



OFFICE OF  
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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MEMORANDUM FOR DISTRICT COUNSEL

Attn:

FROM: Michael R. Arner  
Senior Technician Reviewer

SUBJECT:

This advice is in response to your memorandum concerning the above subject. This document is advisory only and is not to be relied upon or otherwise cited as precedent.

LEGEND:

City:  
Taxpayer:  
SSN:  
Years:  
Assessment Amount: \$

ISSUES:

1. Whether the Service may levy upon and collect the assets in a taxpayer's pension plan when the taxpayer has no immediate right to commence receipt of benefits but has a vested right to future distribution.
2. Whether the Service can levy upon and collect the assets in a taxpayer's pension plan when the taxpayer has an immediate right to elect early retirement benefits but has not yet made an election.

CONCLUSIONS:

1. The Service may serve a levy upon a plan even if a participant has no immediate right to commence receipt of benefits as long as the taxpayer has a vested right to a future distribution from the plan. However, the Service may not force the plan administrator to immediately distribute any assets pursuant to the

Service's levy until the taxpayer obtains an immediate right to commence receipt of benefits under the plan.

2. The Service may levy upon and collect the assets in a taxpayer's pension plan when the taxpayer has an immediate right to elect early retirement benefits but has not yet elected to do so (i.e., Service may make an election on behalf of the taxpayer).

FACTS:

, Taxpayer, is a former and is covered by the Benefit Plan (Plan). He has an unpaid tax liability of \$ . One half of the liability can be collected from sources other than the Taxpayer's retirement benefits. The Taxpayer will turn in of this year, and according to sections and of the Plan, the Taxpayer can elect "early retirement" at age . If the Taxpayer elects early retirement he will receive about \$ per month for life. If he waits until the "normal retirement" age of his benefit will be about \$ per month. The Taxpayer was divorced in and is currently single.

The Taxpayer has told the revenue officer (RO) that he does not intend to elect early retirement, but instead, will wait for the "normal retirement date" under the Plan which occurs on his birthday. According to the RO, the Taxpayer is not cooperating and has filed a Collection Due Process (CDP) hearing request. The RO wants to know if the Service can "elect" early retirement on behalf of the Taxpayer.

LAW AND ANALYSIS:

This is in response to your memorandum regarding the Taxpayer that you intend to send to the District Counsel. 1/ In your memorandum you address three issues regarding levying retirement benefits. 2/

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1/ We note that your request for prereview was signed by you in your individual capacity. We have no proof that you were delegated this authority, or its parameters, if you were. We have never been furnished a copy of a delegation order from your office or the region as is required by CCDM (34)615. We made a similar request of the ARC(GL) but with no responses. Therefore, in the future, in absence of an obligation order, an approval line signed by the supervisor should be added to all requests.

2/ This memorandum addresses two of the issues because we agree with your third conclusion that whether the early retirement election is revocable or irrevocable

Your first conclusion is that “[t]he Service may levy upon retirement benefits, but only when the participant is in pay status.” Your second “qualified” conclusion is that “the Service ‘stands in the shoes’ of a taxpayer respecting the taxpayer’s right to elect an early retirement option under a pension plan in which he is a participant[.]” As discussed below, we disagree with your conclusion on issue one and agree with your conclusion on issue two, however, we disagree as to your suggested course of action in this case.

#### A. Attachment of the Federal Tax Lien

Pursuant to section 6321, a lien arises upon “all property or rights to property” of the taxpayer. I.R.C. § 6321. The federal tax lien attaches to a participant’s interest in an ERISA-covered plan if the participant has any vested benefit under the plan. Thus, the tax lien attaches to all present rights the taxpayer has under the plan. These may include the participant’s present right to future payment and the present right to elect a form of distribution although he has not yet exercised that right. Here, according to section \_\_\_\_\_ of the Plan, the Taxpayer is vested because he \_\_\_\_\_. Hence, the tax lien attaches to the Taxpayer’s present right to elect early retirement benefits at age \_\_\_\_\_.

#### B. Property Subject to Levy

Section 6331(a) authorizes the Service to levy upon “all property or rights to property” of a taxpayer to collect delinquent taxes. I.R.C. § 6331(a). Except for a levy on salary or wages, a levy extends only to property rights and obligations that exist at the time of levy. Treas. Reg. § 301.6331-1. Obligations exist when the liability of the obligor is fixed and determinable, although the right to receive payment thereof may be deferred until a later date. *Id.* Accordingly, even if the retirement plan is not in pay status, if a present right to future payment on an obligation 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). <sup>3/</sup> Similarly, if a present right to elect distribution exists, the levy reaches that present right.

