

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **200842042**

Release Date: 10/17/2008

CC:PA:B04:JClark

POSTN-126220-08

UILC: 6320.00-00

date: August 25, 2008

to: Janis L. Suchyta
CDP Policy Analyst
Appeals Tax Policy and Procedure

from: Joseph W. Clark
Senior Technician Reviewer
Branch 4
(Procedure & Administration)

subject: Inputting Transaction Codes for Returned CDP Lien Notices

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. Is the Service required to retain the envelopes containing Collection Due Process (CDP) notices returned to the Service when the U.S. Postal Service (USPS) is unable to effectuate delivery?

2. Can Appeals rely on entries recorded in its computer system to conclude that a mailed CDP notice was undeliverable, unclaimed or refused by the taxpayer?

CONCLUSIONS

1. Neither the Code nor implementing regulations require the Service to retain the returned CDP notices and envelopes in which they are contained. It will be to the Service's advantage to retain these envelopes for cases where the Service is unable to secure a copy of a certified mail list because the envelope will disclose the address to which the CDP notice was actually sent, and will bear a bar scan code and identification number showing that the item was sent by certified mail. When needed,

this will assist the Service in proving that it mailed the notice to the taxpayer's last known address.

2. It is unlikely that the courts will find an abuse of discretion if the Service relies on transcript entries to determine that the USPS could not make delivery of a CDP notice to the taxpayer and the reason for non-delivery.

FACTS

The Service mails CDP lien notices (a/k/a Letter 3172) to taxpayers in envelopes containing clear plastic windows through which the address printed on the notice is visible. Because the Service is a bulk mailer, it does not use the green and white certified mail form and sticker (PS Form 3800), available to an individual customer of the USPS, when sending CDP lien notices to taxpayers by certified mail. Rather, the Service's Automated Lien System (ALS) generates a certified mail number which is placed onto a green and white envelope. The Service mails the CDP lien notice to the taxpayer's last known address shown in the Service's records.

When the Service sends a CDP lien notice by registered mail, it manually prepares a list of taxpayers and assigns a registered mail number to each. The list of registered mail recipients is thereafter date-stamped by the USPS and returned to the Service's Centralized Lien Unit (CLU).

If the USPS is unable to deliver the CDP lien notice, it stamps the envelope with the word "unclaimed," "refused," or "undeliverable." The USPS then returns the envelope and enclosed CDP lien notice to the CLU. Under present procedures, CDP lien notices returned to the CLU are forwarded to the individual from Collection who requested that the Notice of Federal Tax Lien (NFTL) be filed. It is then Collection's responsibility to update the Integrated Data Retrieval System (IDRS) with the appropriate action code, falling under miscellaneous transaction code (TC) 971, reflecting the reason for the USPS's non-delivery of the CDP notice.

The Service retains the returned envelopes and CDP notices, both for proposed levies and NFTL filings, because its computer system does not have the capability to document the specific reasons the notices were returned by the USPS. The Service recently added separate action codes to IDRS that enable it to document and retain the specific reason given by the USPS for the non-delivery of the CDP lien notices. The Service is presently considering whether to stop retaining CDP lien notices returned by the USPS. The reasons for this are: 1) the employees who receive the returned CDP lien notices from the CLU typically are no longer in possession of the case files, making it burdensome to associate the notices with such files; and 2) IDRS now has specific action codes that enable the Service to document the reason asserted by the USPS for non-delivery of a CDP lien notice.¹

¹ The Service generates and mails CDP lien notices and the Notices of Federal Tax Lien (NFTL) from a single location. If the USPS returns a CDP lien notice because it was unable to deliver the notice, the

LAW AND ANALYSIS

I.R.C. § 6320(a) requires the Service to notify a taxpayer of the filing of a NFTL and of his right to request a CDP hearing not more than five business days following the filing of the notice. The notice required by this section must be given to the taxpayer in person, left at his dwelling or usual place of business or sent by certified or registered mail to taxpayer's last known address. Treas. Reg. § 301.6320-1(a)(1). If the taxpayer makes a timely CDP hearing request, he is entitled to a hearing during which the Service must: 1) obtain verification that the legal and procedural requirements related to the collection of the tax have been met; and 2) allow the taxpayer in appropriate situations to raise any issue relevant to the unpaid tax, including spousal defenses, the appropriateness of the filing of the NFTL and offers of collection alternatives. I.R.C. § 6320(c); Treas. Reg. § 301.6320-1(e)(1).

