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INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR DOREEN M. SUSI
ASSOCIATE AREA COUNSEL
SB/SE, AREA 5

FROM: David L. Fish
Chief, Branch 1 (Disclosure & Privacy Law)
CC:PA:DPL

SUBJECT: Disclosure of Lien Payoff Amounts

This is in response to your memorandum on the above-captioned subject. This document is not to be cited as precedent.

ISSUE:

Under what circumstances may the Internal Revenue Service (Service) provide outstanding lien payoff amounts to title insurance companies, mortgage lenders, and other third parties.

CONCLUSION:

I.R.C. § 6103(k)(2) is the disclosure provision which generally governs the release of outstanding lien payoff amounts to third parties. Pursuant to section 6103(k)(2), the Service may disclose to title insurance companies, mortgage lenders, and other third parties lien payoff amounts for years and taxes represented in a filed notice of federal tax lien provided that they furnish satisfactory written evidence of their right or intent to obtain a right in the property subject to the lien.

In very limited circumstances, section 6103(k)(6) may be used as the authority for releasing outstanding lien balances to third parties. In particular, a lien payoff amount may be disclosed, pursuant to section 6103(k)(6), to a third party requester who does not have nor intend to obtain a right in the property subject to the lien, but can demonstrate a willingness and the means to pay a taxpayer's account balance in full.

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Likewise, a third party, who has a right or intent to obtain a right in property subject to a filed lien, but, for some reason, desires the outstanding payoff amount on an unfiled lien, may, pursuant to section 6103(k)(6), have access to such amount provided that he/she demonstrates the willingness and means to satisfy the entire outstanding liability.¹

Determining whether a third party has the willingness and means to pay off a taxpayer's outstanding account balance is a factually dependent determination that must be made on a case by case basis.

FACTS:

You have received a request for advice from the Phoenix Disclosure Office regarding whether the Service may release outstanding lien payoff amounts to title insurance companies or mortgage lenders seeking to close escrow where no notices of federal tax lien have been filed. You drafted a memorandum in response to this issue and asked that we review your advice prior to its issuance. Because similar lien payoff issues have arisen in Service offices in other parts of the country, we have decided to respond, in a consolidated manner, to all of these issues in this memorandum. Accordingly, in addition to addressing the issue raised by the Phoenix Disclosure Office, this memorandum will discuss the following concerns:

- (i) Whether the practice of providing lien payoff amounts to title insurance companies and mortgage lenders who do not furnish satisfactory written evidence of their right in the property or intent to acquire a right in the property is consistent with the disclosure rules. For instance, may the Service provide lien payoff amounts to title insurance companies who request such information by telephone?
- (ii) Whether it is permissible to disclose lien payoff amounts to third parties pursuant to section 6103(k)(6). For instance, does section 6103(k)(6) authorize the Service to provide a lien payoff amount to a third party caller who wishes to pay a taxpayer's outstanding account balance in full?
- (iii) Who has the authority to make disclosures of lien payoff amounts under sections 6103(k)(2) and (k)(6)?

¹ Regardless of whether the lien payoff amounts are disclosed under the authority of I.R.C. § 6103(k)(2) or I.R.C. § 6103(k)(6), these communications with third parties do not constitute third party contacts under I.R.C. § 7602(c) provided that they are made merely in response to a third party request, and the communications are limited in scope to the matter of the lien payoff amount.

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LAW AND ANALYSIS:

A. The General Rule

In general, section 6103(a) provides that returns and return information are confidential and can only be disclosed as expressly authorized in the Internal Revenue Code (Code). Church of Scientology v. Internal Revenue Service, 484 U.S. 9 (1987).

The disclosures at issue here, namely, disclosures of taxpayers' lien payoff amounts, come within the ambit of the definition of return information. See I.R.C. § 6103(b)(2). Accordingly, the Service is precluded from disclosing this information unless there is authority in the Code permitting such disclosures.

B. Disclosure of Lien Payoff Amounts Under Section 6103(k)(2)

The exception to the nondisclosure rule which deals with the disclosure of outstanding lien amounts is section 6103(k)(2). In particular, section 6103(k)(2) provides:

If a notice of lien has been **filed** pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes **satisfactory written evidence** that he has a right in the property subject to such lien or intends to obtain a right in such property. (Emphasis added).

Accordingly, this section applies to situations where a person wants to know the lien payoff amount reflected in a filed notice of federal tax lien, and he/she can show, by satisfactory written evidence, that he/she has a right in the property subject to the lien or intends to obtain a right in the property subject to the lien. The term "satisfactory written evidence" encompasses any written evidence, including a written declaration by the requester, which indicates that he/she has a right or intends to obtain a right in the property subject to the lien. See IRM 1.3.11.10.1. For example, a copy of a purchase agreement, judgment lien, mortgage application, or security agreement meets the "satisfactory written evidence" requirement of the statute. Id.

