



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE) AREA 3

FROM: Joseph W. Clark
Senior Technician Reviewer, Branch 2
(Collection, Bankruptcy and Summonses)

SUBJECT: Joint Notice of Federal Tax Lien and Tenancy by the Entirety

This Chief Counsel Advice responds to your memorandum dated June 18, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

Whether our previous advice recommending against the use of a joint notice of federal tax lien ("joint notice") when spouses who own property as tenants by the entirety are jointly and severally liable on a tax debt, bars the filing of joint notices.

CONCLUSIONS

Although we agree with our previous recommendation, there is no legal reason why Florida Collection cannot continue its long standing practice of issuing both individual and joint notices of federal tax lien.

FACTS

Previously, we addressed a hypothetical situation where separate but identical trust fund recovery penalties ("TFRP" or "penalty") assessments under section 6672 of the Internal Revenue Code are made against a husband and a wife who are sole officers of a corporation. In this hypothetical the husband and wife own real property as tenants by the entirety in a jurisdiction where the liens arising from the separate TFRP assessments attach to the entireties property. For reasons discussed below, we concluded that although a joint notice may be sufficient to provide constructive notice to third-party creditors, joint notices are not necessary.

Your memorandum asks us to further clarify the meaning of our previous advice. You note that the long standing practice in Florida has been to file both separate and joint notices in cases where both spouses are jointly and severally liable for a TFRP. According to you memorandum, Florida collection personnel feel that

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recording joint notices leads to increased collections and that innocent third-party creditors would be disadvantaged by a change in practice.

LAW AND ANALYSIS

In Brown v. United States, 591 F. Supp. 1136 (5th Cir. 1979) the court of appeals held that section 6672 creates a joint and several liability against all responsible officers subject to TFRP. Thus, each delinquent responsible officer is independently liable for the entire amount of the penalty.¹ In our view, joint notices are inconsistent with the idea that section 6672 imposes an individual liability subject to an individual assessment.

A notice of federal tax lien does not create a lien against property. Rather, a lien is created the moment a person required to pay taxes fails to do so. I.R.C. § 6321. The lien exists regardless of whether notice is filed. However, Congress has seen fit to provide protection to certain classes of creditors, thus a lien will not be valid against a purchaser of a security interest, a mechanic's lienor, or a judgment lien creditor unless notice has been properly filed. I.R.C. § 6323(a).

A notice of federal tax lien is sufficient if it gives constructive notice of the existence of the government's lien. 3 A.L.R. 3d 633, See United States v. Sirico, 247 F.Supp. 421, 422 (S.D.N.Y. 1965). Thus, individual notices filed against a husband and a wife will alert a reasonable third party to the possibility that the entireties property is encumbered by a joint liability. Augello v. United States, 93-2 U.S. Tax Cas. (CCH) ¶ 50, 391 (M.D. Pa. 1993). Yet, there is no legal imperative that only individual notices be filed. As long as the notice gives sufficient constructive notice of the existence of the government's lien then it satisfies the requirements of section 6323(f) of the Internal Revenue Code.

If Florida Collection personnel wish to continue to file both individual and joint notices they may do so. Our previous advice was meant as a recommendation, which is evidenced by our discussion about what a joint notice should contain if one is filed. Nothing in that advice precludes continuation of the current Florida practice.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

¹However, it is the Service's policy to collect the unpaid trust fund taxes only once. IRM 5.17.7.1.11(1).

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If you have any further questions please contact the attorney assigned to this matter at (202) 622-3620.