two years (if the 2017 amendment applies) from the date of levy. Section 6343(b).

Section 301.6343-2(b) and (c) specify the manner for making a request for the return of wrongfully seized property.

A wrongful levy suit action must be brought within nine months or two years (if the 2017 amendment applies) of the date of the levy.

I.R.C. § 6532(c). However, if a request is made for return of property under section 6343(b), then the nine month or two-year period (if the 2017 amendment applies) shall be extended for a period of twelve months from the date of filing such request or for a period of six months from the date the Service denies the claim, whichever is shorter. I.R.C. § 6532(c)(2).

In Volpicelli v. United States, 777 F.3d 1042 (9th Cir. 2015), the Ninth Circuit held that the limitations period under section 6532(c) is not jurisdictional and may be equitably tolled. Numerous prior decisions have held that section 6532(c) is jurisdictional and not subject to tolling. See, e.g., Becton Dickinson and Co. v. Wolckenhauer, 215 F.3d 340 (3d Cir. 2000); Compagnoni v. United States, 173 F.3d 1369, 1370 n.3 (11th Cir. 1999); Miller v. Tony & Susan Alamo Found., 134 F.3d 910, 916 (8th Cir. 1998); Amwest Sur. Ins. Co. v. United States, 28 F.3d 690, 691 (7th Cir.1994); Williams v. United States, 947 F.2d 37, 40 (2d Cir. 1991); Dieckmann v. United States, 550 F.2d 622, 623 (10th Cir. 1977). .

6. Interference with levy

a) Against a Service officer. Section 7212 and 18 U.S.C. §§ 111 and 115 impose criminal sanctions for overt acts committed against a RO in the performance of his duties. Thus, force or threats of force (including threatening letters or communications) directed against ROs or members of their family that are intended to impede or to intimidate them in their official capacity constitute a criminal offense.

b) Concealing property. Any person who "removes, deposits or conceals" any property subject to levy with intent to defeat the collection of any tax is guilty of a felony. I.R.C. § 7206(4).

Any attempt to regain possession of property that has been seized constitutes a criminal offense *if* force is used. I.R.C. § 7212(b); 18 U.S.C. §§ 2232 and 2233.

c) Injunction. Section 7421 generally prohibits a court action to enjoin or restrain the collection of a tax. Section 7426, which provides for a wrongful levy suit, is a statutory exception to this general rule. Enoch v. Williams Packing and Navigation Co., 370 U.S. 1 (1962) sets forth an important judicial exception to the general rule. See also South Carolina v. Regan, 465 U.S. 367 (1984).

7. Service liability for rent following seizure

The United States may become liable for rent as a result of storing seized property on premises leased by the taxpayer. If the taxpayer has paid rent for the period during which the leased property is being used as storage, it is not necessary for the Service to pay rent. If however, the Service uses leased space during a period for which rent has not been paid, it is liable for rent payable to the landlord. If seized personal property consists of machinery or other property not easily transported or is comprised of a considerable number of assets, the RO should contact the landlord and try to arrange for storage of the property on the premises. This does not mean that the Service will necessarily become liable for the same rent and under the same conditions as the taxpayer had arranged. There is binding precedent in the Ninth Circuit (Smith v. U.S., 458 F.2d 1231 (9th Cir. 1972)), that the Service is liable for payment of reasonable storage costs because failure to do so would be a "taking" without compensation that is prohibited by the Fifth Amendment to the Constitution of the United States.

G. Sale

1. Authority

Section 6331(b), which grants the power to levy upon property or rights to property of the taxpayer, also authorizes the sale of such property. Section 6335 sets forth the notice requirements and procedures for selling seized property. In most cases, the sale is conducted by the Property Appraisal and Liquidation Specialists (PALS), not by ROs. The creation of the PALS function and the exclusion of ROs from sales was in response to section 3443 of the 1998 IRS Restructuring and Reform Act which directs the Service to design a system to remove RO participation in tax sales. This prohibition is interpreted to apply primarily to the RO who seized the property to be sold.

When appropriate, the PALS function secures the services of private contractors such as professional auctioneers to conduct the sale.

2. Conditions of sale

Treas. Reg. § 301.6335-1 sets forth the procedures to be followed before the sale of seized property. The procedures are conditions precedent to a valid tax sale. Failure to comply with them may cause a court to void the sale. See Aqua Bar & Lounge, Inc. v. United States, 539 F.2d 935 (3d Cir. 1976) (taxpayer challenged the validity of the seizure and sale of his property for failure to comply with section 6335 requirements).

a) Notice of Seizure. As soon as practicable after seizure, Form 2433, Notice of Seizure, is given to the owner of the property (or possessor of property, with respect to personal property). The Notice can also be left at the usual place of abode or business or mailed to the last known address, if the person/place of abode or business can't be readily located. The Sixth Circuit held in <u>Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing</u>, 377 F.3d 592 (6th Cir. 2004), affirmed on other grounds, 545 U.S. 308 (2005), that substantial compliance with section 6335(a) was sufficient, where the notice of seizure was mailed to the taxpayer before ascertaining whether or not the taxpayer/place of abode or business could be readily located.

b) Notice of Sale. As soon as practicable after seizure, and in the same manner as a Notice of Seizure, Notice of Sale must be given to the owner. The Code and Regulations also require publication of the Notice of Sale in a newspaper or posting of the Notice in a specified manner. <u>See</u> <u>Crump v. United States</u>, 2002-1 USTC P50217 (10th Cir. 2002). The notice must set forth the property to be sold, and the time, place, manner, and conditions of the sale. Failure to give the taxpayer a Notice of Sale or defective service of the Notice may cause the sale to be set aside. <u>Reece v. Scoggin</u>s, 506 F.2d 967 (5th Cir. 1975). <u>Goodwin v. United States</u>, 935 F.2d 1061 (9th Cir. 1991).

c) Time of sale. A sale must be held not less than 10 days nor more than 40 days from the date public notice is given. However, a sale may be adjourned when the parties' interests will best be served. A maximum period of one month is allowed for the adjournment and is measured from the original sale date set in the public Notice of Sale. Notice of adjournment and sale within the time period designated are essential to a valid sale. In <u>Anderson v. United States</u>, 44 F.3d 795 (9th Cir. 1995), the United States had failed to sell seized property within the period specified under section 6335, once notice of the sale had been given. The Ninth Circuit held that the Internal Revenue Service created an impermissible delay of the sale of the seized property beyond what the statute allowed.

Note: The Service is subject to another potential time constraint. Under section 6335(f), the owner of any seized property may request that the property be sold within 60 days of the request. The Service must comply unless it determines (and notifies the owner within the 60-day period) that compliance would not be in the best interests of the United States. <u>See</u> IRM 5.17.3.6.1.3. Failure to do so may have adverse consequences. In <u>Zapara v. Commissioner</u>, 124 T.C. 223 (2005), <u>reconsideration denied</u>, 126 T.C. 215 (2006), the Tax Court held that where the taxpayers requested that the Service sell the seized property and apply the proceeds to their outstanding tax liabilities, but the Service did not sell the property or determine that the sale would not be in the best interests of the United States, the taxpayers were entitled to credit for the value of the property as of the date by which it should have been sold under section 6335(f). The Ninth Circuit affirmed the Tax Court's decision that the taxpayer's account be credited because the Service assumed the risk of depreciation in the value of the levied property (stocks) when it failed to comply with section 6335(f) and that the relief granted by the Tax Court was a specific remedy, not an award of damages under section 7433. Zapara v. Commissioner, 652 F.3d 1042, 1046 (9th Cir. 2011), nonacq., A.O.D. 2012-06, IRB 2013-12 (March 18, 2013). In A.O.D. 2012-06, the Service announced that it does not agree with and does not acquiesce in the decision of the Ninth Circuit affirming the Tax Court's authority to order a credit to the taxpayer, and will continue to litigate in all other circuits (outside the Ninth Circuit) the position that section 7433 is the exclusive remedy for recovering damages resulting from the reckless, intentional or negligent disregard of any provision or regulation in connection with the collection of tax, including any violation of section 6335(f). See IRM 8.22.6.3.1(10) for procedures to follow if the taxpayer requests the sale of jeopardy levied property during a CDP hearing.

d) Place of sale. Normally within the county in which the property is seized, except if the Area Director determines higher bids may be received if the sale is outside such county.

3. Manner of sale

a) Seized property may be sold either by public auction or by public sale under sealed bids. The PALS should select the method that will bring the highest price.

b) If property is divisible and can be sold in parcels or piecemeal, only the portion necessary to cover the tax and expenses is seized and sold. If the property is not divisible, it may be sold in its entirety.

c) The seized property may be offered for sale as separate items, groups of items, or in the aggregate, whichever method is likely to produce the highest price.

4. Minimum price

a) Before the sale, the PALS must establish a minimum price for which the property will be sold. The minimum price is generally computed at 80 percent or more of the forced sale value of the property, less encumbrances having priority over the federal tax lien. The taxpayer is given 10 days to contest the determination of the minimum bid price and may hire an outside appraiser or request a valuation by a Service Valuation Engineer. See Policy Statement P-5-35.

Section 6335(e)(1)(A)(i) prohibits the Service from selling seized property for less than the minimum bid price. Such a sale constitutes an unauthorized collection action, which would permit an action for civil damages pursuant to section 7433. See section 6335(e)(4).

b) Section 6335(e)(1)(A)(ii) requires that, before sale of seized property, the Service must determine if purchase of the property at the minimum price is in the best interest of the government. If the determination is that purchase is in the government's interest, and if no bid meets or exceeds the minimum price, the Service will buy the property; otherwise it will be released back to the owner. After release, the property will still be subject to the lien and can be reseized. Any expenses of levy and sale are added to the amount of taxes due. If the property is "bid in" by the government at the minimum bid price, it becomes "acquired property" and may subsequently be sold under the authority of sections 7505 and 7506.

c) If the property is listed securities, the minimum bid is fixed at no less than 95 percent of the preceding day's closing market price. See Policy Statement P-5-35. Note: the Service can levy on publicly-traded securities, requiring brokers/banks to turn over proceeds after liquidating the taxpayer's interest in the securities. See H. 4. j) in this lesson.

d) The reason for establishing a minimum price is to avoid selling property at substantially less than the forced sale value of the taxpayer's interest in the property. The PALS may or may not announce the minimum bid at the sale.

e) When, after the sale has commenced, events indicate that the highest bid will be less than the predetermined minimum bid price, the PALS may do any of the following, whichever best promotes the interest of the government and the taxpayer.