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has no impact on the issues discussed herein.

<sup>3/</sup> Levying on the present right to future payment would not require immediate distribution by the plan administrator.

Here, the Taxpayer has an unqualified right to elect early retirement benefits when he reaches the minimum age of      required by the Plan. 4/ The levy reaches that right, so the Service may make an early retirement election on behalf of the Taxpayer.

#### C. Spousal Consent

Careful consideration must be given where the Service seeks collection from a retirement plan that, absent waiver, requires benefits to be paid in the form of a joint and survivor annuity. In these cases, the Service may only levy upon that joint and survivor annuity, and may not elect another form of benefit for collection purposes without the consent of a spouse. See I.R.C. § 417. This rule is the same regardless of whether the tax liability is a separate liability of the plan participant or a joint tax liability.

In this case, section      of the Plan requires a widow's benefit, and section defines the term "widow" to include a

The Taxpayer has a former spouse,

however, at this time it is unknown if she has a      against the Taxpayer. 5/ Assuming she does, then the Service would need her consent before electing early retirement benefits on behalf of the Taxpayer.

#### D. Course of Action

In your memorandum you recommend that we institute "a lien foreclosure action, [so] the Service may extend the time in which to collect the underlying taxes", rather than collecting the liability through levy. 6/ You believe that levying now on the early retirement benefits will likely lead to a court battle with the Plan administrators

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4/ In your memorandum you state that it can be argued that the Taxpayer does not have an unqualified right to early retirement payments at age      because he must elect early retirement (i.e., submit written notice at least 30 days prior to his retirement date). Simply having to elect early retirement does not make it a qualified right. However, for example, if the Plan conditioned an early retirement election on an agreement that the Taxpayer not return to the      , then an early retirement election would not be an unqualified right. Here, the Plan has no such conditions.

5/ To date, the RO has not completed investigation of this issue.

6/ A reduce to judgment count would have to be added to a lien foreclosure case in order to extend the collection period.

over whether the levy attaches to the Taxpayer's right to elect early retirement. Accordingly, you question whether this would be economical given the difference in the monthly benefits for an early retirement versus a normal retirement.

We believe a better course of action would be to attempt collection through levy before resorting to a judicial remedy because levying is a more efficient and cheaper method of collection. 7/ A lien foreclosure suit is generally brought when administrative remedies have been exhausted or are unavailing. If the Plan administrators fail to honor the levy then we suggest an action to enforce the levy, or a lien foreclosure action if the Plan administrator has a good faith belief that there may be a claim against the Taxpayer's retirement benefits superior to the federal tax lien.

Here, a levy on the Taxpayer's Plan benefits is appropriate since he is not cooperating and there are no other viable sources for collecting his remaining \$ tax liability. 8/ Even though the monthly benefit is greatly reduced by selecting early retirement (\$ vs. \$ ), it is a better option than waiting years for the normal retirement age. Suspending collection for this length of time is administratively difficult to monitor and decreases the chances of collection. Also, section of the Plan states that retirement benefits cease when death occurs. The Taxpayer's chances of death after age are greater, so collecting reduced payments now is preferable over the risk of collecting a significantly reduced number of full payments in the future.

If you have any further questions, please contact General Litigation, Branch 1 at (202) 622-3610.

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7/ According to the RO the Taxpayer has filed for a CDP hearing, therefore, the RO cannot levy until the CDP hearing and any appeals therefrom are completed. I.R.C. § 6330(e)(2). However, a levy may be made during an appeal if the underlying tax liability is not at issue and the court determines there is good cause not to suspend the levy. I.R.C. § 6330(e)(1).

8/ You cited IRM 536(14).5(3) which recommends levy on retirement plans only in flagrant and aggravated cases. The revised Manual provides that the Service should use discretion in levying on the income from retirement plans and that the corpus of a plan (as contrasted with income from the plan) should be levied upon only in flagrant cases. See IRM 5.11.6.1 and 5.11.6.2 respectively. In this case, levying on income from the plan is at issue so flagrant circumstances are not required.