



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR MILTON B. BLOUKE, CC:TEGE:PCCM:LA

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

SUBJECT: Levy on Income from Indian Nation

By e-mail dated October 8, 2002, you requested technical assistance to respond to a memorandum from a revenue officer. This document may not be cited as precedent. I.R.C. § 6110(k)(3).

ISSUE:

Whether the Service may levy upon purportedly tax exempt income of an Indian taxpayer? 1/

CONCLUSION:

Whether the Service may levy on the tax exempt income of an Indian taxpayer to collect tax liabilities incurred on non-exempt income depends upon an interpretation of the treaty between the Indians and the United States.

FACTS:

The taxpayer, a member of the _____ in _____, failed to file federal income tax returns for the years _____. Although the taxpayer claimed that his income during these years was tax exempt, the Service did not agree with his contention and assessed tax liabilities against him. After obtaining information that the taxpayer was receiving income from _____

1/ We understand that there is an issue as to whether the taxpayer's past, as well as his current, income is tax exempt and that your office is in the process of making this determination. We also understand that there would be no levy if the Service determines that the income is tax exempt.

the Service served a levy on [REDACTED] for the tax liabilities. [REDACTED] has refused to honor the levy because it claims that the taxpayer's income, which is from [REDACTED], is tax exempt and therefore cannot be levied upon.

LAW AND ANALYSIS:

Section 6331 of the Code authorizes the Service to collect taxes by levy upon "all property and rights to property (except such property as is exempt under section 6334)" belonging to the taxpayer. See United States v. National Bank of Commerce, 472 U.S. 713, 720-21 (1985). Section 6334(c) of the Code specifically states that "[n]otwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

I.R.C. § 6334

The courts have held that section 6334(a) sets forth an exclusive list of property and property rights which are exempt from levy. Drye v. United States, 528 U.S. 49, 56 (1999); Overton v. United States, 74 F.Supp.2d 1034, 1045 (D. NM 1999), aff'd, 202 F.3d 282 (10th Cir. 2000) [general retirement benefits are not included within § 6334(a)'s exclusive list]; Beam v. IRS, 192 F.3d 941, 944 (9th Cir. 1999) ["... Congress clearly intended to exclude from IRS levy only those 13 categories of property specifically-exempted in section 6334(a)."]; Sea-land Service, Inc. v. United States, 622 F. Supp. 769, 773 (D. NJ 1985), citing United States v. Offshore Logistics International, Inc., 483 F. Supp. 1055, 1057 (W.D. La. 1979) [Congress intended to provide in Section 6334 an exclusive listing of property exempt from federal tax levies]. The general rule, therefore, is that unless property sought to be levied upon is listed in section 6334(a), the property is subject to levy. [REDACTED] is not set forth in section 6334(a), the Service can levy upon the taxpayer's income. [REDACTED]

Treas. Reg. § 301.6331-1

Because the present case involves a taxpayer who is a member of the [REDACTED] and who is receiving income from [REDACTED], we must also consider Treas. Reg. § 301.6331-1(a)(5) [which provides that "any interest in restricted land held in trust by the United States for an individual noncompetent Indian shall not be deemed to be property, or a right to property, belonging to such Indian"]. The Office of Legal Counsel of the Department of Justice ("OLC"), in the case Keechi v. United States, Civil Action No. 84-2085 (D.D.C.) has issued an opinion concluding that section

301.6331-1(a)(5) may limit the Service's authority to levy. [REDACTED]

In Keechi, the plaintiff, a member of the Wichita tribe, was the beneficial owner of land held in trust by the United States pursuant to the General Allotment Act of 1887. 2/ The Bureau of Indian Affairs of the Department of the Interior, ("the Bureau"), managed the plaintiff's land and subsequently entered into an oil and gas lease for the land, which required the lessee to pay all royalties arising under the lease to the Bureau. The Bureau then deposited the royalties into an Individual Indian Money ("IIM") Account for the plaintiff.

After the Service made two assessments against the plaintiff for the trust fund recovery penalty pursuant to I.R.C. § 6672, the Service served notices of levy on the Bureau for the plaintiff's IIM account in an effort to obtain payment of said assessments. The plaintiff brought an action in district court, essentially seeking a declaratory judgment that his IIM account was not subject to levy. As there was a conflict between the position of the Department of the Interior (the account was exempt from levy), and the position of the Service (the account was not exempt from levy), the agencies agreed to submit their dispute to the OLC for a binding opinion.

The OLC first noted that I.R.C. § 6334(c) specifically provides that "notwithstanding any other law of the United States," only property listed in I.R.C. § 6334(a) is exempt from levy. However, the OLC found that Treas. Reg. § 301.6331-1(a)(5), in effect, exempts from levy any interest in restricted land held in trust by the United States even though it does not fall within any of the categories set forth in section 6334(a).

The OLC found the statutory basis for the regulation was the General Allotment Act, which contained two relevant provisions. Specifically, 25 U.S.C. § 354 provides that:

"No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee thereof."

Additionally, 25 U.S. C. § 410 provides that:

"No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior."

2/ Under the General Allotment Act of 1887, 25 U.S.C. § 331 et seq., Indian tribal lands were divided and allotted to individual members of the tribe.

Given that Congress enacted these two provisions, one protecting the trust land and the other protecting the income derived from that land, at the same time, the OLC found the two provisions were indistinguishable for purposes of limiting the levy power of the Service and determined that, based on the aforementioned provisions, the Service could not levy on income derived from trust land, notwithstanding section 6334(c).

[REDACTED] tribe, which is beyond our expertise and falls within the jurisdiction of the Bureau of Indian Affairs. ^{3/} Therefore, if you ultimately determine that the taxpayer's income from [REDACTED] was non-exempt income, we would be happy to coordinate the resolution of the issue of whether the Service can levy upon the taxpayer's current income with any other relevant government agencies.

^{3/} We note that in Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 547 (1987), the Supreme Court held that, for purposes of Indian reservations, the term "lands" could include adjacent waters.