> (1) Adjourn the sale for the purpose of re-evaluating the minimum bid price;
>
> (2) Release the levy under section 6343 on the basis that the value of the interest of the United States in the seized property is insufficient to cover the expenses of the sale;
> (3) Declare the property purchased by the United States for the minimum bid price; or
>
> (4) Release property to taxpayer pursuant to section 6335(e).

If the bids exceed the minimum price, the property must be declared sold to the highest bidder.

No minimum bid price is necessary in a sale of perishable goods under section 6336.

5. Perishable goods

The normal sale requirements are modified when the property seized is perishable within the meaning of section 6336. Perishable is defined as property liable to perish or become greatly reduced in price or value by keeping, or property that cannot be kept without great expense. The RO needs to document in the case history specifically why section 6336 is applicable. IRM 5.10.4.17(1). Section 6336 should not be used to get around the normal sale requirements. The owner must still be given a Notice of Seizure and Notice of Sale containing the Service's appraised value of the property. The procedures that provide for taxpayer input regarding the minimum bid price do not apply. The requirement that the Notice of Sale be published does not apply. The sale may take place the same day the property is seized, rather than after the 10-day period normally required by section 6335. See Omnibus Financial Corp. v. United States, 566 F. 2d 1097 (9th Cir. 1977). ROs are not prohibited from conducting sales of perishable goods; but it is recommended that the PALS conduct these sales whenever possible. IRM 5.10.4.1.1(1); IRM 5.10.4.17.1(1).

6. Accounting of sales of seized property

Section 6340 requires the Service to provide a written accounting of all sales of seized property, whether real or personal, to the taxpayer. The accounting consists of a copy of the record that the Service is required to keep of the sale and a statement of the amount from the sale applied to the taxpayer's account and any remaining balance.

7. Default by purchaser

a) If payment in full upon acceptance of the bid was a term of sale, the property may be resold if immediate payment is not made. I.R.C. § 6335(e).

(b) Where deferred payment is permitted (see I.R.C. § 6335(e)(3)), and the buyer fails to pay pursuant to the payment agreement, the United States may sue the purchaser for breach of contract or declare the sale void, re-advertise, and resell. The amount paid by the defaulting bidder under a deferred payment agreement is forfeited to the United States. The forfeited amount is paid into the Treasury and is not applied against the taxpayer's account. The new purchaser takes possession free and clear of all claims of the defaulting purchaser.

The amount that is forfeited under section 6335(e)(3) should not be confused with other situations in which the Service may seek damages for nonperformance in connection with acquired property sales. Section 301.7506-1(b)(5) limits to $200 the liquidated damages the United States may claim in these other situations.

8. Warranties

The Service sells only the taxpayer's right, title, and interest in the seized property. If it should later be determined that the taxpayer had no right, title, or interest in the property sold, as a legal matter, the buyer must bear the loss. *Caveat Emptor* is generally the rule for tax sales.

a) The PALS conducting the sale should state that no warranties are made regarding the taxpayer's title to the property. The property is offered for sale "as is" and without recourse against the United States. See Treas. Reg. I.R.C. § 301.6335-1(c)(5)(iii).

b) Only the taxpayer's right, title, and interest in and to the seized property is sold, subject to any prior mortgages, encumbrances or liens in favor of third parties. See section 301.6335-1(c)(5)(iii).

c) The taxpayer may be allowed to explain the condition of his/her title to prospective bidders. Senior lienors of personalty are permitted to announce their liens before the tax sale and to conduct a foreclosure sale immediately after the tax sale. However, the Service will still sell and release personalty to the highest bidder.

9. Certificate of sale and deed of real property

a) Personal property. Upon payment of the purchase price in full, a Certificate of Sale, Form 2435, is issued, and possession of the personal property must at that time be delivered to the successful bidder. I.R.C. § 6338. Section 6339 states that the Certificate of Sale transfers to the purchaser all the taxpayer's right, title, and interest in the property sold, and that the Certificate is prima facie evidence of the right of the Service to make the sale and conclusive evidence of the regularity of the sale proceedings. The Certificate of Sale constitutes authority for the transfer of corporate stock and title to motor vehicles. It also constitutes a receipt if the property sold is securities or other evidence of debt. Treas. Reg. § 301.6339-1(a).

b) Real property. The purchaser receives a Certificate of Sale upon payment of the purchase price. Some purchasers record the Certificate of Sale to preclude transfer by the taxpayer to a bona fide purchaser for value. Whether the purchaser is entitled to possession of the property or to any rents from it before the expiration of the redemption period is a question of state law. See Peterson v. Jurras, 40 P.2d 257 (Sup. Ct. Cal. 1935); Carpenter v. Hamilton, 147 P.2d 563 (Sup. Ct. Cal. 1944).

After the expiration of the period of redemption, the purchaser receives a deed to the real property upon surrender of the Certificate of Sale. (If the purchaser cannot produce the Certificate of Sale, the purchaser must execute an Affidavit of Lost Certificate, drafted by Area Counsel.) A deed to real property is prima facie evidence of the facts stated therein and operates as a conveyance of all the taxpayer's right, title, and interest in the property at the time the tax lien attached to it. Treas. Reg. § 301.6339-1(b). But see Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975) (regarding suit by a taxpayer to set aside a tax sale that did not comply with I.R.C. requirements).

10. Junior and senior liens

Section 6339(c) provides that a Certificate of Sale of personalty or a deed to real property discharges the property from all liens over which the tax lien had priority. Liens senior to the federal tax lien, however, are not extinguished by a sale even when the United States is declared purchaser of the property.

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), although not a federal tax case, sets the constitutional due process standards for notice by publication. Mennonite held that notice by publication of a county tax sale was inadequate notice to a senior lienor of record where Indiana state law provided that the tax sale extinguished all liens on the property. In Verba v. Ohio Casualty Ins., 851 F.2d 811 (6th Cir. 1988), the court applied Mennonite Board to the Service’s notice by publication of its administrative tax sale and held that such notice violated the due process rights of a lienor whose junior lien was extinguished under sale. Subsequently, the Service changed its procedures to provide that notice be provided to all junior lien holders and interests of record. See IRM 5.10.4.8(6).

11. United States as purchaser

Section 6335(e) states the rule for Service purchase of property when no bid meets the minimum bid price.

a) If the United States buys the property, the deed is executed with the United States as grantee and recorded.

b) Under sections 7505 and 7506, personal property and real property, respectively, acquired by the United States may be sold for the government's own account and not that of the taxpayer.

c) A taxpayer or his heirs or legal representatives may redeem property for up to two years from the date of acquisition by the United States if it has not yet been sold pursuant to section 7506(a). Section 7506(d).

12. Application of proceeds of levy

Proceeds from the sale of seized property are to be applied first against the expenses of levy and sale, secondly against any unpaid tax specifically imposed against the seized property (for example, alcohol or tobacco tax), and then against the tax liability for which the levy was made. Any surplus is to be credited or refunded to the persons legally entitled to it. I.R.C. § 6342.

a) Application among Several Liens. If property is seized and sold to enforce several outstanding tax liens, the proceeds must be applied toward satisfaction of the tax liens in the order of their priority. If among the several tax liens there are intervening liens of other creditors, the sale proceeds are similarly applied in order of their priority.

b) Surplus Proceeds. The persons entitled to the surplus may be others with liens on the property or the taxpayer. However, any party other than the taxpayer who claims a right to the surplus must establish a superior claim over that of the taxpayer. If such a claim is denied, a suit may be maintained against the United States for the surplus under section 7426(a)(2). If there are conflicting claims to the surplus that cannot be resolved, the United States may bring an interpleader action in federal district court. See United States v. Sage, 566 F. 2d 1114 (9th Cir. 1977) where the Court held that surplus proceeds never go to satisfy senior lienors since the federal tax sale does not affect their interests. Any interest of a lien holder that is superior to the federal tax lien remains on the property after the sale and, accordingly, would not prime a claim to surplus proceeds.

13. Voidable tax sales

The provisions of the Code relating to the sale of seized property are for the taxpayer's protection. Noncompliance with the provisions of section 6335 renders a sale voidable by the taxpayer-- not void per se. Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975); Johnson v. Gartlan, 470 F.2d 1104 (4th Cir. 1973).

a) A taxpayer may file suit to rescind a sale where the Government has failed to follow the section 6335 requirements. See, e.g., Kabakjian v. United States, 267 F.3d 208 (3d Cir. 2001); Goodwin v. United States, 935 F.2d 1061 (9th Cir. 1991).

b) A taxpayer must cast the lawsuit as a suit to quiet title in order to invoke the waiver of sovereign immunity pursuant to 28 U.S.C. 2410. See, e.g., Kabakjian, 267 F.3d at 212; Goodwin, 935 F.2d at 1063. The taxpayer's actual notice may be a defense for the government. Kabakjian, 267 F.3d at 212 (quiet title claim fails because taxpayer had actual notice and section 6339(b)(2) requires only substantial compliance).

c) In contrast, there is no statutory protection for the purchaser of real property when the Service violates section 6335. Traditionally, purchasers of property at a tax sale did so at their own peril. See, e.g., Anderson v. Zenali, 96-2 USTC P50448 (C.D. Cal. 1996).

d) However, once the sale has occurred, the Service has no statutory authority to void a procedurally defective tax sale and cannot of its own accord resell the property. Koby v. United States, 86 AFTR 2d 5194 (Fed. Cl. 2000).

H. Nature of Property Seized

1. Real or personal property

State law determines whether property is realty or personalty. The characterization of property as realty or personalty may determine the extent of the taxpayer's redemption rights, as previously discussed. See also the discussion of different types of property interests in the GL-1 Lesson for Property to which the Federal Tax Lien Attaches.

a) Improvements. Additions to real estate to make it useful for another purpose or more useful for the same purpose. State law controls who is the owner of improvements.

b) Fixtures. A chattel that is a permanent part of the realty. See Equibank v. United States, 749 F.2d 1176 (5th Cir. 1985) (chandeliers were "component parts" of residence subject to mortgage and not separate movables which the Service could seize).

c) Chattels real. Interests in or arising out of real property which have fixed and determinate durations (e.g., 10-year lease). State law determines whether such interests are realty or personalty.

2. Forms of ownership

The effect of a levy may depend on the way in which the taxpayer holds the property.

a) Joint tenancy. This is an estate where two or more joint tenants each own an undivided interest in the whole of the property with right of survivorship. Each tenant is entitled to share equally in the rents, income, and profits from the estate. Their interests are subject to sale during each tenant's lifetime. A levy and sale of one tenant's interest terminates the joint tenancy. The purchaser of the interest thereafter holds it as tenants in common with the other tenant(s). Rupp v. Kahn, 55 Cal. Rptr. 108 (1966).

