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INTERNAL REVENUE SERVICE
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OFFICE OF
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MEMORANDUM FOR ASSOCIATE AREA COUNSEL CINCINNATI (CC:SB:4:CIN)

FROM: Alan C. Levine
Chief, Branch 1 Collection, Bankruptcy, and Summonses

SUBJECT: Whether Levy May be Challenged at CDP Hearing

By e-mail dated August 6, 2001, you asked if we agreed with the substance of your memorandum to the Appeals Team Manager in Area 4. Your memorandum addresses the following two issues, raised in a hypothetical context:

1. Whether a taxpayer, who was offered and failed to timely request a Collection Due Process (CDP) hearing in response to a Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing (L1058 or LT11) ("CDP Notice") may properly challenge the appropriateness of the proposed levy in a subsequent CDP proceeding arising from the filing of a notice of federal tax lien.
2. If the answer to the above question is answered affirmatively, whether a levy, served after a CDP Notice is issued but no timely request for a CDP hearing has been made, may be challenged at a subsequent CDP proceeding arising from the filing of a notice of federal tax lien.

CONCLUSION:

1. A taxpayer who was offered and failed to timely request a CDP hearing in response to a CDP Notice cannot challenge the appropriateness of the proposed levy in a subsequent CDP hearing arising from the filing of a notice of federal tax lien. However, an appeals officer may consider the effect of the levy on the taxpayer in determining whether the filing of the notice of federal tax lien was appropriate.
2. A taxpayer cannot challenge a levy which was served after a CDP Notice was issued but for which the taxpayer did not timely request a CDP hearing at a subsequent CDP proceeding arising from the filing of a notice of federal tax lien. The appeals officer may, however, consider the effect of the levy on the taxpayer in determining whether the filing of the notice of federal tax lien was appropriate.

ANALYSIS:

1. You opine that a taxpayer may challenge the appropriateness of a previous levy (one in which the taxpayer was offered but did not timely request a CDP hearing), in a subsequent CDP hearing arising from the filing of a tax lien. You base your opinion on the fact that I.R.C. § 6330(c)(2)(A)(ii), which is applicable to a section 6320 hearing under I.R.C. § 6320(c), provides that, at a CDP hearing, a taxpayer may challenge “the appropriateness of collection actions.” You also note that I.R.C. § 6330(c)(4) provides that an appeals officer cannot consider an issue if it was raised and considered at a previous CDP hearing or other administrative or judicial proceeding, and the taxpayer participated meaningfully in said proceeding. Because the taxpayer did not challenge the levy in a previous hearing, you conclude that the taxpayer may raise the appropriateness of the levy in a lien CDP hearing.

We do not agree. The regulations under section 6330 specifically provide that if a taxpayer does not request a CDP hearing with Appeals within the 30-day period commencing the day after the date of the CDP Notice, the taxpayer foregoes the right to a CDP hearing with respect to the tax and tax period or periods shown on said Notice. Temp. Treas. Reg. § 301.6330-1T(c)(2)Q&A-C7. The requirement that a taxpayer request a timely hearing after receipt of a CDP Notice under section 6330 in order to obtain a hearing on the levy is reinforced in Temp. Treas. Reg. § 301.6330-1T(a)(4)Q&A-B2 [taxpayer foregoes right to a CDP hearing if a timely request for a hearing is not made following the first notification of a levy] and Temp. Treas. Reg. § 301.6330-1T(a)(4)Q&A-B4 [taxpayer must request CDP hearing within 30 days of the date of the first CDP Notice]. In other words, a taxpayer who fails to timely request a section 6330 CDP hearing after receiving a CDP Notice listing a specific tax and tax period or periods is not entitled to a second opportunity to challenge the levy, regardless of how many levy notices the taxpayer receives for that same tax and tax period or periods. Allowing a taxpayer to challenge a levy in a section 6320 CDP hearing, after the taxpayer failed to exercise the opportunity to challenge the levy in a section 6330 CDP hearing, would undermine the regulations.

We note that the regulations do not totally preclude a taxpayer from challenging a levy even though the taxpayer did not timely request a CDP hearing under section 6330. Specifically, Temp. Treas. Reg. § 301.6330(i) provides that if a taxpayer fails to request a section 6330 CDP hearing within the 30-day period, the taxpayer may still request an administrative hearing, called an “equivalent hearing,” with Appeals. This hearing is “held by Appeals and will generally follow Appeals procedures for a CDP hearing,” except that Appeals will issue a decision letter rather than a notice of determination. A taxpayer may not appeal to a court from a decision letter, but, under certain circumstances, can seek Tax Court review of a denial of innocent spouse relief under I.R.C. § 6015, pursuant to that Code section.

In context, the reference to the “appropriateness of collection actions” in both I.R.C. § 6330(c)(2)(A)(i) and Temp. Treas. Reg. § 301.6320(e), (setting forth the matters which can be considered at a section 6320 CDP hearing), cannot mean that a taxpayer who fails to request timely a CDP hearing concerning a proposed levy may challenge the validity of the proposed levy in a CDP hearing concerning the filing of a notice of tax lien. It is our opinion, however, that in situations where the taxpayer fails to timely request a section 6330 CDP hearing, these provisions allow the appeals officer to consider the effect (but not the validity) of the levy when determining if the filing of the notice of federal tax lien was appropriate in a subsequent section 6320 CDP hearing. For example, if a levy is expected to result in full payment of the liability, the appeals officer may conclude that filing the lien was unnecessary to protect the government’s interest. On the other hand, if the levy is not expected to result in full payment or is unlikely to be executed for some reason, the appeals officer may conclude that the filing of the lien was necessary and/or appropriate to protect the government’s interest. Finally, there may be other additional fact situations which would permit the appeals officer to consider the effect of a levy at a section 6320 CDP hearing.

2. For the reasons set forth above, if a levy has been served pursuant to a CDP Notice, a taxpayer cannot also challenge that levy at a subsequent section 6320 CDP proceeding if the taxpayer failed to timely request a CDP hearing. However, as also noted above, under I.R.C. § 6330(c)(2)(A)(i), an appeals officer may consider the effect of said levy when determining if the filing of the notice of federal tax lien was appropriate in a subsequent section 6320 CDP hearing.