As such, title insurance companies, mortgage lenders, and other third parties may have access, pursuant to section 6103(k)(2), to lien payoff amounts for years and taxes represented in a filed notice of tax lien provided that they furnish satisfactory written evidence of their right or intent to obtain a right in the property subject to the lien. If satisfactory written evidence is not provided, outstanding lien payoff amounts may not be disclosed under this exception. Likewise, taxes for which no notice of federal tax lien has been filed may not be disclosed under this exception.

Delegation Order 156 (Rev. 16) (11-24-1999) delegates the authority to make section 6103(k)(2) disclosures to SB/SE Territory Managers, Directors of Customer Service Centers, and Directors of Appeals Operating Units. Such persons may redelegate this authority to Chiefs and Advisory Reviewers in Special Procedures functions, Group

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Managers (or their equivalent), and Revenue Officers. Note that the persons listed above are the authorized officials to make the determination as to whether a disclosure under section 6103(k)(2) is proper. Any Service employee can communicate to the requesting third party the decision of the authorized official (including the lien payoff amount if disclosure is deemed proper). However, note that Delegation Order 156 is in the process of being amended to reflect the Service's new organizational structure. Accordingly, the proper authorizing officials for section 6103(k)(2) are subject to change.

C. Disclosure of Lien Payoff Amounts Under Section 6103(k)(6)

If title insurance companies, mortgage lenders, or other third parties do not satisfy the criteria outlined in section 6103(k)(2) for the disclosure of lien payoff amounts, the question has arisen as to whether such information may be disclosed under section 6103(k)(6). Section 6103(k)(6) provides, in pertinent part:

An internal revenue officer or employee may, in connection with his official duties relating to any . . . collection activity . . . disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to . . . the amount to be collected or with respect to the enforcement of any other provision of [Title 26]. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

Treasury Regulations promulgated under section 6103(k)(6) provide, in pertinent part:

In connection with the performance of official duties relating to any . . . collection activity . . . an officer or employee of the Service . . . is authorized to disclose return information (as defined in section 6103(b)(2)) in order to obtain necessary information relating to the following—

* * *

(6) . . . to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability; or

(7) . . . where necessary in order to accomplish any activity described in subparagraph (6) of this paragraph.

Disclosure of return information to a person other than the taxpayer to whom such return information relates or such taxpayer's legal representative for the purpose of obtaining information necessary to properly carry out the foregoing duties and responsibilities as authorized

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by this paragraph or for the purpose of otherwise properly accomplishing any activity described in subparagraph (6) of this paragraph should be made, however, only if such necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained in accurate and sufficiently probative form, or in a timely manner, and without impairing the proper performance of such duties and responsibilities, or if the activities described in subparagraph (6) of this paragraph cannot otherwise properly be accomplished without making such disclosure.

Treas. Reg. § 301.6103(k)(6)-1(b).

The purpose of this regulation is to authorize disclosures “where necessary in order to properly accomplish” tax administration activities, including collection activities. However, even disclosures that are in furtherance of tax administration activities are permissible, only, if “no reasonable alternative exists” to carry out such activities. S. Rep. No. 94-938, 341-342 (1976), 1976-3 C.B. (Vol. 3) 379-380.

In sum, section 6103(k)(6) and its implementing regulation provide for a disclosure of return information when three requirements are met:

- (1) The information sought is with respect to the correct determination of tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code;
- (2) The information sought is not otherwise reasonably available; and
- (3) It is necessary to make disclosures of return information in order to obtain the additional information sought by the Service.

DiAndre v. United States, 968 F.2d 1049, 1052 (10th Cir. 1992).

The disclosure of payoff amounts to third parties pursuant to section 6103(k)(6) is addressed in IRM 1.3.11.10(2). In particular, this provision reads as follows:

A situation may occur where the person requesting the outstanding balance does not have nor intend to obtain a right in the property subject to the lien but expresses a desire to make a payment toward the outstanding liability. In such cases, to the extent necessary, the outstanding balance owed may be disclosed to that individual under IRC 6103(k)(6), if they demonstrate a **willingness and the means to pay**. (Emphasis added.)

The disclosure of payoff amounts under the circumstances contemplated in the above IRM provision meets the requirements outlined in section 6103(k)(6) and its

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implementing regulation. That is, the information that is sought by the Service is with respect to the collection of amounts owed; collection of these amounts cannot be accomplished in a timely manner without disclosure of the payoff amount; and disclosure of the payoff amount is necessary to collect the proper amount due.

Accordingly, in light of the analysis set forth above, we conclude that a lien payoff amount may be disclosed, pursuant to section 6103(k)(6), to a third party requester who does not have nor intend to obtain a right in the property subject to the lien, but can demonstrate a willingness and the means to pay a taxpayer's account balance in full. For instance, section 6103(k)(6) would authorize the disclosure of the lien payoff amount on a taxpayer's delinquent tax account where, for example, the taxpayer's parent demonstrates that he/she has the willingness and means to satisfy the child's outstanding account balance.