When all joint tenants are liable for the tax, the Service can seize and sell the entire property. When one tenant dies and the surviving tenant owes tax, the entire property can be seized. Generally, when the taxpayer-tenant predeceases the other tenants, the tax lien is extinguished. But state law must always be examined to verify that the tax lien was extinguished. See United States v. Librizzi, 108 F.3d 136 (7th Cir. 1997) (because state law preserved certain liens, after the taxpayer-joint tenant died, the federal tax lien remained on the property).

b) Tenancy by the entirety. This is an estate where a husband and wife each own the whole property as one, with right of survivorship. If the husband and wife are jointly liable, the long standing rule is that the federal tax lien attached to the tenancy by the entirety. The more difficult question was whether the federal tax lien attached when only one spouse had a tax liability. This was answered in United States v. Craft, 535 U.S. 274 (2002), where the Supreme Court held that the federal tax lien attached to the tenancy by the entirety when only one spouse had a tax liability. The Craft decision applies retroactively, and the Service may levy on a taxpayer’s interest in a tenancy by the entirety. Hatchett v. United States, 330 F.3d 875 (6th Cir. 2003). However, levying on the taxpayer’s interest in a tenancy by the entirety may not always be a practical solution, as there may be a dearth of purchasers at the administrative sale—i.e., purchasers willing to buy a part interest in property where the non-taxpayer spouse still holds an interest. If collection action is to be taken, foreclosing the federal tax lien may be the better option in many situations. See Notice 2003-60, 2003-39 I.R.B. 643, for further guidance on collection issues raised by Craft. As with joint tenancy with right of survivorship, generally when the taxpayer predeceases the non-liable tenant, the taxpayer’s interest in the property is extinguished and the lien ceases to encumber the property post-death. State law determines whether the death of the taxpayer extinguishes the taxpayer’s interest in the property. See Notice 2003-60, 2003-39 I.R.B. 643. But see, e.g., Paternoster v. United States, 640 F. Supp. 2d. 983, 992 (S.D. Ohio 2009) (a federal lien attached to the taxpayer’s property that was held pursuant Ohio’s survivorship tenancy statute with his non-liable wife prior to the death of the taxpayer continues to encumber the property after the death of the taxpayer under Ohio law).

c) Tenancy in common. This estate is similar to joint tenancy without the right of survivorship. The tax sale purchaser holds the property as a tenant in common with the other tenant(s). Since this estate does not include the right of survivorship, the Service may levy and sell subsequent to the taxpayer-tenant's death to collect assessed taxes or to enforce the estate tax lien.

d) Community Property. The primary issue is whether the property is separate (although held by spouses as joint tenants) or community. The separate tax liability of the delinquent spouse may be satisfied out of that spouse's one-half interest in the community property. In addition, state law may provide that the nonliable spouse's community interest is liable for the delinquent spouse's separate tax liability. Creditors' rights against community property vary widely depending on the law of the particular community property state.

e) Dower. At common law, dower was the life estate given to a widow in one-third of all inheritable real property which her deceased husband owned during their marriage. Statutory dower exists in either surviving spouse as to both real and personal property. The Service must examine the pertinent state law to determine the effect of dower in any particular case. For example, in Rev. Rul. 79-399, 1979-2 C.B. 398, the facts were that under state law, a spouse’s dower or statutory right could not be defeated by the other spouse’s conveyances or alienations after the marriage or by a lien in favor of the other spouse’s creditors that become effective after the marriage. Rev. Rul. 79-399 concluded that a federal tax lien arising before the death of a taxpayer is not superior to a competing claim by a surviving spouse for a dower or statutory right if the marriage occurred before the federal tax lien arose and if, under state law, such dower or statutory interest cannot be defeated by the other spouse or by that spouse’s creditors prior to death.

f) Curtesy. Traditionally, curtesy provided a husband a life estate in all real property if he survives his wife, and there is a child of the marriage. The dower analysis, above, applied equally to curtesy.

g) Homestead. In United States v. Rodgers, 461 U.S. 677 (1983), the Supreme Court held that a state homestead right does not bar a judicial foreclosure of the family home to satisfy the tax liability of one of the spouses. However, the nondelinquent spouse must be compensated from the proceeds for the loss of her homestead interest. In dicta, the Court noted that the Service could levy and sell only the taxpayer’s interest in the homestead, not the entire property. Rodgers, 461 U.S. at 695. Because the nondelinquent spouse’s interest is not affected by the levy, the Service is not required to compensate the nondelinquent spouse.

h) Future interests. Interest in land in which possession is postponed until some future event. If the future interest constitutes property or rights to property, it may be levied upon and sold. See Treas. Reg. §301.6331-1(a). If it is a mere expectancy or contingency, there is no property interest to which the levy can attach.

3. Levy on realty

A writ of entry is not necessary to seize unimproved realty, a business building, or a private residence where no entry will have to be made. Posting of a Notice of Levy and Warning Notices are sufficient to effect levy.

4. Levy on personal property

a) Salary

(1) A section 6331(a) levy reaches accrued salary, wages, or commissions, but not future compensation that is contingent upon the performance of future services, except as provided in section 6331(e). Salaries of federal, state, and other governmental employees are subject to levy. Treas. Reg. § 301.6331-1(a)(4).

(2) State laws limiting the amount of wages that may be garnished by creditors are not effective against a federal tax levy. Treas. Reg. § 301.6334-1(c). Section 6334(a) sets forth the only exemptions from a federal tax levy. For example, section 6334(a)(8) exempts from levy an amount that is necessary to comply with a judgment ordering the taxpayer to pay child support.

(3) Section 6334(a)(9) and 6334(d) provide for a minimum exemption from levy for wages, salary, and other income based upon the standard deduction and personal exemptions.

(4) Section 6331(e) provides that the effect of a levy on salary or wages (but not other income) shall be continuous from the date the levy is made until the liability is satisfied or becomes unenforceable by reason of lapse of time. See United States v. Jefferson-Pilot Life Insurance, 49 F.3d 1020 (4th Cir. 1995) (section 6331(e) is applicable to commissions). This means that a new levy does not have to be made on each payment, but the original levy continues to attach to wages as they are earned.. When the liability is either satisfied or becomes unenforceable, Form 668-D "Release of Levy/Release of Property From Levy" is given to the party levied upon to release the levy. Policy Statement P-5-29 states that the levy is limited to “the take home pay of the delinquent taxpayer unless it is determined that the taxpayer is voluntarily allotting his/her pay to an extent that would defeat the purpose of the levy.”

b) Bank accounts

Regardless of whether bank accounts are characterized as savings, checking, special interest, certificate of deposit, etc., if the taxpayer has property or rights in the deposit, the United States may levy upon that interest. The levy is accomplished by serving a Notice of Levy on the bank, or if the bank has several branches, on the branch where the taxpayer maintains his account. The levy will reach all funds on deposit at the time of service. Under certain circumstances, a levy may reach deposits of a taxpayer in an office of the bank which is outside the United States. See Treas. Reg. § 301.6332-1(a)(2). Banks are required to hold the accounts 21 days with interest accruing to be surrendered to the Service on the 21st day. I.R.C. § 6332(c).

(1) A related question is whether a levy on a branch bank seized the taxpayer's funds at a different branch of the same bank. There are no definitive cases involving Service levies. However, in commercial litigation, the separate entity rule states that branch offices of a bank are separate business entities, so execution must be made on the particular branch bank in which the depositor maintains his account. Det Bergenske Dampskibssekskab v. Sabre Shipping, 341 F.2d 50 (2d Cir. 1965). Cf. Bank Leumi Trust Co. of N.Y. v. Klein, 1993 WL 403967 (S.D.N.Y. 1993). It appeared that Digitrex v. Johnson, 491 F. Supp. 66 (S.D.N.Y. 1980), recognized an exception to the separate business entity rule: where the bank's computer gives it the capability to locate and freeze an account in a branch office, a creditor may be able to enforce a levy issued to the bank's main office to attach funds on deposit in a branch bank. However, in Limonium Maritime, S.A. v. Mizushima Marinera S.A., 961 F. Supp. 600, 607 (S.D.N.Y. 1997), the district court limited Digitrex to situations where (1) the restraining notice is served on the bank's main office; (2) the bank's main office and branches are within the same jurisdiction; and (3) the bank branches are connected to the main office by high-speed computers and are under the centralized control of the main office. See also, Woodlands, LTD. v. Westwood Insurance Co., 965 F. Supp. 13 (D. Md. 1997) (following Limonium). See IRM 5.17.3.9.4.4 for more information.

(2) After the Supreme Court's Decision in Craft, 535 U.S. at 288, the Service may levy on a joint bank account held in tenancy by the entirety to satisfy the liability of only one spouse.

(3) Trust or special account. In the absence of evidence that an account designated "special account" created a trust and that the taxpayer-depositor no longer has a beneficial interest in the deposit, a bank must honor a levy served upon it to reach the taxpayer's interest in such account.

A "Totten Trust" is a trust created by deposit by one person in his own name as trustee for another. It is revocable at will until the depositor dies or completes the gift in his lifetime, as by delivery of the passbook to the beneficiary. In re Totten, 71 N.E. 748 (N.Y. 1904). A levy will reach the taxpayer's interest in a Totten Trust if he is the depositor and the trust is still tentative, e.g., he retains signature authority. A levy will also reach a taxpayer's interest if he is the beneficiary, and the trust has become unrevocable.

(4) Outstanding checks. When the taxpayer has drawn checks on an account before the levy is served, but the checks have not been presented to the bank until after the levy is served, the bank has property of the taxpayer which is reached by the levy. See The Citizen's and People's National Bank of Pensacola, Florida v. United States, 570 F. 2d 1279 (5th Cir. 1978), which discusses the UCC requirement that the bank make a definite decision to honor the check prior to the levy. The Service position is that if checks have been presented, but not honored prior to service of the Notice of Levy, the property is reached by the levy.

(5) Checks made payable to the taxpayer. The Service must have physical possession of a check made payable to a taxpayer. The seized check is stamped with a statement that the Area Director has seized the rights of the taxpayer in the check. The Area Director endorses the check payable to the United States and demands payment from the bank. See IRM 5.10.3.14.1.

(6) Unpaid checks or money orders. Section 6311(c) provides that if any certified, treasurer's or cashier's check, or any money order received by the Service for payment of taxes is not duly paid, the United States has a lien for the amount of the check upon all assets of the bank or issuer on which the check or money order was drawn. To enforce the 6311 lien, the United States must bring a foreclosure action. See United States v. Second National Bank of North Miami, 502 F.2d 535 (5th Cir. 1974).

(7) A levy on a deposit made by a taxpayer to his account, which deposit has not yet cleared, is effective since the tax lien attaches to after-acquired property. Bank of America National Trust and Savings Association v. Socrates Mamakos, 509 F.2d 1217 (9th Cir. 1975).

