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MEMORANDUM FOR DISTRICT COUNSEL, ROCKY MOUNTAIN DISTRICT

FROM: Alan C. Levine  
Chief, Branch 1 (General Litigation)

SUBJECT: Use of Taxpayer Name in Advertisements of Sale of Seized  
Property

This memorandum is in response to your memorandum dated May, 18, 1998, from District Counsel, Rocky Mountain District, to the Chief, Special Procedures, Rocky Mountain District. You requested our post-review. We concur with your conclusion that the use of the taxpayer's name on the Notice of Sale or on advertising would not be a violation of I.R.C. § 6103.

Please find attached a memorandum dated October 6, 1998, from Assistant Chief Counsel, Disclosure Litigation to Acting Assistant Chief Counsel, General Litigation. This memorandum addresses whether any provision of Title 26 authorizes the disclosure of the taxpayer's name in notices of sale and advertisements of sale of property seized by the Service.

If you have any further questions please call (202)622-3610.

Attachment  
October 6, 1998, Memorandum

CC:EL:D:115558-98

MEMORANDUM FOR KEITH FOGG  
ACTING ASSISTANT CHIEF COUNSEL (GENERAL  
LITIGATION)

FROM: John B. Cummings  
Assistant Chief Counsel (Disclosure Litigation)

SUBJECT: Use of Taxpayer Name in Advertisements of Sale of Seized  
Property

This memorandum is in response to the memorandum of August 5, 1998, from Alan Levine of your office requesting our opinion on the authority for the disclosure of taxpayer names in notice of sale and the advertisements for the sale of property seized by the Internal Revenue Service.<sup>1</sup>

#### Issue

Whether any provision of Title 26 authorizes the disclosure of return information, *i.e.*, taxpayer names, in notices of sale and advertisements of sale of property seized by the Service.

#### Conclusion

It reasonably can be argued that both I.R.C. § 6335, by implication, and § 6103(k)(6) authorize the disclosure of taxpayer names in the notice of sale and advertisements of sale of property seized by the Service.

#### Background Information

The question has arisen whether the Internal Revenue Code authorizes the disclosure of taxpayer names in the notices of sale and the advertisements of sale of property seized by the Service in order to satisfy the tax liability of delinquent

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<sup>1</sup>Your memorandum was prompted by an opinion from the District Counsel, Rocky Mountain District, to the Chief, Special Procedures, Rocky Mountain District, answering a request for Counsel's views on the disclosure of the taxpayer's name in advertisements for the sale of seized property. You were asked to post-review that opinion. While we concur in the ultimate conclusion reached by district counsel, we arrive at that conclusion with a somewhat different analysis.

taxpayers. With respect to the sale of property seized to satisfy tax liability, both the applicable statute, I.R.C. § 6335, and regulations, § 301.6335(b)-1, provide for the publication of notice of sale and the advertisement of the sale of the seized property.<sup>2</sup> I.R.C. § 6335(b) provides that the “notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale.” Treasury Reg. § 301.6335-1(b) also provides that the notice “shall expressly state that only the right, title, and interest of the delinquent taxpayer in and to such property is to be offered for sale.” Neither § 6335 nor the regulations specifically provide for the inclusion of the taxpayer’s name in the posted notice of sale or the advertisement of the sale of property seized by the Service.<sup>3</sup>

Because the Service is limited to selling the right, title and interest of the taxpayer, in order to understand the value of the property being offered for sale and thereby make an informed bid, a potential buyer would be well advised to make a due diligence effort to determine the extent of the owner’s right, title, and interest in the property being offered for sale. As District Counsel advised, within the Rocky Mountain District there are counties where an interested purchaser can obtain an abstract for real property with only a description of the property. However, the abstract would only list consensual encumbrances against the property and, therefore, would not reflect judgments or federal, state or local tax liens against the property which are indexed by name. Moreover, with respect to personal property, it would be difficult to determine the taxpayer/owner’s interest in the seized property without knowing the taxpayer’s name. The exception, of course would be a motor vehicle where title and lien information can be determined by tracking the vehicle identification number.

