

INTERNAL REVENUE SERVICE

June 28, 2001

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MEMORANDUM FOR SENIOR TECHNICIAN REVIEWER, BRANCH 1
(Administrative Provisions & Judicial Practice)

FROM: JOSEPH W. CLARK
Senior Technician Reviewer, Branch 2
(Collection, Bankruptcy & Summonses)

SUBJECT: Refund Offset
Taxpayer:

This responds to your memorandum soliciting the assistance of the Collection, Bankruptcy & Summonses division in responding to a request for Significant Service Center Advice initiated by the Taxpayer Advocate. The request for advice, which was sent by the Area Counsel (Small Business/Self -Employed:Area 1)(copy attached), deals with a number of issues arising from the Service's receipt of amounts from a levy on a taxpayer's property following the filing and acceptance of, and payment in full on, an offer in compromise. Our response has been coordinated with Branch 1 (Collection, Bankruptcy & Summonses).

The specific issue which you asked CBS to address is:

Under the facts presented, whether a wage levy was either an erroneous levy from the outset or became an erroneous levy when it was resumed after the Service had accepted an offer in compromise from the taxpayer.

The Area Counsel's memorandum indicates that she did not have direct access to the actual file for the taxpayer, but that the relevant facts were obtained from a memorandum provided by the Taxpayer Advocate on April 16, 2001. We are not in possession of the April 16 memorandum. However, the facts set forth in the Area Counsel's memorandum are, in brief, as follows. _____, the taxpayer, owed taxes for 1992, 1993, and 1995. To collect on these outstanding liabilities, the Service instituted a levy on the taxpayer's wages. The Service received the first payment from the levy on March 2, 1998. On February 8, 1999, the taxpayer filed an offer in compromise, covering these liabilities, with the Service. This offer in compromise was accepted December 10, 1999. On December 27, 1999, 17 days

thereafter, the liabilities at issue were satisfied in full. The wage levy "resumed" on February 14, 2000, and yielded 13 additional payments thereafter. The last levy to effect a payment that was retained by the Service occurred on October 27, 2000.

These facts reflect that not only was the offer in compromise accepted, but the liabilities covered by the offer were satisfied in full, between the time the levy was instituted and the time it "resumed" in February 2000.

2/ Moreover, pursuant to Section § 6343(d), the Service is authorized to return levied-upon property where either the levy was not in accordance with administrative procedures of the Secretary or the National Taxpayer Advocate determines that the return of such property would be in the best interests of both the taxpayer and the United States. I.R.C. § 6343(d)(2)(A), (D). Where Section 6343(d) applies, the provisions of Section 6343(b) apply in substantially the same manner as if the property had been "wrongfully" levied upon, or as if property other than that of the taxpayer had been incorrectly levied upon. See I.R.C. § 6343(d). Section 6343(b) permits the Service to return the appropriate amount "at any time before the expiration of 9 months from the date of such levy." I.R.C. § 6343(b). The position of the Office of Chief Counsel is that the taxpayer is not required to file a claim to trigger the return of the property. However, the Treasury Regulations promulgated pursuant to Section 6343(b) require that any claim that is made by the taxpayer be made in writing. See Treas. Reg. 301.6343-2(b). 3/

1/ We have been told that subsequent payments were obtained via the levy, but that those payments were ultimately returned to the taxpayer.

2/ I.R.C. § 6331(k), added to the Code by the Internal Revenue Service Restructuring and Reform Act of 1998, specifically prohibits the Service from making a levy with respect to an unpaid tax while an offer in compromise of such unpaid tax is pending. This provision applies to offers in compromise pending on or made after December 31, 1999. Accordingly, it does not apply to this case, since the offer was made in February 1999 and was accepted December 10, 1999, and since the liability was satisfied in full on December 27, 1999. Prior to the effective date of Section 6331(k), the Service was not prohibited by statute from levying during the pendency of an offer in compromise, although as a policy matter the Service generally refrained from taking collection action in this context. See Policy Statement P-5-97.

3/ Under regulations proposed to be promulgated pursuant to Section 6343, the Service may return property based on information received from a source other than the taxpayer. Return of Property in Certain Cases, 66 Fed. Reg. 10249 (proposed February 14, 2001)(to be codified at 26 C.F.R. Part 301).

In this case, the facts contained in the Area Counsel's memorandum do not reflect that the taxpayer at any time requested the return of the erroneously levied wages. [REDACTED]

Assuming the funds erroneously levied upon in this case can be returned to the taxpayer, the question which arises is whether and how the offset which was effected in this case, pursuant to I.R.C. § 6402(d), can be reversed. This constitutes a separate issue, one which we believe is within the exclusive purview of your function. 4/

Thank you for soliciting our advice on this matter. If you require further assistance, please contact Debbie Kohn, the CBS attorney assigned to this case.

4/ We note, however, that pursuant to the position taken in the preamble to the proposed regulations referred to in footnote 3, supra, [a]ny property received pursuant to a levy made in violation of the law **will be returned** unless the taxpayer gives permission to the IRS to keep the property." Return of Property in Certain Cases, 66 Fed. Reg. 10249, 10250 (proposed February 14, 2001) (emphasis supplied).

Attachment:

Memorandum from Area Counsel (Small Business/Self-Employed:Area 1)(undated).

cc: Chief, Branch 1 (Collection, Bankruptcy & Summonses)

Attention: Robin Ferguson