(8) Money on deposit that is represented by certificates of deposit (CDs) in the hands of a delinquent taxpayer is within the scope of a bank account and subject to levy. Rev. Rul. 73-12, 1973-1 CB 601. However, the Service has taken the position that, with respect to negotiable CDs and the rights obtained by a holder in due course of such instruments, the government must seize the CD and present it to the bank in order to obtain the money on deposit. Rev. Rul. 75-355, 1975-2 CB 478.

c) Licenses, franchises, memberships

(1) The Supreme Court looks initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as "property" or "rights to property" under the Internal Revenue Code. Drye v. United States, 528 U.S. 49, 57 (1999). In Drye, a case involving attachment of the tax lien to inheritance rights, the Court noted approvingly the decision in 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354 (3rd Cir. 1986) (although a liquor license did not constitute property under state law, it was property under the Internal Revenue Code). Drye, 528 U.S. at 57 n.5. After recognizing that state-law rights that have pecuniary value and are transferable fall within section 6321, the Court noted, without deciding, that transferability of an interest is not always essential to determining that a property interest exists under the Internal Revenue Code. Drye, 528 U.S. at 59 n.7.

(2) When a license or franchise is sold at a tax sale, the purchaser must comply with the reasonable rules and regulations of the licensing agency to effect transfer of the license. United States v. California, 281 F.2d 726 (9th Cir. 1960). Tax sales of licenses are conducted on condition that the transfer to the purchaser be approved by the licensing authority. The Notice of Sale of a license should contain a statement that the sale is conditioned on the acceptance and approval of the purchaser by the licensing agency. The Service has allowed a purchaser to escrow the amount paid for a license pending approval by the licensing agency.

(3) Manner of Seizure. As with tangible property, a license or franchise must be seized and reduced to Service possession or constructive possession. One method of seizure is to take physical possession of the license certificate and return it to the issuing agency. In the case of a liquor license, where the taxpayer refuses to surrender the license certificate, seizure may be effected by

sending Form 668-B, Levy, to the state alcoholic beverage control office.

(4) Examples of licenses subject to seizure:

- Liquor licenses. See, e.g., In re Terwilliger's Catering Plus, Inc., 911 F.2d 1168 (6th Cir. 1990); 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354 (3d Cir. 1986), cited approvingly, Drye, 528 U.S. at 57 n.5.

- Taxicab licenses.

- State common carrier franchises.

- Certificates of Public Convenience and Necessity (ICC). In re Rainbo Express, 179 F.2d 1 (7th Cir. 1950), cert den. subnom. Richardson v. National Suceptance Co., 339 U.S. 981 (1950).

- Certificates issued under the Federal Aviation Act.

- Seat on the stock exchange. Board of Trade v. Johnson, 264 U.S. 1 (1924).

- Membership on a grain or livestock exchange.

Note: FCC broadcasting licenses. The Service will not administratively seize broadcast licenses issued by the FCC. IRM 5.10.1.12.2. Additionally, in light of United States v. Corry Communications, 2011 WL 4572012 (W.D. Pa. 2011), and discussions with the Department of Justice, the Service will not bring suits to foreclose the tax lien on FCC licenses. The Service, however, may file a suit to appoint a receiver to sell the license under FCC supervision, without asserting that the tax lien attaches to the license.

d) Trusts

(1) Since a trustee holds bare legal title for the benefit of others, neither the corpus of the trust nor its income may generally be seized to satisfy the trustee's individual tax liability. However, if the trustee-taxpayer is also a beneficiary of the trust, his interest is subject to levy.

(2) When a taxpayer-settlor establishes a trust after the assessment

of taxes, tax liens arising from those assessments have already attached to the property prior to the conveyance of legal title to the trustee. A levy may be made upon the trust corpus.

(3) When a taxpayer-beneficiary has a right to a distribution of income or corpus, and his right is not subject to the discretion of the trustee, a levy may be served upon the trustee to seize the taxpayer's right to the distribution. Rev. Rul. 55-210, 1955-1 CB 544, states that where a taxpayer has an unqualified right under a trust or contract or through a chose in action, to receive periodic payments or distributions of property, the federal tax lien attaches to the entire right. The Notice of Levy reaches, in addition to payments and distributions then due, any subsequent payments or distributions that will become due. See also Treas. Reg. § 301.6331-1(a).

(4) Spendthrift trust provisions do not limit the government's right to levy, regardless of whether the prohibition on alienation is embodied in the trust instrument or created by state exemption statutes. Bank Ohio Trust Co. v. United States, 80 F.3d 173 (6th Cir. 1996); United States v. Rye, 550 F.2d 682 (1st Cir. 1977).

(5) Family trusts are generally considered shams, and the use of nominee liens and levies should be considered to reach the trust assets. See, e.g., Muhich v. Commissioner, 238 F.3d 860 (7th Cir. 2001); Schulz v. Commissioner, 686 F.2d 490 (7th Cir. 1982).

e) Partnerships

(1) Although a partner's interest in the partnership can, as a legal matter, be seized and sold to satisfy a partner's individual tax liability, the Service may be able to collect more through obtaining a charging order and foreclosing against the partner's interest. See Bohnus v. Amerco, 602 P.2d 469 (Ariz. 1979); United States v. Robbins, 235 F. Supp. 353 (E.D. Ark. 1964). The Service may not seize partnership property to satisfy a partner's tax liability. Rev. Rul. 73-24, 1973-1 CB 602; Stuart v. Willis, 244 F.2d 925 (9th Cir. 1957).

(2) A general partner is jointly and severally liable for the debts of the partnership. Ballard v. United States, 17 F.3d 116 (5th Cir. 1994). The tax liability of a partnership may be satisfied out of partnership property, as well as from the property of each general partner. See, e.g., United States v. Wright, 57 F.3d 561 (7th Cir. 1995); Ballard v. United States, 17 F.3d 116 (5th Cir. 1994).

(3) In United States v. Galletti, 541 U.S. 114 (2004), the Supreme Court held that a timely assessment of a partnership's employment tax liability permits the Service to collect the liability in a bankruptcy case filed by the general partners who were derivatively liable for the taxes under state law. The Service was not required to make separate assessments against the original partners. While the Court did not directly address administrative collection of partnership liability, the opinion in Galletti does not alter the Service's longstanding position that it may administratively collect a partnership's employment taxes from general partners based on their derivative liability under state law. See Chief Counsel Notice 2005-003 (January 19, 2005).

f) Accounts receivable

Service of Notice of Levy upon the taxpayer's debtor provides the Service with alternative collection options. The Service could administratively sell the account receivable, or the Service could take payment from the levied-upon party. Cash v. U.S., 961 F.2d 562 (5th Cir. 1992).

g) Chose in action

This is an intangible personal right not reduced to possession but recoverable by action at law. A levy reaches only what the taxpayer is entitled to receive under the contract. When a taxpayer has instituted suit to recover property or damages, a Notice of Levy is served upon the taxpayer and his attorney, as well as on the defendant and defendant's attorney. Should the plaintiff-taxpayer obtain a judgment, Notices of Levy should again be served before payment is made by the defendant.

h) Insurance

Section 6332(b) permits the Government to levy against the cash loan value of a life insurance (or endowment contract) without resort to the foreclosure suit. A levy on an insurance policy constitutes a demand by the Secretary or his delegate for payment of the cash loan value (with certain adjustments) and the exercise of the right of the taxpayer to the advance of such amount.

A lien foreclosure action is used to collect the cash surrender value of an insurance policy. However, a suit to foreclose the tax lien on life insurance policy is disadvantageous to both the government and the taxpayer. Such a suit is a cumbersome method of collection. The consequences are more serious for the taxpayer as the suit, if successful, cancels the policy and completely eliminates the insurance coverage.

In United States v. Bess, 357 U.S. 51 (1958), the Court ruled that the deceased taxpayer-insured had a property right in the cash surrender value of life insurance policies and that the government's lien was enforceable against his widow. The tax lien, however, did not attach to the proceeds.

i) Leasehold

The right of a taxpayer to occupy premises for a fixed period of time pursuant to a lease agreement is property that may be seized and sold, notwithstanding any clause prohibiting assignment without lessor's consent. This right should be distinguished from the right to rental payments, which can be reached by levy.

j) Securities and notes

Stocks, mutual funds, bonds, debentures, notes, etc., are evidence of an obligation to pay money or of the right to participate in the earnings and distribution of corporate or other property. When the Service seizes a note payable in installments, the debtor is obliged to pay the installments to the United States. Since the right to deferred payment is fixed, successive levies are not required. To obtain payment of the debt owing on a note or bond, service of Notice of Levy upon the maker is sufficient. If the Service wishes to sell a negotiable instrument, it must actually seize it. <u>See</u> Rev. Rul. 75-554, 1975-2 CB 478.

Certain obligations of the United States, such as Treasury bills, notes, bonds, and savings bonds (as well as obligations of state and local governmental bodies) are property or rights to property to which federal tax liens attach and may be levied on to collect the holder's delinquent taxes. Treasury bills, notes, and bonds are held electronically; they are not paper securities like some savings bonds. After serving a notice of levy, the Service may choose to either sell the taxpayer's interest or wait until the bill, note, or bond matures and obtain the money. Note that federal law, rather than state law, controls the rights and duties of the United States with respect to commercial paper issued by it, as well as all other obligations of the Government. <u>Clearfield Trust Co. v. United States</u>, 318 U.S. 363 (1943). Therefore, determining the nature and extent of the taxpayer's interest in a United States security will require examination of the law and regulations governing the specific security.