### Legal Analysis

As a general rule, the disclosure of return information is controlled by I.R.C. § 6103. That section provides in pertinent part that “returns and return information shall be confidential, and *except as authorized by this title* ... no officer or employee of the

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<sup>2</sup>Such practice of publication dates back at least to 1866 where, with respect to the collection of excise taxes, the collector “shall forthwith cause a notification to be published in some newspaper within the county wherein said distraint is made...” Act of 13 July, 1866, c. 184, § 9, vol. 14, p. 107. This language was adopted in the Revised Statutes in 1873. See title XXXV R.S., ch. 2, § 3190 (Dec. 1, 1873). See also I.R.C. § 3701(b) (1939), I.R.C. § 6335(b) (1954) and I.R.C. § 6335(b) (1986).

<sup>3</sup>Section 6335(a) provides that as soon as practicable after the seizure of the property, the Secretary is to provide notice of the seizure to the taxpayer, and § 6335(b) requires notice of the sale to be given to the taxpayer as soon as practicable. In these instances, inasmuch as the notices are addressed to the taxpayer, any disclosure to the taxpayer of the taxpayer’s return information relating to the sale, *e.g.*, the taxpayer’s identity, would be authorized under I.R.C. § 6103(e)(7). Accordingly, the issue is whether the *public* notices may properly include the taxpayer’s name.

United States ... shall disclose any return or return information obtained by him in any manner....” (Emphasis added.)<sup>4</sup> Thus, the authority to permissibly disclose returns and return information may be derived from any provision of Title 26 and is not limited to the specific disclosure exceptions found in § 6103.

Case law supports the conclusion that I.R.C. § 6103 is not the sole source of authority for the disclosure of returns and return information. For example, in *Messinger v. United States*, 769 F. Supp. 935 (D. Md. 1991), the court noted that under § 3406(c)(1), the Service is authorized to release return information to financial institutions in order to notify them of the necessity to deduct interest and dividends for payees who are underreporting when certain conditions occur.<sup>5</sup> The court concluded that “Title 26 U.S.C. § 3406(c)(1) allows the IRS to disclose the return information in question, provided that it met the specific requirements set forth in the statute.” 769 F. Supp at 938.

Similarly, in *O'Donnell v. United States*, 85-1 USTC ¶ 9379 (S.D. Fla. 1985), the court determined that the Service had not violated § 6103 by disclosing to plaintiff's employer that plaintiff had filed a defective certificate of exemptions. The district court reasoned that “§ 6103(a) prohibits the disclosure of certain tax information except as authorized by this title which refers to Title 26 U.S.C., the Internal Revenue Code.” 85-1 USTC at 88,003. The court further reasoned that § 3402 requires an employer to withhold taxes from wages in accordance with procedures promulgated by the Secretary. See § 3402(m) and Treasury Reg. 31.3402(f)(2)-1(g)(5). The court observed that inasmuch as the procedures provide that the Service will notify the employer when the certificate is defective, it is evident that the Service cannot so notify the employer without disclosing the employee's return information. 85-1 USTC at 88,003. See also *Swierkowski, et al. v. United States*, 85-2 USTC ¶ 9640 (E.D. Cal. 1985). Accord *Kalama v. United States*, 1996 WL 806150, 97-1 USTC ¶ 50,242 (N.D. Cal. 1996) (same).

Thus, to the extent I.R.C. § 6103 or any other provision of Title 26 authorizes the disclosure of return information, *i.e.*, taxpayer names, in notices of sale and advertisements of sale of property seized by the Service, disclosure would be permissible. We believe that it reasonably can be argued that both I.R.C. § 6335, by implication, and § 6103(k)(6) authorize such disclosure.

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<sup>4</sup>A taxpayer's identity is return information. See I.R.C. § 6103(b)(2). I.R.C. § 6103(b)(6) defines a “taxpayer's identity” as “the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identification number ... or a combination thereof.”

<sup>5</sup>Under § 3406, a payor is required to withhold on reportable income, *i.e.*, interest and dividends, if, for example, the payee fails to furnish his taxpayer identification number; the Service notifies the payor that the TIN is incorrect; or, payee underreporting has occurred. See I.R.C. § 3406(c).

A. I.R.C. § 6335 AUTHORIZES THE DISCLOSURE OF RETURN INFORMATION IN THE NOTICE OF SALE AND ADVERTISEMENTS OF SALE OF SEIZED PROPERTY

I.R.C. § 6335(b) sets forth the procedures by which the Service is to effectuate the sale of seized property.<sup>6</sup> These procedures include providing a written notice of sale to the owner or left either at his abode or at his usual place of business and publication of an advertisement of sale in a newspaper published or generally circulated in the county, or if there is no newspaper, posted in the post office, and posted in at least two other public places. The purpose behind these procedures is clear: this is a public sale of property to obtain the highest possible bid for the good of both the Service and the taxpayer.