Neither the Code nor implementing regulations require the Service to retain CDP notices or the envelopes in which they are contained when returned by the USPS marked "refused," "unclaimed" or "undeliverable." Nonetheless, the retention of these returned notices may be critical if the taxpayer contests whether the Service sent him a CDP notice and the Service is required to prove that it complied with Code section 6320(a)(2)(C) by mailing the CDP notice by certified or registered mail to the taxpayer's last known address.²

When the Service takes the position that the taxpayer's written CDP hearing request was untimely, the taxpayer may request that the Service provide him with an equivalent hearing followed by issuance of a decision letter. Treas. Reg. § 301.6320-1(i)(1). If the taxpayer nonetheless alleges that he had no opportunity to make a timely request for a CDP hearing because he never received notice, the burden will be placed on the

notice is unclaimed or the taxpayer refused delivery, the envelope and notice are returned to the person who initiated the NFTL filing. Offer Specialists, Revenue Officers and other Service personnel who initiate NFTL filings have indicated that it is burdensome to associate returned envelopes containing CDP lien notices with administrative files, primarily because of the delay associated with their receipt of the notices. Typically, when a case is closed the administrative file is sent to the Federal Record Center. The official who initiated the filing of the NFTL ends up in possession of a returned envelope containing the CDP lien notice while the related administrative file may no longer be in his possession. By contrast, a CDP levy notice sent by a Revenue Officer is not mailed from a central location, and therefore when such notice is returned to the Service by the USPS, the Revenue Officer can readily associate it with the administrative file.

Because your question centers on CDP lien notice procedures, this memorandum focuses on the procedures used to generate these notices. The discussion and reasoning below, however, also applies to CDP levy notices (Letter 1058 or LT11).

² Section 6330(a)(2)(C) requires a mailed CDP levy notice to be sent by certified or registered mail, return receipt requested, while section 6320(a)(2)(C) contains no return receipt requirement for CDP lien notices.

Service to show that the CDP notice was mailed to the taxpayer's last known address by certified or registered mail. Orum v. Commissioner, 123 T.C. 1 (2004); Buffano v. Commissioner, T.C. Memo 2007-32.

In Orum the issue before the court was whether the Service mailed a CDP levy notice to the taxpayer's last known address by certified or registered mail. The Service did not introduce into the record a copy of the CDP notice, presumably because it was not retained. The record before the court, however, included: 1) a Form 4340 for the relevant tax year showing the date on which the CDP notice was issued and that a return receipt was signed a few days later; 2) a certified mail list (USPS Form 3877) reflecting issuance of a CDP notice and bearing the same date as the one shown on the 4340; and 3) the parties' stipulation that the taxpayer filed a tax return before the date the Service allegedly sent the CDP notice; and 4) the taxpayer's signed Collection Information Statement for Wage Earners and Self-Employed Individuals (Form 433-A) indicating that the taxpayer lived at the same address his entire life. The court found that the address used to send the CDP notice was the taxpayer's last known address and consequently dismissed the case for lack of jurisdiction because no notice of determination was issued.

By contrast, if the taxpayer alleges that he never received a CDP notice and the Service cannot prove that it mailed the notice by certified or registered mail, the court will dismiss the case for lack of jurisdiction on the basis that the CDP notice was invalid. Buffano, *supra*; Graham v. Commissioner, T.C. Memo 2008-129; Schwengel v. Commissioner, No. 13979-06L (unreported).

Schwengel, *supra*, illustrates how inadequate proof of the existence and mailing of a CDP notice will result in the court finding the Service's notice invalid. There the Service provided the taxpayer an equivalent hearing respecting a proposed levy because the written CDP hearing request was untimely. The taxpayer argued that the Service did not prove either the existence or mailing of a CDP levy notice to his last known address. The Service acknowledged that it followed the policy of not retaining copies of CDP notices mailed to taxpayers but argued that it furnished proof of mailing the CDP notice to the taxpayer's last known address. To do so, the Service introduced the declaration of an employee and attached to it a printout from the Service's CDP Certified Mail Website and an email message from the USPS. The printout showed the taxpayer's name, three certified mailings associated with the taxpayer's identification number, a certified mail number and "10/17/2005", the date the Service allegedly sent the CDP notice, plus an address, the tax form type and the taxable period. The email referenced a certified mail identification number and stated that the attempted delivery of the certified mail on 10/17/2005 was twice refused at 2:30 p.m. and 4:42 pm.

The Schwengel court found: 1) based on the record it was not clear that the Service prepared and mailed a CDP notice to the taxpayer's last known address; 2) given that the Service failed to retain a copy of the document required by Code section 6330(a)(1), the court could not conclude that any CDP notice which may have been sent contained

the information required by section 6330(a)(3) ; and 3) it did not appear that the Service employee who made the declaration actually prepared or mailed the CDP notice. Accordingly, the court dismissed the case for lack of jurisdiction on the basis of an invalid CDP notice.

In instances when the Service is unable to secure a date-stamped certified mail list showing that the Service sent a CDP notice to a particular address, it will make it very difficult for the Service to persuade the court that the Service complied with Code section 6320 or 6330 by mailing the notice to the last known address. Schwengel, supra; Buffano, supra.

