Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Associate Area Counsel (Indianapolis)
(Small Business/Self-Employed)

from: Mitchel S. Hyman, Senior Technician Reviewer
(Procedure & Administration)

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subject: Levy on State Retirement Fund

This Chief Counsel Advice responds to your request for assistance. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

After serving a notice of levy on a state retirement fund, can the Service exercise the taxpayer's right to suspend membership in the fund in order to obtain an immediate distribution of the taxpayer's assets in the fund when the taxpayer has not yet reached retirement age?

CONCLUSION

No, the Service may not exercise the taxpayer's right to suspend membership in the fund in order to obtain an immediate distribution of the taxpayer's assets in the fund when the taxpayer has not yet reached retirement age. The Service may levy upon a retirement plan even if a participant has no immediate right to receive benefits. However, the fund is not obligated to turn over any assets pursuant to the Service's levy until the taxpayer reaches the age in which she is eligible for retirement benefits under the plan or the taxpayer voluntarily suspends her membership in the plan.

FACTS

Married taxpayers have an unpaid joint income tax liability. One spouse has an account with a state retirement fund. She is fifty years old and not currently receiving benefits from the fund. Although the taxpayer no longer works for the state, she has obtained other employment and is not retired. According to the terms of the retirement fund the taxpayer may elect to suspend membership in the fund and receive a distribution of all assets in her account. If she does not make such an election, when the taxpayer reaches retirement age, she will be eligible to receive her retirement benefits from the account.

The Service served a notice of levy on the state retirement fund in order to collect the taxpayer's assets in the fund. The fund will not distribute the assets unless the taxpayer elects to suspend membership in the fund. The revenue officer asks whether the Service can "elect" to suspend membership in the fund on the taxpayer's behalf.

LAW AND ANALYSIS

For the reasons stated below, the Service cannot elect the suspension of membership in the state retirement fund on behalf of the taxpayer.

Pursuant to I.R.C. § 6321, a lien arises upon "all property or rights to property" of the taxpayer. Additionally, I.R.C. § 6331(a) authorizes the Service to levy upon "all property and rights to property" of a taxpayer or on which there is a federal tax lien in order to collect delinquent taxes. Congress broadly defined "property" in section 6331(a) to reach every interest a taxpayer might have in property. See United States v. Nat'l Bank of Commerce, 472 U.S. 713, 719-720 (1985). Only property that is specifically enumerated in I.R.C. 6334(a) is exempt from levy. Because the Code does not specifically exempt funds in a state retirement fund from levy, the Service's levy attaches to the taxpayers' interest in the state retirement fund. See Shanbaum v. United States, 32 F.3d 180 (5th Cir. 1994).

Generally, a levy extends only to property rights and obligations that exist at the time of the levy. Treas. Reg. § 301.6331-1(a). Obligations exist for purposes of a levy when the liability of the obligor is fixed and determinable, although the right to receive payment is deferred until a later date. Id. See also Tull v. United States, 69 F.3d 394 (9th Cir. 1995). Accordingly, even if the taxpayer is not currently receiving benefits from the retirement fund, if a present right to a future payment exists, the levy reaches that present right. See Rev. Rul. 55-210, 1955-1 C.B. 544 (lien attaches to entire unqualified right to receive future benefits; only one notice of levy needs to be served to effectively reach benefits subsequently payable.)

Upon service of a notice of levy, the Service steps into the shoes of the taxpayer and acquires whatever rights to the property the taxpayer had possessed prior to the notice of levy. Nat'l Bank of Commerce, 472 U.S. at 725. However, the levy only reaches the taxpayer's rights "as it finds them." United States v. Sullivan, 333 F.2d 100,110 (3rd Cir. 1964). Accordingly, the levy only reaches property rights that exist at the time of the levy. Thus, for example, in Sullivan, the Service levied on the taxpayer's insurance policy. The insurance policy had a cash surrender value. The court held that the Service's levy did not require the insurance company to turn over the cash surrender value of the policy. The court reasoned that the levy reached only the taxpayer's basic right under the policy to receive benefits upon the policy's maturation. The Service had no authority, through its levy, to exercise the taxpayer's right to cancel the policy. Id. at 108-119.[1]

In this case, we similarly conclude that although the Service's levy reaches the taxpayer's future right to retirement benefits when the taxpayer reaches retirement age[2], it does not entitle the Service to compel suspension of the taxpayer's membership in the fund. Accordingly, the Service is not entitled to a distribution of the assets in the account before the taxpayer is eligible to receive benefits.

However, the Service may bring a lien foreclosure suit pursuant to I.R.C. § 7403. A lien foreclosure suit is appropriate here because the administrative levy in this situation will not immediately entitle the Service to any assets.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call if you have any further questions.

By: ______________________________
Mitchel S. Hyman
Senior Technician Reviewer
(Procedure & Administration)

[1] Congress subsequently enacted I.R.C. §6332(b) which created a special procedure by which the Service can levy upon the cash surrender value of an insurance policy.

[2] Levying on the present right to future payment would not require immediate distribution by the retirement fund. Honoring the levy would only be required when the benefits become payable to the taxpayer under the terms of the retirement fund. See IRM 5.11.6.1(3).