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From:

Sent: Tuesday, April 05, 2011 1:48:12 PM

To:

Cc:

Subject: RE: Erroneous Levy

On a blank slate, your position would be perfectly defensible. However, that is not the position of Counsel. If an underlying assessment is invalid, then a taxpayer would be entitled to new CDP rights if and when a new assessment is made. Although Treasury regulation sec. 301.6330-1(b)(2) Q&A-B4 provides that a taxpayer is entitled to only one CDP hearing with respect to a particular tax type and tax period, it is clear that a tax type for any given tax period must be distinguished on an assessment by assessment basis. This is because the circumstances in which a taxpayer may receive more than one pre-levy CDP notice include those "where the same type of tax for the same period is involved, but where the amount of the unpaid tax has changed as a result of an additional assessment of tax (not including interest or penalties)." Treas. Reg. sec. 301.6330-1(d)(2) Q&A-D1. Thus, in situations involving additional assessments, barring additional assessments of only accruals of interest or penalties, the Service must afford the taxpayer with additional CDP (levy) rights. This is the regulatory support for the IRM provisions that you cited in the Appeals Manual (IRM Parts 8.22.2.2.3(1) and 8.22.2.2(8)).

Note that in the situation you describe, it was determined that the original issuance of the section 6330 CDP notice was invalid, because it inadvertently was issued before the underlying liabilities were assessed. This is not (technically) a situation involving an "additional assessment," because there has been only one assessment. Accordingly, the Service must issue section 6330 CDP rights to the taxpayer no less than 30 days before the date of levy pursuant to the statute. I.R.C. sec. 6330(a)(2).

Note that this situation also does not involve an "improperly" issued CDP notice under Treasury regulation sec. 301.6330-1(a)(3) Q&A-A10. If the Service properly had assessed the liabilities, but instead had failed to properly provide the taxpayer with the CDP notice (e.g., if the Service had sent the notice to an address other than the taxpayer's last known address), then the taxpayer would be entitled to a "substitute" notice, which would afford the taxpayer with CDP rights. In this case, the Service has yet to provide the taxpayer with CDP rights with respect to the assessments at issue.

In the situation you describe, the taxpayer did not request a CDP hearing within the relevant 30-day period following the issuance of the (invalid) section 6330 CDP notice. However, if the taxpayer had requested a CDP hearing, the Settlement Officer would have been required to verify the validity of the assessment pursuant to section 6330(c)(1). See Hoyle v. Commissioner, 131 TC 197 (2008). After determining that the liabilities had not been assessed, the Settlement Officer would have had to issue a Notice of Determination finding that the proposed collection could not proceed. As explained in our prior advice, the bottom line is that the taxpayer was not afforded CDP rights with respect to the assessments that are the subject of the levy. The CDP notice that was sent before assessment would be invalid. The taxpayer should be afforded CDP rights pursuant to section 6330(a) for the first (and to date, only) assessment of the tax types and periods at issue.

As always, feel free to give me a call directly if you want to further discuss.

Regards,