

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Duane Thomas
(Collection Policy, Field Payment Compliance)

from: Peter J. Devlin
Branch Chief
(Procedure & Administration)

subject: Sale of Property Following DETL and CDP Rights

This Chief Counsel Advice responds to your August 4, 2008 request for assistance. This advice may not be used or cited as precedent.

ISSUES

How do post-seizure Collection Due Process rights affect the sale process following a seizure of tangible property under a Disqualified Employment Tax Levy.

CONCLUSIONS

After a Disqualified Employment Tax Levy (DETL) is served, the taxpayer is given an opportunity for a collection due process (CDP) hearing. When Appeals receives a DETL case, it should promptly confirm whether the DETL was proper under the law. If the DETL was not proper, Appeals must contact the client to discuss the matter. At the CDP hearing the taxpayer may, among other things, challenge the appropriateness of collection actions and/or offer collection alternatives (bond, OIC, IA, etc.). I.R.C. § 6330(c)(2)(A)(ii & iii). Although there are no legal restrictions against the continuation of the sale of tangible property seized under a DETL, if the taxpayer raises a non-frivolous argument addressing either of these issues and requests a stay of the sale, Appeals should exercise its discretion in determining whether to stay the sale. If a notice of sale has been published at the time the taxpayer requests the stay of sale, the sale may be adjourned for up to one month from the original date of sale. Treas. Reg. § 301.6335-1(c)(2).

LAW AND ANALYSIS

I.R.C. § 6330(f) was amended by the Small Business and Work Opportunity Tax Act of 2007 to permit a levy to collect employment taxes without giving a taxpayer a pre-levy CDP notice if the levy is a DETL. A DETL is a levy to collect employment tax when the person subject to the levy has requested a hearing under section 6330 with respect to unpaid employment taxes arising in the two year period prior to the taxable period for the current levy. I.R.C. § 6330(h). We believe the DETL provisions were enacted in order for the Service to more effectively deal with tax pyramiders who are using multiple CDP hearings to merely delay collection.

There are three situations where a taxpayer would have a right to a post-seizure CDP proceeding. The first situation occurs where the Service has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy; the second situation occurs when a levy is served upon a state to collect a federal tax liability from a state tax refund; and the third situation occurs when a DETL is served. I.R.C. § 6330(f). Section 6330(f) does not address the sale of the property following a DETL seizure. If there is a jeopardy levy or assessment, section 7429 provides for administrative and judicial review of the actions of the Service. The taxpayer will also have an opportunity to request a CDP hearing under section 6330. The provisions of section 7429 are not applicable to property seized under a DETL (not a jeopardy levy or assessment). Congress also enacted section 6863(b)(3) which provides provisions for a stay of sale of property seized following a jeopardy assessment pending a Tax Court decision. A similar provision was not enacted for DETLs.

When tangible property is seized from a taxpayer, the collection process is not concluded until the property is sold. I.R.C. §§ 6331(b) and 6335. Once property is seized, notice of the seizure must be given to the owner of the property as soon as practicable. I.R.C. § 6335(a). After notice of seizure is given, notice of the sale must likewise be given as soon as practicable. I.R.C. § 6335(b). The sale must then take place not less than 10 days nor more than 40 days from the time notice of sale is given. I.R.C. § 6335(d). If an adjournment of the sale best serves the interest of the United States or the taxpayer, the sale may be adjourned for no more than one month after the date fixed in the original notice of sale. Treas. Reg. § 301.6335-1(c)(2). If the property is not sold within the time frame prescribed by the Code and regulations, the property is released to the owner of the property. See Treas. Reg. § 301.6335-1(c)(4)(iii); Anderson v. United States, 44 F.3d 795 (9th Cir. 1995). It may be possible for the taxpayer to voluntarily waive the said statutory and regulatory requirements. Id. at 799 (dicta suggests that that a taxpayer may stipulate to a delay beyond the one month adjournment in Treas. Reg. § 301.6335-1(c)(2)). Presently, the Service does not have any procedures in place to effectuate a waiver.

The taxpayer is given an opportunity for a CDP hearing within a reasonable time after the DETL. I.R.C. § 6330(f)(3). There are no legal restrictions against the sale of property seized under a DETL. It is our position that the Tax Court in a CDP proceeding has no jurisdiction to review the Service's DETL seizure and sale procedures and actions. If the court was to review the levy action, the sole focus of the court should be whether Appeals abused its discretion in deciding that future levies for the DETL module may proceed.

During the CDP hearing Appeals must consider collection alternatives and any challenges to the appropriateness of the collection action, such as whether the taxpayer has previously requested a CDP hearing for employment taxes in the two years prior to the current levy period. I.R.C. § 6330(c)(2)(A). If the taxpayer raises non-frivolous arguments such as a collection alternative or challenges the appropriateness of the collection action and requests a stay of sale of the seized property while discussions take place, Appeals should exercise its discretion in determining whether to stay the sale. If the taxpayer does not request a stay of sale but Appeals determines that the DETL was not appropriate, Appeals should immediately contact the client. However, since we believe the purpose of a DETL is to prevent tax pyramiders from using multiple CDP hearings to delay collection, the general rule should be that sales will not be delayed. If Appeals determines that they would like to stay a sale, they should look at factors such as past compliance history of the taxpayer, including history of submission of collection alternatives and compliance. As with jeopardy levies, if the property is perishable or the cost of storing and maintaining the property will reduce the net proceeds, Appeals should take this into consideration when determining whether to stay the sale. Where only frivolous arguments are being raised or the taxpayer has a history of defaulting with respect to collection alternatives, the sale should not be stayed. If the notice of sale has already been published, the sale can be adjourned for no more than one month after the original sale date. As stated above, it may be possible for a taxpayer to waive the one month requirement.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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