Treasury regulations promulgated under I.R.C. § 6335 provide in pertinent part:

(b) *Notice of Sale.* (1) As soon as practicable after seizure of the property, the district director shall give notice of the sale in writing to the owner... The notice shall specify the property to be sold, and the time, place, manner and conditions of the sale thereof, and *shall expressly state that only the right, title, and interest of the delinquent taxpayer in and to such property is to be offered for sale.* The notice shall also be published in some newspaper published in the county wherein the seizure is made or in a newspaper generally circulated in that county....

Treasury Reg. 301.6335-1(b)(1) (emphasis added).

As noted, in order for potential purchasers to determine the extent of the right, title and interest which the taxpayer has in the property to be sold, the purchaser must have a description of the property and the name of the owner or, in the case of personal property, the possessor. The disclosure of such information gives effect to the mandate of the Treasury regulations that the notice of sale “expressly state that only the right, title, and interest of the delinquent taxpayer in and to such property is to be offered for sale,” and serves to facilitate the sale of the property at

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<sup>6</sup>That section provides in relevant part:

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or, if there is no newspaper published or generally circulated within the county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner and conditions of the sale thereof....

a price which is fair to the taxpayer. Accordingly, although the statute and the regulations do not specifically provide that the taxpayer's name is to be included in the notice of sale and the advertisement of sale,<sup>7</sup> by implication, a reasonable argument can be made that the taxpayer's name would have to be included to help identify the property being offered for sale.<sup>8</sup>

B. I.R.C. § 6103(k)(6) AUTHORIZES THE DISCLOSURE OF RETURN INFORMATION IN THE COLLECTION CONTEXT

With respect to disclosures of return information, such as the taxpayer's identity, in the context of collection activities, the Code provides as follows:

(k) DISCLOSURE OF CERTAIN RETURNS AND RETURN INFORMATION FOR TAX ADMINISTRATION PURPOSES.--...

(6) DISCLOSURE BY INTERNAL REVENUE OFFICERS AND EMPLOYEES FOR INVESTIGATIVE PURPOSES.--An internal revenue officer or employee may, in connection with his official duties relating to any audit, *collection activity*, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in

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<sup>7</sup>Obviously, a clarification of Treasury Reg. 301.6335-1 that the notice of sale should include the taxpayer's name would reinforce the legal argument.

<sup>8</sup>The Court of Appeals for the Sixth Circuit had an opportunity to rule on this issue in *Rowley v. United States*, 76 F.3d 796 (6th Cir. 1996), when the court was faced with an I.R.C. § 7431 suit brought by taxpayers claiming employees of the Service had made unauthorized disclosures by publicizing the taxpayers' names in a notice of sale of seized property. The court of appeals declined to address that issue. The court concluded that once the lien was filed, it placed the public on notice of the lien and the lien filer's interest in the property. In other words, because the purpose of the filing of the lien is to put people on notice, so long as the notice of sale and information sent to prospective purchasers provides no more information than that information disclosed in the lien filed in the Register of Deeds Office, which is already in the public domain and no longer confidential, no disclosure of confidential tax information has been made. 76 F.3d at 801. We do not rely on any formulation of the "public record" doctrine to determine the authority to disclose return information in a notice of sale or advertisement of sale. The "public record" doctrine focuses on, and is limited to, information that is already available in the public domain, rather than what information the Service can properly disclose based on disclosure exceptions found in Title 26.

such situations and under such conditions as the Secretary may prescribe by regulation.

I.R.C. § 6103(k)(6) (emphasis added). Thus, I.R.C. § 6103(k)(6) provides, generally, that consistent with Treasury regulations promulgated by the Secretary, a disclosure of return information which is necessary to accomplish collection activities, is a permissible disclosure excepted from the general disclosure prohibition of § 6103(a).<sup>9</sup> See *Elias v. United States*, 91-1 USTC ¶ 50,040 (C.D. Cal. 1990) (“Section 6103(k)(6) and the pertinent regulations plainly indicate that disclosure of return information necessary to accomplish collection activities ... is exempt from general disclosure prohibition of Section 6103(a).”).