A levy may be made on a brokerage firm (banks, etc.) to seize a taxpayer's stock and mutual funds. Generally, the Service will demand a broker turn over the proceeds from the liquidation of the taxpayer's interest in publicly-traded stock in response to a levy, avoiding the section 6335 procedures for seizure and sale.[1] This is the case whether the stock is

[1] This rule does not apply to the taxpayer's shares in a closely-held corporation, where the Service cannot arrange for the sale of the stock through the broker. In such situations, the Service must seize and administratively sell the

certificated or uncertificated. Collection employees issue a notice of levy requesting the broker to liquidate the stock and remit the proceeds. Kane v. Capital Guardian Trust Co., 145 F.3d 1218 (10th Cir. 1998) (Service of a levy requires the broker to redeem the taxpayer's interest and remit the funds). The broker may charge the appropriate commission or fee under the agreement with the taxpayer. If the broker refused to sell the stock after the RO served the levy, a suit to foreclose the federal tax lien, as well as filing suit for failure to honor the levy should be considered. To prevent the taxpayer from selling the shares during the pendency of a lien foreclosure suit, the Government should seek an injunction directing the taxpayer to retain the shares or deposit them with the clerk of the court.

k) Safe deposit boxes

Ordinarily two keys are used to open a safe deposit box: A master key owned by the company that owns the box and an individual key held by the person who rents the box. If the taxpayer will not cooperate in opening the box, it is unlikely that the company that owns the box will either. Seizure is made by service on the company of a copy of the Notice of Federal Tax Lien, a Notice of Levy, and a Notice of Seizure, Part 2 of which is served on the taxpayer. The taxpayer's access to the box should be barred by sealing it with Publication 787, Warning-United States Government Seizure. If the taxpayer still refuses to open the box, access to it may be gained through a writ of entry or a suit to open the safe deposit box. See IRM 5.10.3.15; IRM 5.10.3.15.1.

l) Cash register contents

If the taxpayer or person in possession of the cash register will not consent to opening it for a Service seizure, the RO must obtain a writ of entry before he can seize the contents. See IRM 5.10.3.14.

m) Alimony

A Notice of Levy served upon the payor spouse will reach the right of the payee spouse to alimony payments. See United States v. Owen Rye, 550 F.2d 682, (1st Cir. 1977), rev'g 390 F. Supp. 528 (D. Mass. 1975). A seizure made to collect a delinquent spouse's alimony will not reach that part of a payment that is for child support. Section 6334(a)(8).

n) Alcoholic beverages

IRM 5.10.3.13 permits the seizure and sales of a taxpayer's alcoholic beverages but includes additional instructions that must be followed. Any opened bottles or containers are excluded from seizure.

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shares, or refer the case to counsel for a lien foreclosure suit. Also, the Service's position that it can demand that brokerage firms liquidate stock does not prohibit the Service from administratively seizing and selling stock when it chooses to do so because, for example, the stock is represented by paper certificates. .

o) Bail

Bail is the posting of security for a defendant's appearance in court. The federal tax lien attaches to property deposited by the taxpayer in lieu of bail. Although the deposited property is in *custodia legis*, it may be seized by levy when it would otherwise be returned to the taxpayer. If the property was deposited on behalf of the taxpayer by a third person, there may be no property right of the taxpayer in the deposit. See United States v. Badger, 930 F.2d 754, 756-57 (9th Cir. 1991) (holding that there is no requirement that the Service prove what portion of the bond represents the taxpayer's property and that the court should honor the levy).

p) Coin, currency, or stamp collection

The taxpayer is asked to arrange for its sale through a dealer, as this may yield the best price. The collection can also be administratively sold.

q) Condemnation awards

The Service may seize the taxpayer's right in a condemnation award. A Notice of Levy should be served upon the appropriate governmental official of the unit charged by the court to pay the award.

r) Debts

Debts owing to a taxpayer are subject to levy and are reduced to possession by service of a Notice of Levy upon the debtor. When the debtors are joint and several, a levy may be served on any one of them to reach the entire debt owed the taxpayer.

s) Dividends

When a dividend is declared, a stockholder becomes the creditor of the corporation with a right to be paid a sum certain at a future time. A Notice of Levy should be served on the corporation after the date of declaration and on the designated paying agent before the date set for payment.

t) Narcotics and dangerous drugs

These substances may be seized; however, coordination with the Drug Enforcement Administration is required for disposing of them. If a public sale is held, only an authorized person is permitted to buy them. See IRM 5.10.1.12.5 and 5.10.3.19.

u) Limited Liability Company ("LLC")

An LLC is a hybrid business entity created under state law, which has attributes of both a partnership (or, if a single owner, a sole proprietorship) and a corporation. The owners of an LLC have membership interests in the LLC. Except as otherwise provided in the operating agreement, a membership interest in an LLC entitles a member to share the profits and losses of the LLC, to receive distributions from the LLC, and to vote and participate in the management of the LLC. A member of an LLC resembles a stockholder of a corporation in that a member is not liable for the debts of the LLC. LLC members are subject to the same alter-ego theories (e.g., "pierce the LLC veil") as shareholders of a corporation. State law provides that an LLC may own property in its own name. State law also provides that a member has no interest in specific property of the LLC.

<u>Federal income taxation of LLC</u>: Section 301.7701-1 et seq. provides a framework for the federal tax classification of entities. Under these regulations, the classification of an LLC will depend on the number of the LLC's regarded owners for U.S. federal income tax purposes (as opposed to state law members) and any federal income tax election filed for the LLC.

<u>Default rules</u>: Under the default rules of section 301.7701-2 and -3 (the so-called "check-the-box" regulations), an LLC is treated as a pass-through entity for U.S. federal income tax purposes. Under these default provisions, the LLC is treated as either a "disregarded entity" or a partnership, depending on the number of its owners. In determining who qualifies as an "owner" for this purpose, you "look through" any of the LLC's members that are themselves disregarded for federal income tax purposes to their ultimate regarded owners. Note: These are the default rules for domestic LLCs.

<u>Example</u>: LLC-X has two members: LLC-1 and LLC-2. LLC-1 and LLC-2 are wholly-owned by state-chartered Corporation W. Although LLC-1 and LLC-2 are respected as the members of LLC-X under state law, they are disregarded for U.S. federal income tax purposes. Thus, LLC-X is treated as having a single owner, Corporation W, for the purposes of determining LLC-X's U.S. federal income tax entity classification.

If an LLC has only a single owner for federal income tax purposes, section 301.7701-3(b)(1)(ii) provides that the LLC will be "disregarded as an entity separate from its owner." If the LLC is treated as a disregarded entity for tax purposes, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." Section 301.7701-2(a). In the above example, LLC-1, LLC-2 and LLC-X would be treated as divisions of Corporation W.

Section 301.7701-3(b)(1)(i) provides that an LLC with two or more members is treated as a partnership.

Note that if the number of the LLC's owners (as determined for federal income tax purposes) changes, under the default rules, the entity's classification may change. An LLC classified as a disregarded entity will become a partnership if the LLC gains at least one additional (regarded) owner. An LLC classified as a partnership will become a disregarded entity if it goes from having more than one owner to having a single owner. Treas. Reg. § 301.7701-3(f).

<u>Elections</u>: An LLC may elect out of its default classification. It may elect to be treated as an association taxable as a corporation by filing Form 8832, Entity Classification Election. Treas. Reg. § 301.7701-3(c). The LLC may make the election whether it has a single owner or more than one owner. If the LLC elects to be treated as an association, it cannot change its classification by election again for 60 months, except as provided in section 301.7701-3(c)(1)(iv). Subject to this provision, the LLC may subsequently elect to again become a pass-through entity (either a disregarded entity or partnership, depending on the number of its owners).

Section 301.7701-3(g) explains the federal income tax treatment of certain elective changes in classification. For example, if an LLC changes its classification from an association taxed as a corporation to disregarded entity, the association is *deemed* to distribute all of its assets and liabilities to its single owner. Treas. Reg. § 301.7701-3(g)(1)(iii). Note that although the fictional association is deemed to distribute its assets and liabilities to its single owner for certain U.S. federal income tax purposes, the LLC actually retains these assets and liabilities. The fictional distribution is not taken into account for collection and refund determinations. Treas. Reg. § 301.7701-2(c)(2)(iv)(B).

If an LLC makes an election to be treated as an association that is taxed as a corporation, the fictional corporation may or may not be liable for a corporate level tax. For example, the corporation may be subject to tax as a "C" corporation or it may qualify as a tax-exempt corporation (e.g., section 501(c)(3)), a subchapter S corporation, a qualified subchapter S subsidiary, a subchapter T corporation, a RIC, or a REIT).

Because an LLC's classification for federal income tax purposes may change under the default rules (due to a change in the number of its owners) or as the result of an election, its filing responsibilities may change from time to time.

During the period of time an LLC is treated as an association, it may incur a federal income tax liability. The LLC remains liable for this tax even if it changes its tax classification. If the LLC incurs the tax liability, the Service should collect the tax by assessing the LLC and pursuing administrative action, including the filing of a Notice of Federal Tax Lien ("NFTL") and issuing levies against the property of the LLC. Treas. Reg. § 301.7701-2(c)(2)(iii). If the LLC overpays its corporate income tax, the LLC is entitled to a refund of the overpayment even if it is no longer treated as a corporation for federal income tax purposes when the Service issues the refund. Treas. Reg. § 301.7701-2(c)(2)(iii).

During the period of time an LLC is treated as a disregarded entity, its items of income, deduction, credits, etc., are treated as those of its (regarded) single owner. For this period of time, the LLC's regarded single owner is liable to report and pay the tax on the LLC's earnings. For such periods, the Service should collect the tax liability by assessing the single owner and pursuing administrative action, including the filing of a NFTL and issuing levies against the property of the single owner. In pursuing administrative collection action, CDP rights under sections 6320 and 6330 must be accorded the single owner taxpayer.

Question: If an LLC is treated as a disregarded entity and its single owner incurs a federal tax liability, can the Service levy on the LLC's bank account to collect the federal tax liability of the single owner?

Response: The Service cannot levy on the LLC's bank account to collect the single owner's tax liability.   A levy may be made on a taxpayer's property and rights to property. Under state law, the LLC is a separate person from its single owner. State law determines what rights the taxpayer has in property, while federal law determines whether the taxpayer's state-delineated rights qualify as property or rights to property under the Internal Revenue Code. Drye v. United States, 528 U.S. 49 (1999). See Rev. Rul. 73-24, 1973-1 C.B. 602 (Service cannot levy on a partnership's bank account to collect the tax liability of a partner). The taxpayer has no direct property interest or right to property in the LLC's bank account.

Note: During the period of time an LLC is treated as a partnership, it is required to carry out certain partnership administrative responsibilities. For example, partnerships must complete the Schedule K-1 which shows each partner's separate share of the partnership's income, credits and deductions. Generally, the partnership is required to provide a copy of the K-1 to each person who was a partner in the partnership at any time during the year and file a copy of the K-1 with the Service.

Question: LLC-1 is directly owned by LLC-A and LLC-B and others. LLC-A is wholly-owned by state-chartered Corporation A and LLC-B is wholly-owned by state-chartered Corporation B. LLC-A and LLC-B are disregarded for federal income tax purposes. Does LLC-1 satisfy the K-1 requirements if it prepares K-1s for LLC-A and LLC-B (and its other members) even though LLC-A and LLC-B have no responsibility to pay federal income tax?

