



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR SBSE ASSOCIATE AREA COUNSEL, NEWARK

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)

SUBJECT: Release of Lien, IRC § 2032A

This memorandum responds to your request for advice dated January 19, 2001. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

ISSUE:

Whether the I.R.C. § 6324B special estate tax lien must be released after the 10-year recapture period of I.R.C. § 2032A(c)(1) has elapsed.

CONCLUSION:

The section 6324B lien must be released if the 10-year recapture period has elapsed without a triggering event for the recapture tax, such that there is no longer any potential liability for recapture. However, if a triggering event did occur within the 10-year period such that the recapture liability arises, the lien should not be released until that liability has been fully satisfied or has become unenforceable, which may be at some point after the 10-year period.

BACKGROUND:

Your office has received a request for advice on the above-cited issue. The facts you present are as follows: Special tax liens (Forms 668H) are filed by the Special Procedures Branch ("SPB"), when requested to do so by the Estate and Gift Tax Group ("EGT"). Under I.R.C. § 2032A, Special Use Valuation, the EGT forwards a Form 611 containing the information necessary to prepare the Form 668H to SPB and the Form 668H is filed in the appropriate location.

The Insolvencies, Decedent's Estates, and Estate Taxes Collecting Handbook, IRM 5.5.8.3(2), provides in pertinent part, "Approval of the Estate and Gift Tax Manager should be secured before releasing the lien imposed by IRC § 6324B."

SPB has requested approval from EGT to file releases of federal tax liens in those cases where more than ten years have passed since the election was filed under section 2032A. EGT has responded that it is unable to concur, based on the lack of manpower. In addition, EGT argues that the taxpayers have not requested the releases.

SPB has asked whether it is necessary for the heir to request a formal release of lien or whether the Service should file a release of lien once it has become aware of the expiration of the 10-year period.

DISCUSSION:

I.R.C. § 6324B creates a special lien for the pending additional estate tax attributable to the estate's election to use a "special use value" for certain "qualified" property for estate tax calculation purposes. The lien is created by an election under I.R.C. § 2032A (valuation of farm real property and certain real property used in family businesses).

The amount of the lien is an amount equal to the "adjusted tax difference" attributable to the property interest. I.R.C. § 6324B(a). Generally, this is the difference between the estate tax calculated using the fair market value of the property and the estate tax calculated using the special use value of the property. The property covered by this lien is the interest in qualified real property. I.R.C. § 6324B(c)(2).

Section 6324B(b) provides that the duration of the section 6324B lien is as follows:

(B) Period of Lien.—The lien imposed by this section shall arise at the time an election is filed under section 2032A and shall continue with respect to any interest in the qualified real property--

(1) until the liability for tax under subsection (c) of section 2032A with respect to such interest has been satisfied or has become unenforceable by reason of lapse of time, or

(2) until it is established to the satisfaction of the Secretary that no further tax liability may arise under section 2032A(c) with respect to such interest.

(Emphasis added.)

Section 2032A(c)(1) provides as follows:

(1) Imposition of Additional Estate Tax.—If, within 10 years after the decedent's death and before the death of the qualified heir--

(A) the qualified heir disposes of any interest in qualified real property (other than by a disposition to a member of his family), or

(B) the qualified heir ceases to use for the qualified use the qualified real property which was acquired (or passed) from the decedent, then there is hereby imposed an additional estate tax.

Thus, liability for a recapture tax arises if the qualified heir disposes of any interest in the property or fails to use the property for a qualified purpose within 10 years ^{1/} from the decedent's date of death. This recapture period also ceases if the qualified heir dies and, thus, can be less than 10 years.

Section 2032A(c)(4) provides that the recapture tax described in section 2032A(c)(1) shall become due and payable on the date which is 6 months after the disposition or cessation described. Section 2032A(f) further provides that the statute of limitations for assessment of the recapture tax is generally 3 years from the date the Secretary was notified of the disposition/cessation (but may be later). Accordingly, while the event that triggers the liability for the recapture tax must occur within 10 years of the decedent's death, collection of that liability may clearly continue beyond that 10-year period.

The lien in section 6324B will expire upon occurrence of one of three events, as previously discussed: (1) the recapture tax liability has been satisfied; (2) the recapture tax liability is unenforceable by reason of lapse of time; or (3) no further recapture tax liability is possible. The issue raised by your office is whether the recapture liability becomes "unenforceable by reason of lapse of time" such that the Service should file a certificate of release for the section 6324B lien after the elapse of the 10-year period, even though the Service can continue to collect the recapture liability beyond the 10-year period.

There is little case law addressing the duration of the section 6324B lien. However, we do not read the phrase "liability ... has become unenforceable by reason of lapse of time" to equate the elapse of the 10-year period, such that all section 6324B liens must be automatically released after 10 years following the decedent's death. Rather, the 10-year period provides a measure of time during which the recapture tax triggering event must occur. The "liability" for the tax may continue beyond that period, as provided by sections 2032A(c)(4) and (f). Accordingly, if a recapture event has occurred during the 10-year period and the recapture tax liability has not been fully satisfied within that 10-year period, the section 6324B lien should not be released, as the recapture tax liability is still enforceable.

^{1/} With respect to the estates of decedents dying before December 31, 1981, the recapture period was 15 years rather than 10 years.

Support for this position is found in the legislative history. The General Explanation of the Tax Reform Act of 1976 (H.R. 10612, 94th Congress, Public Law 94-455) [Prepared by the Staff of the Joint Committee on Taxation (December 29, 1976)] provides, at page 543, “[t]he Act provides a special lien on all qualified farm or closely held business real property with respect to which an election to use the special use valuation provision has been made. This lien is to continue until the tax benefit is recaptured or until the potential liability for recapture ceases (i.e., the qualified heir dies or a period of 15 years from the decedent’s death lapses).” Thus, the legislative history equates the 15-year (now 10-year) period with the time period after which the potential liability for recapture ceases, rather than a time period after which the recapture tax liability becomes unenforceable.

If Congress had intended for the section 6324B lien to have a finite duration of 10 years, it could have used clearer language to provide for this result. If the “unenforceable by lapse of time” language simply meant that the 10-year period had elapsed, this would render the additional language in the statute providing that the lien will expire when no further recapture liability is possible (which also indicates the lapse of the 10-year period) superfluous.

While the section 6324B lien should not be automatically released at the end of the 10-year recapture period, the District does need to make a release determination at that time. If there was recapture liability that has been fully satisfied before the elapse of the 10-year period or if there was no recapture liability triggered during that 10-year period, such that there is no possible future recapture tax liability, the Service is required to release the section 6324B lien, pursuant to I.R.C. § 6325. Section 6325(a)(1) provides that “[s]ubject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which ... [t]he Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable”

If the 10-year period has passed without triggering any recapture liability, or any recapture liability has been fully satisfied, and the Service fails to release the lien, as required by section 6325(a)(1), there is potential for damage claims under I.R.C. §§ 7432 and 7433. The criteria for potential damage claims under sections 7432 and/or 7433 are further discussed in your memorandum (i.e., the taxpayer must first exhaust all administrative remedies).

Accordingly, we conclude that the duration of the section 6324B lien may be beyond the 10-year recapture period, such that the liens should not automatically be released upon the date 10 years after the decedent’s death. If the 10-year period has elapsed without the recapture tax being triggered such that there is no further potential for liability or if any recapture liability has been fully satisfied, however, the liens should be released. The District should make a determination as to whether or not to release the section

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6324B liens after the elapse of the 10-year period and should release the liens, where appropriate, as soon as possible in order to avoid potential damage claims.

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