Treasury Reg. § 301.6103(k)(6)-1(a) provides for the disclosure of “taxpayer identity” information, which includes a taxpayer’s name, in connection with collection activities. Treasury Reg. 301.6103(k)(6)-1(a) provides in relevant part:

*(a) Disclosure of taxpayer identity information and fact of investigation in connection with official duties relating to examination, collection activity, civil or criminal investigation, enforcement activity, or other offense under internal revenue laws.* In connection with the performance of official duties relating to any examination, [or] collection activity ... an officer or employee of the Internal Revenue Service or Office of the Chief Counsel therefor is authorized to disclose taxpayer identity information (as defined in section 6103(b)(6)), the fact that the inquiry pertains to the performance of official duties and the nature of the official duties in order ... to properly accomplish any activity described in subparagraph (6) of paragraph (b) of this section. Disclosure of taxpayer identity information to a person other than the taxpayer to whom such taxpayer identity information relates ... for the purpose of ... properly accomplishing such activities as authorized by this paragraph should be made however, only ... if

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<sup>9</sup>We note that I.R.C. § 6103(h)(4) permits the disclosure of return information in an administrative proceeding relating to tax administration. However, the case law which defines the scope of administrative proceeding, does so narrowly. In *First Western Gov’t Securities v. United States*, 578 F. Supp. 212 (D. Colo. 1984) the district court noted that “there is little doubt that an audit, with its numerous procedural steps and protections and its appeal process, constitutes an administrative proceeding relating to tax administration.” 575 F. Supp. at 217. The collection process does not have the same built in procedures, and accordingly, may not meet this court’s definition of an administrative proceeding. Moreover, in *Mallas v. United States*, 993 F.2d 1111, 1122 (4th Cir. 1993) the court of appeals specifically held that an audit was not an administrative proceeding. Therefore, we do not rely on I.R.C. § 6103(h)(4) to disclose taxpayer names during collection activities inasmuch as it is open to question whether collection activity can be considered an *administrative proceeding* relating to tax administration.

such activities cannot otherwise properly be accomplished without making such disclosure. (*Italics in original.*)

With respect to “any activity described in subparagraph (6)” as referred to above, Treasury Reg. § 301.6103(k)(6)-1(b)(6) provides in pertinent part:

(6) To establish or verify the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in subparagraph (3) of this paragraph to be collected, or otherwise *to apply the provisions of the Code relating to the establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy such liability....*

Thus, under the regulations promulgated by the Secretary to implement subsection (k)(6) of I.R.C. § 6103, if the sale of the seized property under I.R.C. § 6335 cannot otherwise be properly accomplished without disclosing the taxpayer’s name in the notice and advertisement of sale, that disclosure is permissible.

The Rocky Mountain District Counsel’s memorandum makes a compelling case that the publication of the taxpayer’s name is a matter of necessity for the potentially interested purchasers to be able to determine what property is being offered for sale, thus facilitating the sale of seized property. With respect to real property, the most obvious method of ascertaining ownership and the description of the land is to check the owner’s name in the recorder of deeds office for the county in which the real property is located to determine the property description and the encumbrances. Likewise, it would be difficult to determine if another party has an interest in personal property without knowing the taxpayer’s name. Because the Service can sell only the “right, title and interest” of the taxpayer, a potential purchaser can only determine the scope of the “right, title and interest” if he or she has the taxpayer/owner’s name.

If you concur with the District Counsel’s analysis and conclude that the sale of seized property cannot be properly accomplished without the disclosure of the taxpayer’s name in the notices of sale and advertisements of sale, such disclosure would be authorized by I.R.C. § 6103(k)(6).<sup>10</sup>

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<sup>10</sup>The seizure and sale of a taxpayer’s property occurs in the collection phase of the tax administration cycle. Section 7433 provides a remedy for the negligent, reckless or

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intentional disregard of any provision of Title 26 or its regulations in connection with any collection of Federal tax, and further provides that, except as provided by § 7432, § 7433 is the exclusive remedy for recovering damages. Accordingly, § 7433 would be the exclusive remedy for any challenges to collection activities, including disclosures incident to such activities. *Elias v. United States*, 91-1 U.S.T.C. (CCH) ¶ 50,040 at 87,172 n.7 (C.D. Cal. 1990), *aff'd*, 974 F.2d 1341 (9th Cir. 1992) (table case).