<u>Response</u>: Although LLC-A and LLC-B are disregarded for federal income tax purposes, they are respected as legal entities under state law as the members of LLC-1. Section 7701(a)(2) defines the term "partner" to include a member in a syndicate, pool, joint venture or organization. For the purpose of fulfilling the K-1 requirement, LLC-1 satisfies the K-1 requirements if it sends the K-1s to LLC-A and LLC-B. Note that LLC-A and LLC-B are not the entities that are required to take a share of the partnership's income, deductions, etc., into account. For federal income tax purposes, Corporation A and Corporation B are treated as the "partners" of the LLC-1 partnership. Corporation A must include LLC-A's partnership allocation in its income calculation and Corporation B must include LLC-B's partnership allocation in its income calculation.

<u>Question</u>: The facts are the same as in the prior question. LLC-A owns the largest interest in LLC-1. May LLC-A, a disregarded entity, be designated as the tax matters partner (TMP) of the LLC-1 (deemed) partnership? If not, who can be the TMP?

<u>Response</u>: Section 301.6231(a)(7) provides that the TMP of any partnership is (A) the general partner designated as the TMP, or (B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the partnership. Rev. Rul. 2004-88, 2004-32 I.R.B. 165, holds that an LLC that is a general partner in a *state law partnership* may be the partnership's TMP even if the LLC is disregarded for federal income tax purposes. The ruling explains that state law, rather than the check-the-box regulations, determines a partner's status. Under state law, LLC-1 is not a partnership, none of its members are liable for LLC-1's liabilities and LLC-1 does not have any general partners. In order to determine whether LLC-A may be designated the TMP of the (deemed) LLC-1 partnership, one must determine whether LLC-A is a "member-manager" of LLC-1. Section 301.6231(a)(7)-2(a) provides that only a member-manager of an LLC is treated as a general partner.

Note: The check-the-box regulations were amended to provide that an otherwise disregarded single owner LLC will not be disregarded for federal employment tax and excise tax purposes. <u>See</u> Treas. Reg. § 301.7701-2(c)(2)(iv), (v) and -2T. The employment tax provision is effective with respect to wages paid on or after January 1, 2009, and the excise provision is effective with respect to liabilities imposed and actions first required or permitted in periods beginning on or after January 1, 2008. See Treas. Reg. § 301.7701-2(e)(5) and (6).

If the LLC has employees, section 301.7701-2(c)(2)(i) does not apply to taxes imposed under Subtitle C (Employment Taxes and Collection of Income Tax (Chapters 21, 22, 23, 23A, 24 and 25 of the Internal Revenue Code). However, section 301.7701-2(c)(2)(i) does apply to withholding requirements imposed under section 3406 (backup withholding). Additionally, the individual owner of an LLC will be subject to tax on self-employment income if the LLC is treated as a sole proprietorship under section 301.7701-2(a).

If the LLC has an employment tax liability, the Service should levy on, or otherwise collect from, the property of the LLC. However, as noted above, if the single owner of a (disregarded) LLC is an individual, the owner is taxed on the income of the LLC as if it were a sole proprietorship and the individual is subject to tax on net earnings from self-employment. In that case, the Service should levy on, or otherwise collect from, the property of the individual responsible for the self-employment tax. Treas. Reg. § 301.7701-2(c)(2)(iv). If the single owner of a disregarded LLC is subject to excise tax, the LLC will be treated as a corporation for excise tax purposes. Treas. Reg. § 301.7701-2(c)(2)(v).

Note that if the LLC is taxed as a partnership, the LLC's regarded owners are taxed on the LLC's income and the regarded owner's name is listed as the taxpayer on the NFTL. However, the LLC would incur an employment tax liability with respect to wages paid to the LLC's employees. If the Service files a NFTL to collect the employment tax, the LLC would be listed on the NFTL as the taxpayer.

Note that the collection process is not the same for a state law partnership and a state law LLC that is treated as a partnership for federal income tax purposes. In the case of a state law partnership, a general partner is derivatively liable under state law for the full amount of the employment tax liability of the partnership. However, in the case of an LLC, under state law, a member of the LLC is not liable for the LLC's employment tax liability (unless they are liable as an alter-ego or as a transferee). Rev. Rul. 2004-41, 2004-1 CB 845. Thus, in determining who is liable for employment tax, it is imperative to determine whether the employer is a partnership under state law or just as a result of the fiction created by the check-the-box regulations.

Although the members of an LLC are not generally liable for an employment tax liability of the LLC, the Service may consider asserting the Trust Fund Recovery Penalty under section 6672 against members who are responsible for paying the tax, depending on the facts and circumstances of the case.

Note: Although an LLC may be treated as a disregarded entity or a partnership under the check-the-box regulations, these U.S. federal income tax fictions are not generally respected by foreign taxing jurisdictions. The foreign jurisdiction's treatment of the LLC may be relevant in certain circumstances (e.g., treaty application).

The LLC's U.S. tax treatment as a disregarded entity or partnership is not generally respected for the purposes of bankruptcy determinations.

Note: Most states allow an entity to change its state law entity classification by a filing with the Secretary of State. Under such procedures, a state-chartered corporation, a state law general partnership or a state law limited partnership may become an LLC. An LLC may similarly file under state law to become a state-chartered corporation, general partnership or limited partnership. In such circumstances, the Service must check the applicable state law to determine who is liable for any outstanding federal tax or has the property right in any overpayment of tax that gives rise to a refund.

Caution: A number of states have enacted statutes providing for the creation of an entity that has the characteristics of a single entity in some respects and multiple entities in other respects. In some cases, these entities are called "series" LLC's. Domestically, only the following jurisdictions have enacted series LLC statutes: Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, Utah and Puerto Rico. In general, these statutes allow a single LLC to have multiple cells or series. The members of the LLC may have rights with respect to all of the LLC's cells or only to certain of the LLC's cells. Under state law, each cell (or series) is able to have separate property rights and separate liabilities from the other cells (or series). If certain record-keeping and notice requirements are satisfied per local law, the debts, liabilities, and obligations of one series are enforceable only against the assets of that series and not against assets of other series or cells or of the series organization. These statutes are relatively new and Area Counsel and the National Office are still considering how best to pursue collection action against these entities and members of these entities. If you have a case involving a series, series organization, or member of a series or series organization, please contact Area Counsel and the Office of the Associate Chief Counsel (Procedure and Administration).

v) Credit/debit card processing contract

Under credit/debit card processing contracts, a processing company is obligated to pay the merchant/taxpayer for all credit card sales made. This obligation arises at the time of sale, not later when the information is forwarded to the company or even later after daily settlement has occurred. While payments are not made to the merchant/taxpayer instantaneously, the obligation to pay is fixed and determinable, and the funds are owed to the merchant/taxpayer at least daily. Whenever a processing company is served with a levy, it is required to surrender any amounts owed to the taxpayer for credit card sales at the time the levy is served. Also, where a processing company may maintain amounts in a reserve of "charge back" account that are used to setoff any future "charge back" amounts against the merchant/taxpayer, the levy will attach to all funds held in those types of accounts, and those funds must be paid over to the Service. Only those funds which the processing company has already setoff and paid over to itself prior to receipt of the levy would be beyond the reach of the levy. United States v. Central Bank of Denver, 843 F.2d 1300, 1309-1310 (10th Cir. 1988).

w) Stock options

Sometimes persons affiliated with a company, typically key employees, are granted stock options. Generally, there are two types of stock options: statutory stock options and nonstatutory stock options. Statutory stock options are subject to the requirements set forth under sections 422 or 423, as applicable. In the case of nonstatutory stock options, the terms of the stock option are dictated by the contractual terms of the applicable stock option plan or the stock option agreement. To the extent the stock option is vested and exercisable, the taxpayer's interest in the stock option is subject to levy.

Typically, nonstatutory stock options contain restrictions on transferability. Statutory stock options are subject to the restrictions on transferability contained in sections 422(b)(5) or 423(b)(9), as applicable. Any restrictions on the transfer of stock options applicable to the taxpayer would not apply to the Service: section 6334(a) enumerates certain types of property that are exempt from levy under section 6331, and neither nonstatutory stock options nor statutory stock options are listed (although, it is possible that stock options may qualify under section 6334(a)(8) as property for support of minor children). Therefore, the Service can enforce a levy by selling such stock options to a third party.

x) Health savings account

A Health Savings Account (HSA) is a trust or custodial account created for the purpose of paying the qualified medical expenses of the account beneficiary, the individual who establishes the HSA. I.R.C. § 223(c)(3) and (d)(1). Banks, credit unions, insurance companies, and other financial institutions serve as trustees or custodians for HSAs. Section 223(d)(1)(B). The account beneficiary (taxpayer) that establishes the HSA owns and controls the funds in his or her HSA. The taxpayer makes decisions regarding which qualified medical expenses are paid from the account and how the money in the account is invested. The taxpayer may receive a distribution at any time. Notice 2004-2, 2004-1 C.B. 269. The HSA trustee or account custodian is not required to determine whether the distributions are used for qualified expenses. The taxpayer's interest in the HSA is nonforfeitable under section 223(d)(1)(E). In light of the foregoing, the taxpayer's interest in an HSA constitutes "property" or "rights to property" that is subject to levy under section 6331.

A levy on an HSA is not a distribution to pay qualified medical expenses. Therefore, the taxpayer is liable for the additional 20 percent tax imposed by section 223(f)(4) on the amount of the levy, unless, at the time of the levy, the taxpayer had attained age 65 or was disabled (as defined in section 72(m)(7)). Regardless of the taxpayer's age, the amount of the levy is also includible in the taxpayer's income for the year in which the levy was made.

y) Thrift Savings Plan account

A Thrift Savings Plan (TSP) account is a retirement savings and investment plan for Federal employees and members of the uniformed services, including the Ready Reserve. The TSP is a defined contribution plan, meaning that the retirement income the taxpayer receives from his TSP account will depend on how much he (and his agency, if he is eligible to receive agency contributions) put into his account during his working years and the earnings accumulated over that time.

Section 5 U.S.C. § 8437(e)(3), governing TSP distributions, provides that the entire amount in a taxpayer's TSP accounts is subject to levy. This is interpreted to make the funds in the account subject to turnover even if the taxpayer is not yet eligible to retire and so cannot voluntarily withdraw the funds. This is in contrast to levies on other retirement assets, which generally do not require turnover of the funds until the time that the taxpayer can voluntarily withdraw the funds. On September 10, 2014, the Federal Retirement Thrift Investment Board (FRTIB) published final regulations in the Federal Register to implement the statutory mandate, detailing the procedures for complying with Federal Tax Levies. 5 CFR § 1653.31-.36, 79 FR 53603 (Sept. 10, 2014).

