



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE) AREA 8

FROM: Mitchel S. Hyman
Senior Technician Reviewer, Branch 1, Collection, Bankruptcy &
Summons

SUBJECT: Levy on Certain Pension Benefits Payable to a Beneficiary

This Chief Counsel Advice responds to your memorandum dated March 14, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

Whether the Service's levy reaches benefits payable under a defined benefit pension plan to the taxpayer's beneficiary where the levy occurs before the death of the taxpayer.

CONCLUSION

Although the federal tax lien attaches to a taxpayer's vested interest in a pension plan, the levy does not reach amounts payable to the beneficiary as death benefits.

BACKGROUND

The relevant facts can be summarized as follows: The taxpayer failed to file federal income tax returns for tax years The Service conducted an audit for those years and on March 10, 1997 made assessments totaling approximately \$ As of September 2001, the amount due totaled approximately \$

According to correspondence from the counsel for the plan administrator contained in the material you provided us, in March 1999, at age 65, the taxpayer, who was unmarried, began receiving life annuity benefits with "a guaranteed amount." Also at that time, the taxpayer designated a live-in acquaintance as beneficiary of the plan benefits payable at his death. Specifically, the terms of the plan provide that an unmarried participant is entitled to an amount specified in the plan "in the form of a single life annuity providing monthly payments for the life of the Participant with the

following additional guaranteed payments.” Plan, section 8.01. The plan further provides that where the participant dies before “receiving a total pension benefit amount equal to 100 times the monthly pension benefit amount he or she would have received had he or she been 65 years old as of his or her Annuity Starting Date, the balance of such total pension benefit amount shall be paid to his or her beneficiary”. Plan, section 8.01(b)(1).

In January 1999 an L1058 CDP notice was sent to the taxpayer, but no response was received by the Service. On November 20, 2000, the Service served a Form 668-W levy on the plan. This levy is still outstanding. The Service received at least one payment from the plan, in January 2001.

The taxpayer died on January 5, 2001, and the Service has received no further payments. On August 22, 2001, the Service sent the plan a Form 668-A levy. Apparently, the Service used this levy to put the plan on notice that the Service intended to levy on the death benefits payable to the participant. Counsel for the plan advised the Service that the plan would not comply with the levy because the levy form did not contain the signature that would indicate that the levy reaches funds in retirement plans. The plan’s counsel also asked that the Service seek advice from field counsel concerning the levy on the death benefits.

LAW AND ANALYSIS

Specifically, you seek advice as to whether the tax levy can attach to the amount due to the taxpayer’s beneficiary under the pension plan. You state that a reasonable argument can be made that the entirety of the pension benefits, including the amounts payable as death benefits to the beneficiary, are amounts payable to the taxpayer as compensation for services rendered, thus giving the taxpayer a property interest that can be reached by levy prior to death.

As a preliminary matter, we note that state law determines the taxpayer’s interests in property, but it is federal law that determines whether those interests constitute property for federal tax purposes. United States v. Craft, 122 S. Ct. 1414 (2002). Thus, we agree with you that the taxpayer had a state-law interest in the plan benefits. What we find of particular import here is the nature of that interest given the death of the taxpayer. If this case involved a defined benefit plan that only provided X dollars per month to the participant and Y dollars a month to a beneficiary as death benefits, there would be little doubt that the Service would be unable to collect death benefits from the plan—in other words, the ability of the Service to collect from the plan would end when the taxpayer dies.

What distinguishes this case from the above hypothetical is the existence of the so-called guaranteed amount. Your position is that the government is arguably entitled to collect, by levy, the unpaid remainder of the so-called guaranteed amount because at the time the federal tax lien arose, the taxpayer’s rights extended to the guaranteed

amount. We see the matter differently: While the taxpayer was alive, he was not entitled to the guaranteed amount, rather under the terms of the plan he was entitled to monthly payments for as long as he lived. The guaranteed amount is the device used to determine the death benefits payable to the beneficiary. With respect to the guaranteed amount, what the taxpayer had was the right to designate a beneficiary.

Viewed this way, we conclude, based on the facts of this case, that the levy does not reach the death benefits. Our conclusion fits squarely within the reasoning of United States v. Bess, 357 U.S. 51 (1958). As you know, in Bess, the Supreme Court held that the federal tax lien attaches to the cash surrender value of a life insurance policy, but not the proceeds otherwise payable at the death of the insured. In finding that the insured did not have a property interest in the death proceeds the Court stated:

It is not questioned that the rights of the insured are measured by the policy contract as enforced by New Jersey law. Manifestly the insured could not enjoy the possession of the proceeds in his lifetime. His right to change the beneficiary, even to designate his estate to receive the proceeds, gives him no right to receive the proceeds while he lives. It would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy, and which are reducible to possession by another only upon the insured's death when his right to change the beneficiary comes to an end.

357 U.S. at 57 (citation omitted). Here, the federal tax levy reached the monthly annuity payments payable to the taxpayer during his lifetime. However, the levy does not reach payments of death benefits which the taxpayer could never enjoy, even where those death benefits are computed using a "guaranteed amount." As we stated previously, under the terms of the plan, the guaranteed amount was not an amount that the taxpayer was guaranteed to receive. While the Ninth Circuit held in Connor v. United States, 27 F.3d 365 (9th Cir. 1994) that the federal tax lien attaches to a taxpayer's vested right to receive future pension benefits, ^{1/} Connor is not dispositive here as it does not address the central issue presented in this case—administrative collection from death benefits payable to the taxpayer's beneficiary under a defined benefit plan.

If you have questions or comments regarding the foregoing, please contact Branch 1 at (202) 622-3610.

^{1/} In fact, the principle that the federal tax lien attaches to property (and that the property is reachable by levy) where the taxpayer has the present right to future payment is a key part of the legal basis for our position that retirement assets are subject to collection.