The Form 4340 presently contains no entry for the sending of a CDP lien notice,³ and it does not include address information pertaining to the taxpayer. Additionally, the IDRS action codes signifying that a CDP lien notice was not delivered by the USPS because it was refused, unclaimed or undeliverable presently do not carry over to a 4340 transcript.

The Form 4340 is the principal transcript used in deficiency and collection cases and the courts have come to accept these certificates as accurate portrayals of the taxpayers' liabilities in the Service's records as well as presumptive evidence that the tax has been validly assessed. Maynard v Commissioner, 233 Fed Appx. 721 (9th Cir. 2007); Hefti v. IRS, 8 F.3d 1169 (7th Cir. 1993); United States v. Wall, 2007 U.S. Dist. Lexis 74614 (D. N.J. 2007). Absent evidence to the contrary, the 4340 is also evidence of the proper issuance of the Service's notices. Orum, supra. However, the 4340 (which includes code entries input by the Service) creates only a *presumption* that the facts contained in it accurately portray what transpired in the case.

Even if the 4340 included the IDRS action codes specifying the reason the USPS was unable to deliver a CDP lien notice, retention of the returned envelope would be essential if the taxpayer disputes the Service's entries on the 4340. For example, assume that the Service received a returned envelope, and the enclosed Letter 3172, stamped "refused" by the USPS. Under the proposed procedure, the Service would enter a TC 971 action code 255 to reflect in IDRS that the CDP lien notice was refused and discard the envelope. In the area of deficiency notices, the courts have held that a taxpayer may not defeat actual notice of the notice of deficiency by refusing the actual notice of deficiency, even if it was not mailed to the taxpayer's last known address. Sloan v. Commissioner, 1993 U.S. Dist. Lexis 6151 (S.D.N.Y. 1993)(summary judgment denied to taxpayer where address used to send deficiency notice contained error but fact finder could conclude returned notice stamped "unclaimed" by USPS showed deliberate failure to pick up certified mail); Zikria v. Williams, 535 F.Supp. 481 (W.D. Pa. 1982)(documents from post office demonstrated that taxpayers failed to claim certified

³ The 4340 contains a dated entry showing the mailing date of a CDP levy notice, but does not have a similar indication for a CDP lien notice. The Service created TC 971, action code 252 within IDRS to signify the sending of CDP lien notices, and it is our understanding that eventually the date of mailing of a CDP lien notice will be shown on a 4340.

mail containing deficiency notice); Patmon & Young Professional Corp. v. Commissioner, T.C. Memo 1993-143 (envelope containing deficiency notice delivered to taxpayer's post office box was purposefully "unclaimed and refused" by addressee). If the taxpayer asserts that he never received the CDP lien notice and disputes that he refused delivery of such notice, the Service will be required to prove such refusal. A court would be more likely to find in the Service's favor if the record included the envelope stamped "refused" by the USPS. Introducing only the Service's transcript with an entry stating that the USPS could not deliver the notice because it was refused will be insufficient proof.

By retaining the envelope and enclosed CDP notice returned by the USPS, the Service will be able to present substantial proof that the notice was sent by certified mail to the taxpayer's last known address. Cf. Morse v. Internal Revenue Service, 635 F.2d 701 (8th Cir. 1980)(where record included returned envelope marked "unclaimed" and USPS form bearing date notice of certified mail was left at taxpayer's address, Service proved deficiency notice was sent to taxpayer's last known address); Brown v. Lethert, 360 F.2d 560 (8th Cir. 1966)(district director fully complied with mailing requirement for deficiency notice where it was sent by certified mail to taxpayer's home, USPS employee unsuccessfully attempted to deliver it and thereafter certified letter was stamped "unclaimed" and returned to Service); Sitka v. United States, 903 F.Supp. 282 (D. Conn. 1995)(record adequately demonstrated deficiency notice sent to taxpayer by certified mail); *but see* Powell v. Commissioner, 958 F2d 53 (4th Cir. 1992)(Service did not exercise due diligence in ascertaining taxpayers' last known address where taxpayers filed change of address form with USPS before deficiency notice mailed, even though USPS mistakenly stamped envelope containing deficiency notice "unclaimed" before returning it to Service).

We recommend that Appeals weigh the administrative burden associated with continuing to retain returned CDP notices against the potential resources that will be required for CDP cases where the Service discards the evidence, i.e. the envelope and notice returned by the USPS, that proves mailing to the last known address.⁴ If the Service cannot prove that it complied with the mailing requirements of section 6320 or 6330 respecting CDP notices, the courts will hold the notices invalid. This will require the Service to issue a new CDP notice and offer the taxpayer a new hearing.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

⁴ It is our understanding that beginning July 2007 the Service began to retain scanned images of the CDP notices mailed to taxpayers. While such documents provide proof of the address to which the notices were sent, these may not bear markings, e.g. bar scan and certified mail number, showing that the notice was sent by certified or registered mail.



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 (202) 622-3630 if you have any further questions.