The regulations require that the notice of levy expressly refer to the TSP and include a signature certifying that it attaches to a retirement plan. It must be issued in the name of the plan participant and must require an immediate payment of a stated dollar amount from the participant's account. 5 CFR § 1653.32(b). The levy cannot require payment at a future date, nor can it request a series of periodic payments. 5 CFR § 1653.32(c). The Small Business/Self-Employed Division has published procedures in IRM 5.11.6.2.1, Thrift Savings Plan, dated July 17, 2015, which incorporate the requirements in the FRTIB regulations. See also CC Notice 2016-001, Levy on Thrift Savings Plan Accounts ("coordination of TSP levies with Procedure and Administration is no longer necessary").

A levy on a TSP account requires the same approval as a levy on a private pension or retirement plan or IRA. See IRM 5.11.6.2; IRM 5.11.6.2.1. The IRS should consider alternative means of collecting the liability; whether the taxpayer's conduct has been flagrant; and whether the taxpayer depends on the money in the TSP account (or will in the near future) for necessary living expenses. See IRM 5.11.6.2(4)-(7).

V. STATUTE OF LIMITATIONS ON COLLECTION

A. I.R.C. § 6502

Section 6502 provides that a tax may be collected by levy or proceeding in court begun within ten years of assessment. Effective for requests to extend made after December 31, 1999, the ten-year collection statute cannot be extended by agreement between the taxpayer and the Service, except in connection with an installment agreement or release of levy under section 6343. I.R.C. § 6502(a)(2). However, as will be discussed more fully below, some statutory provisions may suspend the running of the period of time. With respect to agreements to extend the collection statute entered into before December 31, 1999, such extension will expire on the latest of (a) the last day of the original 10-year period under section 6502(a); (b) December 31, 2002; or (c) in the case of an extension entered into in connection with an installment agreement, the 90th day after the end of the period of such extension.

1. A levy is made within the ten-year period if a Notice of Seizure is served on the taxpayer or a Notice of Levy is served on a third party.

2. A court proceeding is begun within the ten-year period if the complaint is filed within that time.

3. Section 6502 (flush language) provides that where a timely proceeding is commenced in court for collection of a tax by levy, the period during which such tax may be collected is extended until the liability for the tax, or a judgment against the taxpayer arising from the liability, is satisfied or becomes

unenforceable.

B. I.R.C. § 6503

Section 6503 lists a number of situations or conditions that suspend the collection period (in addition to the assessment period). These statutory suspension provisions toll the collection period even if that period has been extended pursuant to an executed collection agreement. In re Klingshirn, 147 F.3d 526 (6th Cir. 1998). The major ones are:

1. Issuance of a notice of deficiency

The periods of limitations on assessment is suspended during the period the Service is prohibited from assessing (e.g., during the 90-day or 150-day period for petitioning or, if a petition is filed, until the Tax Court decision becomes final, under section 6213(a)), and for 60 days thereafter. I.R.C. § 6503(a)(1).

The period of limitations on collection is suspended during the period in which collection by levy is prohibited. I.R.C. § 6503(a)(1). This suspension is also triggered when a notice of deficiency is issued because section 6213(a) contains a levy prohibition.

Interestingly, there is no prohibition on levy following a jeopardy assessment sections 6861 and 6862) of a deficiency, even if the taxpayer petitions the notice of deficiency (that, in jeopardy situations, is issued post-assessment). At least there is no prohibition on levy stemming from section 6213(a) (there may be a prohibition on levy unless and until CDP rights are resolved under section 6330). The period of limitations on collection of a liability based on a jeopardy assessment, however, is nonetheless suspended during the period in which a deficiency case has been placed on the docket of the Tax Court until the decision is final. See I.R.C.§ 6503(a)(1) (parenthetically providing “and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court is final”); United States v. Shahadi, 340 F.2d 56 (3d Cir. 1965) (finding that the statute on its face supports the conclusion that the period of limitations on collection is suspended during proceedings in the Tax Court under any circumstance, and that the parenthetical clause beginning with “and in any event” was intended to provide that the period of limitations on collection be suspended in any situation where a taxpayer takes action to have deficiencies redetermined by proceedings in the Tax Court); accord United States v. Maxwell, 459 F.2d 22 (5th Cir. 1972). Although some Circuits have held that the “in any event” language in the parenthetical in section 6503(a)(1) is triggered notwithstanding that there is no general levy prohibition post-jeopardy assessment, it is nonetheless advisable to refer a case to DOJ to reduce the jeopardy assessment to judgment if the nominal (unsuspended) section 6502 period of limitations on collection after assessment is otherwise close to lapsing.

2. Custodia legis

Statute on collection suspended while all or substantially all of the taxpayer's assets are in the control or custody of the court, and for 6 months thereafter. See United States v. Silverman, 621 F.2d 961 (9th Cir. 1980); I.R.C. § 6503(b).

3. Taxpayer outside United States

Statute on collection suspended during taxpayer's absence if he is absent for a continuous six months or more. I.R.C. § 6503(c); Treas. Reg. § 301.6503(c)-1 states that the taxpayer will be "deemed" absent if he is "generally and substantially absent" from the United States, even though he makes "casual temporary visits." United States v. Nesline, 590 F. Supp. 884 (D. Md. 1984) invalidated this part of the regulation as contrary to congressional intent. A.O.D. 1985-022 explains that the Service will not follow Nesline.

4. Wrongful levy/wrongful lien

Statute on collection is suspended for the period during which Service holds property of a third party that was wrongfully seized, plus 30 days. The period during which the property is held ends when the property is administratively returned under section 6343(b) or on the date a final judgment is secured against the United States in a wrongful levy action under section 7426. The period is suspended only as to that part of the assessment equal to the amount of money or value of specific property returned. I.R.C. § 6503(f)(1).

The statute on collection is also suspended for the period beginning on the date the third-party owner of property becomes entitled to a certificate under section 6325(b)(4) with respect to such property and ending on the date 30 days after the earlier of: (a) the earliest date on which the Service no longer holds any amount as a deposit or bond provided under section 6325(b)(4) where such deposit or bond is used to satisfy the unpaid tax or is refunded or released; or (b) the date that the judgment secured under section 7426(b)(5) becomes final. I.R.C. § 6503(f)(2).

5. Bankruptcy code cases

The statute on collection is suspended during the period the automatic stay (11 U.S.C. § 362) prohibits the Service from taking any action, and for six months thereafter. The statute on assessment is suspended for the period of the stay plus 60 days. I.R.C. § 6503(h).

C. Other Suspension Situations/Conditions

1. Offers in compromise and installment agreements

Section 6331(k)(1) prohibits the Service from levying on the taxpayer’s property while an offer in compromise is pending, during the 30 days following rejection of the taxpayer’s offer, and during a timely appeal of the rejection decision. Section 6331(k)(2) prohibits the Service from levying on the taxpayer’s property while an offer for an installment agreement is pending; during the 30 days following rejection of the offer and during a timely appeal of the rejection decision; during the period the installment agreement is in effect; and during the 30 days following the Service's termination of the installment agreement and during a timely appeal of the termination decision.

Close attention must be paid to calculating the collection period as the Code changes. Effective December 31, 1999, for an OIC or installment agreement, the statute of limitation on collection was suspended during the period that the levy was stayed. However, the Community Renewal Tax Relief Act of 2000, effective December 21, 2000, mistakenly changed section 6331(k) so that the statute of limitations was not suspended during the time that levy is prohibited under section 6331(k). Congress corrected the mistake in the Job Creation and Worker Assistance Act of 2002, subsection 416(e) (effective March 9, 2002). The current law is that the statute of limitations on collection is suspended, once again, for the period that the levy is stayed. Consequently, in calculating the collection period, note that between December 21, 2000, and March 9, 2002, the statute of limitations on collection continued to run even though the levy was prohibited.

2. CDP hearing

The periods of limitation under section 6502 are suspended until the date the IRS receives the taxpayer's written withdrawal of the request for a CDP hearing by Appeals or the determination resulting from the CDP hearing becomes final by expiration of the time for seeking judicial review or the exhaustion of any rights to appeals following judicial review. In no event shall any of these periods of limitation expire before the 90th day after the IRS receives the taxpayer's written withdrawal of the CDP hearing request or the Notice of Determination with respect to such hearing becomes final. See I.R.C. § 6330(e); Treas. Reg. § 301.6330-1(g).

3. Taxpayer assistance orders

Section 7811(d) and Treas. Reg. § 301.7811-1(e) provide that if a taxpayer or his/her duly authorized representative submits a Form 911, *Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order)*, the statute of limitations on collection and/or assessment may be extended for a certain period. Due to system programming limitations, Taxpayer Advocate Service (TAS) employees currently do not input the appropriate IDRS codes to reflect the suspension of the statute of limitations. TAS employees will input the appropriate IDRS codes to show the correct suspension periods once programming enhancements are completed. See IRM 13.1.14. If you encounter a case where you need to calculate the period of time that the collection statute expiration date was suspended under section 7811(d), contact the Office of the Special Counsel to the NTA.

4. Innocent spouse claim

The collection period is generally suspended from the filing of an innocent spouse claim until a waiver is filed plus 60 days, or until the expiration of the 90 day period for petitioning the Tax Court, plus 60 days, or if a Tax Court petition is filed, until the Tax Court decision becomes final, plus 60 days. I.R.C. § 6015(e)(2). If, however, the taxpayer appeals the Tax Court's decision to the United States Court of Appeals, the collection period will begin to run 60 days after the filing of the appeal unless a bond is posted with the appeal.

VI. METHODS OF ENSURING PAYMENT

A. General

In collecting delinquent accounts, situations may arise in which a temporary suspension or stay of collection action will benefit both the taxpayer and the government. Collection action may be stayed if the taxpayer executes a satisfactory bond, collateral agreement, mortgage, or escrow arrangement. Area Counsel may be asked to approve these arrangements. However, the Code precludes the taxpayer and the Service from entering into an agreement extending the ten-year collection period, except as described in section 6502(a)(2). Therefore, consideration of the expiration of collection statute should be made prior to suspending any collection action.

B. Bond

1. A bond must be executed by a surety company that holds a certificate of authority approved by the Secretary of the Treasury that it is an acceptable surety. Treas. Reg. § 301.7101-1(b)(1). At the discretion of the Area Director, a bond executed by corporate or individual sureties not holding such certificates of authority may be accepted. Treas. Reg. § 301.7101-1(b)(2).