Likewise, a third party, who has a right or intent to obtain a right in property subject to a filed lien, but, for some reason, desires the outstanding payoff amount on an unfiled lien, may, pursuant to section 6103(k)(6), have access to such amount provided that he/she demonstrates the willingness and means to satisfy the entire outstanding liability.

However, note that a third party, who has a right or intent to obtain a right in property subject to a filed lien, and who desires the payoff amount on the filed lien, cannot use the disclosure authority in section 6103(k)(6) to access such amount merely because the third party does not want to meet the "satisfactory written evidence" requirement contained in section 6103(k)(2) or because it is easier for the Service to assert that section 6103(k)(6) is applicable to avoid a perceived burden.² Section 6103(k)(6) may not be used to circumvent the procedures and rules of section 6103(k)(2). As a general rule, section 6103(k)(2) is the disclosure authority to be used when releasing filed lien payoff amounts to title insurance companies, mortgage lenders, and other persons with a right or who intend to obtain a right in the property subject to such liens.

It may be asserted that the required procedures to make disclosures under section 6103(k)(2) are too burdensome or impractical for customer service representatives to

² The Tax Reform Act of 1976 (TRA) amended section 6103 by adding section 6103(k)(2). Prior to the TRA, disclosures of outstanding payoff amounts on filed liens were authorized under section 6323(i)(3) and its implementing regulation. The regulation required the Service to disclose the unpaid balance on a filed lien only if the requester was deemed to have a "proper interest" in determining such amount. Even though the TRA repealed section 6323(i)(3), section 6103(k)(2) incorporated a similar "proper interest" requirement. Congress, in enacting section 6103(k)(2), made it a specific requirement that the Service be furnished with satisfactory written evidence of the requester's right or intent to obtain a right in the property subject to the lien before making any disclosure to the requester of a taxpayer's outstanding lien payoff amount.

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implement. We suggest that an IRS form with instructions be developed for interested persons and Service employees to follow in processing these requests, and that authority be redelegated to an appropriate level to permit section 6103(k)(2) authority to be utilized as intended.

In sum, it is important to note that the statutory and regulatory requirements of section 6103(k)(6) do not make it amenable to programmatic disclosures of outstanding lien payoff amounts to any third party. Congress intended that outstanding lien balances generally be disclosed under the procedures outlined in section 6103(k)(2). Section 6103(k)(6) should only be used to release outstanding lien balances in the limited circumstances detailed above.³

All Service employees have the authority to make disclosures of return information pursuant to section 6103(k)(6). These disclosures may be made face to face or by telephone. With respect to face to face contact, a Service employee will be able to fairly easily discern whether a third party has the willingness and means to pay a taxpayer's outstanding account balance. Essentially, the third party will need to have his/her checkbook in hand ready to make payment once the proper figure is disclosed to him/her. However, determining whether a third party has the willingness and means to pay off an account over the telephone might be somewhat more difficult. In such a case, a Service employee, before disclosing a taxpayer's lien payoff amount to a caller, must elicit enough information from the caller to have a reasonable belief that the caller wants the information for the purpose of paying off the taxpayer's liability in full. The disclosure here would be predicated on satisfying an indebtedness owed to the Service,

³ The legislative history of section 6103(k)(6) indicates that the exception to the general disclosure prohibition is to be read narrowly:

IRS officials and employees would be permitted, if no reasonable alternative exists, to make limited disclosures of return information in connection with an audit or investigation to the extent necessary in arriving at a correct determination of tax, liability for tax, or the amount to be collected, or otherwise in enforcement of any provision of the Code. In certain circumstances, it may be necessary to disclose . . . In rare and extraordinary circumstances, it may also be necessary . . . to disclose . . . S. Rep. No. 94-938, 341-342 (1976), 1976-3 C.B. (Vol. 3) 379-380 (Emphasis added).

Consistent with this clear direction from Congress, judicial review of taxpayer challenges to section 6103(k)(6) disclosures has focused on the circumstances surrounding each disclosure.

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and the only way to collect the proper amount due would be to disclose to the caller the amount of the liability.⁴

Any disclosure pursuant to section 6103(k)(6) is subject to second guessing. By definition, such disclosures require judgment and are often the basis for taxpayer unauthorized disclosure suits under section 7431 of the Code.⁵ Therefore, it is essential that section 6103(k)(6) disclosures are only made in those situations where the statutory and regulatory rules are met.

This memorandum has been coordinated with the Office of Governmental Liaison and Disclosure.

If you have any further questions concerning this matter, please call me at (202) 622-4580.

cc: Executive Technical Advisor, Office of Governmental Liaison and Disclosure

⁴ In cases where a third party would like to pay less than the outstanding lien payoff amount, please see the instructions outlined in IRM 1.3.11.10.

⁵ In this vein, we recommend that Service employees make notations of their thought processes in reaching the decision to disclose a taxpayer's outstanding lien payoff amount to a caller. We believe that such notations would support a good faith defense should a taxpayer file a suit under section 7431.