



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:7

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

SUBJECT: Delaying Collection Due Process Hearings During the Pendency of Criminal Tax Proceedings

This responds to your request for prereview of a draft advisory memorandum in the above-referenced case regarding the delay of a collection due process (CDP) hearing during the pendency of criminal proceedings. In accordance with I.R.C. § 6110(k)(3), this guidance should not be cited as precedent.

LEGEND

Year 1

Year 2

Year 3

Amount A

Property A

Date 1

Date 2

Date 3

Month 1

Month 2

ISSUE

Whether an appeals officer should proceed with conducting a CDP hearing for tax periods that are the subject of a criminal tax proceeding.

CONCLUSION

An appeals officer should generally delay a CDP hearing during the pendency of criminal investigations and proceedings, unless the determination is made consistent with Policy Statement P-4-84 that the CDP hearing and any appeals will not imperil prosecution.

BACKGROUND

For a ten year period, taxpayer filed income tax returns for which he owed significant taxes, but only paid small amounts. By Year1, taxpayer owed over Amount A in delinquent taxes.

The Criminal Investigation Division (CID) began an investigation of taxpayer for suspected evasion of payment in violation of I.R.C. § 7201. Special agents executed judicial search warrants of taxpayer's residence and law office. Agents seized currency, and Property A as evidence of taxpayer's criminal failure to pay tax.

Compliance personnel, however, did not apply the currency to taxpayer's accounts because a notice of levy had not been served. SBSE Counsel also advised that notice of levy could not be served until notice of intent to levy was issued.

As a result, Final Notice/Notice of Intent to Levy and Notice of Your Right to a Hearing, Letter 1058, was mailed to taxpayer on Date 1, for tax years Year 2 through Year 3. On Date 2, taxpayer made a timely written request for a CDP hearing. In his request, taxpayer claimed that: 1) the statute of limitations had expired for some of his tax liabilities; 2) a criminal investigation was underway in U.S. District Court; 3) he wanted the Service to consider an offer in compromise or an installment agreement to satisfy his tax liabilities; and 4) his financial situation made it impossible for him to pay the full tax liability and if he did so, he would not be able to afford to retain legal representation.

On Date 3, taxpayer requested that the seized Property A be sold and the proceeds and seized currency be applied to his delinquent account. The Service complied with taxpayer's request, and the currency and the proceeds of Property A were applied to his tax liabilities. Taxpayer, however, never withdrew his request for a CDP hearing.

In Month 1 the investigation of taxpayer was completed and CID recommended prosecution of taxpayer for criminal tax violations for the same tax years at issue in the

CDP case. A criminal investigation, conducted by a grand jury, has been completed. The Department of Justice has not yet authorized prosecution.

In Month 2 the appeals officer assigned to the CDP case requested advice as to whether the CDP hearing should be held for a taxpayer who is also the subject of an ongoing criminal matter. You have requested prerule of a draft advisory opinion that concludes the CDP hearing would imperil the criminal case and should not be held until all aspects of the criminal case are concluded. We have coordinated this case with the Division Counsel/Associate Chief Counsel (Criminal Tax).

DISCUSSION

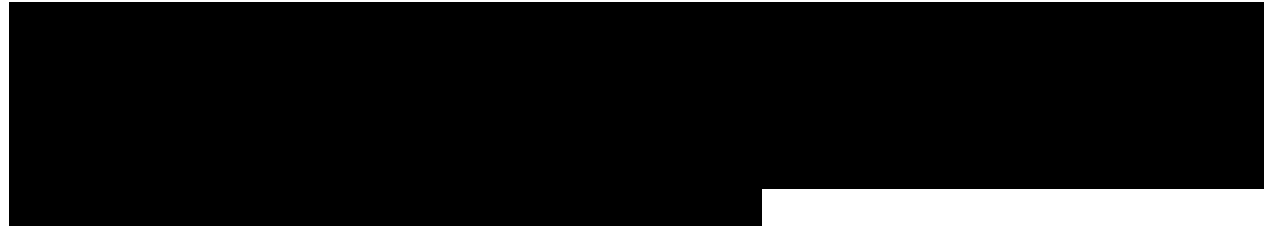
We agree that a CDP hearing should generally be delayed during the pendency of criminal matters involving the same tax years that are the subject of the CDP case.

Generally, the Service may not levy until the taxpayer has been given an opportunity for a CDP hearing, and during the pendency of any appeals. I.R.C. §§ 6330(a), (e). When a taxpayer receives a notice of intent to levy, Letter 1058, he has a right to request a CDP hearing before an impartial appeals officer. I.R.C. §§ 6330(a) and (b)(3). At the hearing, the appeals officer shall verify that all applicable law and administrative procedures have been met with regard to the levy, and shall consider any relevant issues raised by the taxpayer relating to the unpaid tax or the proposed levy. I.R.C. § 6330(c). Relevant issues include appropriate spousal defenses, challenges to the appropriateness of the collection actions, and offers of collection alternatives. I.R.C. § 6330(c)(2). The taxpayer may raise any relevant issues but is not permitted to obtain discovery or subpoena witnesses at a CDP hearing. Davis. v. Commissioner, 115 T.C. 35 (2000). Additionally, the appeals officer may review the underlying tax liability at the hearing if the taxpayer did not receive a notice of deficiency or did not have a previous opportunity to dispute his liability. Sego v. Commissioner, 114 T.C. 604, 609 (2000).

There is no predetermined time period within which an appeals officer must conduct a CDP hearing after a taxpayer has requested it, but the appeals officer must attempt to conduct a hearing "as expeditiously as possible under the circumstances." Treas. Reg. § 301.6330-1(e)(3) Q&A-E9. The regulations do not provide any guidance for defining the limits of "as expeditiously as possible under the circumstances," and the language of the statute provides no specific time frame for conducting a CDP hearing. However, we interpret the regulation to permit postponement of a CDP hearing for special "circumstances," including ongoing criminal proceedings and bankruptcy proceedings. See Notice CC-2001-038, IV(D).

Because civil enforcement actions in cases that are also under criminal investigation may imperil subsequent prosecution, the Government's general policy is to suspend civil enforcement until the criminal aspects of the case are resolved, unless the civil action will not imperil prosecution. See Policy Statement P-4-84.

We agree with your conclusion in your draft memorandum that postponement of a CDP hearing consistent with Service policy during the pendency of criminal investigations and proceedings does not violate section 6330 and the regulation. The pendency of the criminal proceeding is a special "circumstance" justifying the postponement of a CDP hearing to protect both the interests of the taxpayer and the Government. Such postponement does not prejudice the taxpayer since no levies will be made until the CDP proceedings are final, and in fact protects the taxpayer's interests since information provided by the taxpayer in the civil proceeding could be used against him in the criminal case.



We, therefore, request that you revise your draft memorandum consistent with this advice. If you have any questions concerning this matter, please contact the attorney assigned to this case at (202) 622-3610.