2. In lieu of a surety bond, section 7101(2) provides that bonds or notes of the United States may be deposited.

3. Reasons for accepting bonds:

a) Extension of Time for Payment of Tax. Section 6165 provides that if the Service grants any extension of time to pay any tax, a bond may be required in an amount (not exceeding twice the amount covered).

b) Stay of Collection. Section 6863 authorizes the acceptance of a bond to stay collection of a jeopardy assessment of any tax.

c) Release of lien. Treas. Reg. § 301.6325-1(a)(2) authorizes the release of a federal tax lien upon the acceptance of a bond conditioned on the payment of the amount assessed within the time stated in the bond, but not later than six months before the expiration of the collection period.

d) Perishable Goods. Section 6336(1)(B) authorizes the acceptance of a bond for the release of perishable goods.

e) Release of levy. Section 301.6343-1(b)(2)(ii)(B) provides that a levy may be released upon the acceptance of a bond providing for the payment of the liability and expenses of levy.

f) Forbearance from Filing Notice of Federal Tax Lien. A bond may be accepted in exchange for the Service's forbearance from filing a Notice of Federal Tax Lien. See IRM 5.12.2.3.2(3).

C. Collateral Agreements

A taxpayer may execute a payment agreement, performance of which is ensured by collateral security, such as:

1. Corporate certificates of stock or bonds of stability.

2. Other corporate certificates of stocks or bonds, if supported by statements of financial conditions reflecting the actual value of the security.

3. United States government securities.

4. Securities issued by any state, territory, or political subdivision.

5. Letters of credit. Taxpayer and bank make an agreement and bank issues a letter of credit. Taxpayer gives a Service letter of credit with agreement as collateral. The value of the collateral must be sufficient to protect the government's interest, taking into account possible market fluctuations.

See Treas. Reg. § 301.7101-1(b)(2); IRM 5.6.1.

D. Mortgages

1. The acceptance of a mortgage on real or personal property is another, though rarely used, means of protecting the interest of the government during the period payment is to be deferred. See Treas. Reg. § 301.7101-1(b)(2)(iii); IRM 5.6.1.2.4.

2. The mortgagor's equity in the property should not be less than the outstanding tax liability, plus additions that would accrue during the deferred payment period.

E. Escrow Arrangements

1. Escrow arrangements provide safeguards for the government's interest, yet allow taxpayers to remain in business during the time required for judicial review

of their cases or for readjustment of their affairs. See IRM 5.6.1.2.5(1). Situations in which escrow arrangements become desirable usually involve substantial tax liabilities. An escrow arrangement may also be entered into for the purpose of releasing a levy. Treas. Reg. § 301.6343-1(b)(2)(ii).

2. In agreeing upon a suitable escrow agent, care must be taken to make certain he is a disinterested and reliable person and that the government's interests will be protected at all times. Only under the most extenuating circumstances should the Area Director or Service personnel serve as the escrow agent. See IRM. 5.6.1.2.5(2).

VII. JEOPARDY ASSESSMENT OR LEVY

Section 7429(a)(1) provides that no jeopardy assessment or levy may be made unless the Chief Counsel for the Internal Revenue Service (or such Counsel's delegate) personally approves (in writing) such assessment or levy. After Counsel's approval, the Area Director may make an immediate assessment and pursue collection without need to follow normal assessment and collection procedures. As soon as a jeopardy or termination assessment is made, the tax, penalties, and interest become due and payable, and the Area Director issues a notice and demand for payment in full. If payment is not made, the Service may immediately proceed to collect by levy without waiting for the usual ten-day period after notice and demand to expire. Collection may be stayed by filing a surety bond. I.R.C. § 6863.

The term "jeopardy assessment" may refer to either a termination assessment (section 6851) or a jeopardy assessment (sections 6861 and 6862) since both types of assessment are premised upon a determination that the collection of the tax is in jeopardy. See Lesson 1 for a further discussion of jeopardy and termination assessments.

A "jeopardy levy" is not limited to situations in which there is a jeopardy assessment. A jeopardy levy without a jeopardy assessment can happen: (1) after the tax is assessed but before the section 6303 notice and demand for payment is issued; (2) after the notice and demand is issued but before the 10-day period in section 6331(a) has expired; (3) after the 10-day period but before the 30-day notice of intent to levy (section 6331(d)) and notice of a right to a CDP hearing (sections 6320(a) and 6330(a)) have been issued; or (4) after the notice of intent to levy and notice of a right to a CDP hearing have been issued, but before the 30-day period has passed. See IRM 5.11.3.2. Administrative and judicial review of a jeopardy levy under section 7429 is not available if the jeopardy levy was made 30 days or more after notice and demand for payment. I.R.C. § 7429(a)(1).

A jeopardy levy requires a condition that would have allowed a jeopardy assessment to be made. I.R.M. 5.11.3.3. See Policy Statement P-4-88 regarding what needs to be present to make a jeopardy assessment. Collection is in jeopardy when at least one of the following conditions exists: (1) the taxpayer is or appears to be designing to leave the United States or to conceal himself; (2) the taxpayer is or appears to be designing to hide, transfer, conceal, or dissipate his assets; (3) the taxpayer's financial solvency appears to be imperiled; or (4) an individual is in physical possession of cash, or its equivalent, in excess of $10,000 who does not claim the cash as his, or as belonging to another person whose identity can be readily ascertained and who acknowledges ownership of the cash. Policy Statement P-4-88; see I.R.C. § 6867(a); Treas. Reg. § 1.6851-1(a)(1).

A. Form and Procedure

Only the Area Director (or an Acting Area Director with full authority) has been delegated authority to determine that jeopardy exists.

1. Review criteria

Sufficient, objective facts must support the reasonableness of the determination that collection was in jeopardy; the amount assessed must be supportable. There must be a reasonable, factual basis for determining the taxpayer received income.

2. Illegally seized evidence

In arriving at its jeopardy determination, the Service may rely on facts obtained through illegally seized evidence. United States v. Janis, 428 U.S. 433 (1976).

B. Administrative Review

Section 7429(a)(1)(B) requires that within five days after the jeopardy assessment or levy is made, the Service must send the taxpayer a written statement of the information relied on in making the assessment or levy. The notice under section 7429 must state the specific facts and reasons (not mere conclusions) relied on by the Area Director. If the notice states merely conclusions, the assessment or levy may be held invalid. See Walker v. United States, 650 F. Supp. 877 (E.D. Tenn. 1987).

Within 30 days after the written statement is furnished (or 30 days after the five-day period expires), the taxpayer may ask for administrative review. Section 7429(a)(2). This request requires the Service to determine whether making the assessment or levy was reasonable (i.e. whether collection was in jeopardy because one of the conditions listed in Policy Statement P-4-88 exists) and whether the amount assessed was appropriate under the circumstances. Section 7429(a)(3). In this administrative review, the Service must consider not only the information available at the time of the assessment or levy, but also information that subsequently becomes available. Treas. Reg. § 301.7429-2(b). Therefore, any abatement or release of levy following administrative review does not necessarily imply that the Service acted improperly in making the assessment or levy. The request by the taxpayer for administrative review is a prerequisite to judicial review. See Machado v. United States, 45 AFTR 2d 80-1483 (S.D.N.Y. 1980).

If the taxpayer would be entitled to a CDP notice, e.g., first levy for the period in question, the Service may still make the jeopardy levy, but the taxpayer shall be given the opportunity for a CDP hearing within a reasonable time after the jeopardy levy. I.R.C. § 6330(f). A taxpayer may raise in a CDP hearing the reasonableness or the appropriateness of the amount of a jeopardy assessment or the reasonableness of a jeopardy levy. If the taxpayer challenged the reasonableness or appropriateness of the amount of the jeopardy assessment or the reasonableness of the jeopardy levy in a previous section 7429 proceeding, then the taxpayer is precluded from raising those same issues in the CDP hearing pursuant to section 6330(c)(4), which precludes the taxpayer from raising an issue that was raised and considered at a previous administrative or judicial proceeding. See Lesson 9 for a further discussion of CDP hearings and jeopardy levies.

C. Judicial Review

The taxpayer may seek judicial review within 90 days after the earlier of the date the Secretary notifies him of the administrative determination or 90 days following the 16th day after the taxpayer requests administrative review. I.R.C.§ 7429(b)(1). Normally the proper forum for a section 7429 review is the district court, but the Tax Court will have concurrent jurisdiction where a Tax Court petition was filed prior to the jeopardy assessment or levy and one or more of the taxable periods before the Tax Court is covered by the jeopardy assessment or levy. I.R.C.§ 7429(b)(2). The court's review is limited to the reasonableness of the jeopardy assessment or levy and the appropriateness of the amount. I.R.C.§ 7429(b)(3). The court will consider information available to the Service at the time of the jeopardy assessment or levy, plus information available at the time of review. Loretto v. United States, 440 F. Supp. 168 (E.D. Pa. 1977). The court has 20 days to make its determination; however, the taxpayer, on reasonable grounds, may request an extension of up to 40 days. I.R.C.§ 7429(c).

The court's determination under section 7429 as to the merits of the jeopardy assessment or levy is not subject to review. Section 7429(f) states that the decision "... shall be final and conclusive and shall not be reviewed by any other court." But, if the court's decision is based on some grounds other than the reasonableness of the jeopardy assessment or levy and the appropriateness of the amount assessed, the appellate court has jurisdiction. E.g., Wapnick v. United States, 112 F.3d 74 (2d Cir. 1997).

If the taxpayer requested a CDP hearing and Appeals sustains the jeopardy levy in the post-levy hearing, the taxpayer may appeal that determination to the Tax Court. Bussell v. Commissioner, 130 T.C. 222, 236 (2008).

D. Restriction on Sale in Jeopardy Situations

When a termination assessment or a jeopardy assessment of income, estate, or gift tax is made under section 6851 or section 6861, property seized for collection may not be sold before: (1) the expiration of the period in which the taxpayer may petition the Tax Court; (2) the Tax Court decision becomes final; (3) the issuance of the notice of deficiency; 4) the expiration of the period for requesting a section 7429(a) administrative review, and if such review is requested, until the expiration of the period for commencing an action in district court under section 7429(b); or (5) the district court's determination under section 7429(b) becomes final. Section 6863(b)(3)(A); see Smith v. Flinn, 261 F.2d 781 (8th Cir. 1958), modified, 264 F.2d 523 (8th Cir. 1959). However, such property may be sold if the taxpayer consents to the sale, the Area Director determines that the expenses of conserving and maintaining the property will greatly reduce the net proceeds, or the goods are perishable within the meaning of section 6336. I.R.C.§ 6863(b)(3)(B).

For jeopardy assessments and seizures made under section 6862, where there is no Tax Court review, a different stay provision applies. Section 6863(c) stays the sale of seized property until the district court's determination under section 7429 becomes final or until the expiration of the period for requesting a section 7429(a) administrative review expires, and if such review is requested, until the expiration of the period for commencing an action in district court under section 7429(b) expires.

2018 GL-1 Instruction Assigned to Melinda Fisher (CC:SB)

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