

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:SB:LPLafferty
GL-120254-15

date:

to: Alan Gilds
Analyst, Collection Policy
(Small Business/Self-Employed)

from: Lisa Lafferty
Attorney, Division Counsel
(Small Business/Self-Employed)

subject: Notice of Sale Requirements

This memorandum provides an analysis of the issues raised in your April 1, 2015 email to Division Counsel, Small Business/Self-Employed. You sought our advice regarding the statutorily required content of the Notice of Sale and the published notice. This inquiry stems from a discussion held by the Director, Headquarters Collection, the Director, Field Collection, and the Director, Collection Policy concerning the ongoing disagreement with TIGTA over the content required by IRC § 6335.

Issues

1. Whether IRC § 6335 requires the minimum bid to be listed on the Notice of Sale or the notice required by the statute to be published.
2. What, if any, litigation risks exist if the minimum bid is not listed on either the Notice of Sale or the published notice.
3. Whether IRC § 6335 requires the Notice of Sale and the published notice to be identical.

Conclusions

1. The minimum bid is not required to be listed on the Notice of Sale or the published notice.
2. [REDACTED]
3. The Notice of Sale and published notice are not required to be identical.

Discussion

1. Minimum bid is not required to be in Notice of Sale or published notice.

The IRS must give the owner of seized property a notice of sale as soon as is

practical after the seizure is made.¹ The IRS must also cause notice of the sale to be published in a newspaper that is generally circulated or published in the county in which the seizure was made.² If no newspaper is published or generally circulated in the county, the notice must be posted at the post office closest to the place the seizure was made and at least two other public places.³

IRC § 6335(b) sets out the content required to be included in the Notice of Sale and the published notice. The Notice of Sale and published notice are required to “specify the property to be sold, and the time, place, manner and conditions of the sale” of the seized property.⁴ The manner and conditions of the sale are addressed by IRC § 6335(e). IRC § 6335(e)(1)(A) requires the IRS to determine the minimum bid below which the property will not be sold. IRC § 6335(e)(2) mandates that the Secretary prescribe by regulation the “manner and other conditions of the sale” of seized property. More specifically, IRC § 6335(e)(2)(C) requires the regulations prescribed by the Secretary to address whether the announcement of the minimum bid may be delayed until receipt of the highest bid. The legislative history of this provision reveals that Congress was concerned that announcing the minimum bid before the sale might depress the bidding.⁵ Accordingly, Treasury Regulation § 301.6335-1(c)(3) provides that the announcement of the minimum bid may be made before the sale or deferred until after receipt of the highest bid, and that in the case of deferral, if the highest bid exceeds the minimum bid then no announcement of the minimum bid shall be made.

a. Published Notice

The minimum bid is not required to be included in the published notice. IRC § 6335 left to the Secretary the determination of whether the minimum bid must be announced before the sale. Treasury Regulation § 301.6335-1(c)(3) establishes that an announcement before the sale is not required. Requiring the minimum bid to be included in the notice which is published before the sale would render the statute ineffective to the extent it affords the Service discretion to determine whether the announcement of the minimum bid can be deferred. There would be no reason for the regulation to allow deferral of the announcement of the minimum bid if it were required to be included in the published notice. It is our opinion that the unavoidable conclusion to be drawn from the statute and the regulation is that the minimum bid is not a condition of the sale required to be included in the published notice.

b. Notice of Sale

The minimum bid is not required to be included in the Notice of Sale. IRC § 6335 provides one requirement for content that is applicable to both the Notice

¹ IRC § 6335(b).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ S. REP. NO. 83-1622, pt. 10 at 26 (1954).

of Sale and the published notice. Both are required to “specify the property to be sold, and the time, place, manner and conditions of the sale”, and both are governed by the Treasury Regulation with regard to the manner and conditions of the sale. As noted above, the statute and regulation lead to the inescapable conclusion that the minimum bid is not a condition of the sale required to be included in the published notice. It would be an incongruous result for the minimum bid to be required in the Notice of Sale where it is not required in the published notice.

The taxpayer is not deprived of notice of the minimum bid where it is not included in the Notice of Sale. The IRS provides notice of the minimum bid in the form of a minimum bid worksheet (Form 4585) that is separately sent by certified mail to the taxpayer prior to the sale.⁶ The taxpayer is also provided an opportunity to challenge the minimum bid through an administrative appeal procedure.⁷ The separate notice of the minimum bid provided to the taxpayer should discourage the courts from grafting a requirement onto the statute that is inconsistent with both its language and the regulation.

2. The risk of litigation concerning the minimum bid

The protections found in IRC § 6335 are for the benefit of the taxpayer, not the public and not the IRS.⁸ Only a taxpayer can bring a suit based on an IRS failure to meet the IRC § 6335 requirements.⁹ That being said, the majority of circuit courts that have decided the issue have held that strict compliance with IRC § 6335 is required for a valid tax sale.¹⁰ If the IRS fails to strictly comply with IRC § 6335, the sale is voidable and the taxpayer may bring a suit to set aside the sale.¹¹ As a result, if a court were to find that the minimum bid is required to be included in the Notice of Sale or the published notice, failure to do so would result in the taxpayer being able to bring a successful suit to set aside the sale in many jurisdictions without showing prejudice or harm, even where the taxpayer and/or public had actual notice of the minimum bid.

a. *Published Notice*

[REDACTED]
[REDACTED] The language and legislative history of section 6335 indicate that such a requirement should not be read into the

⁶ IRM 5.10.4.8.2.

⁷ IRM 5.10.4.8.3.

⁸ *Bartell v. Riddell*, 202 F.Supp. 70, 76 (S.D. Cal. 1962); see also *Anderson v. United States*, 44 F.3d 795 (9th Cir. 1995).

⁹ *Bartell*, 202 F.Supp. at 76.

¹⁰ *Kulawy v. United States*, 917 F.2d 729, 734 (2nd Cir. 1990); *Johnson v. Gartlan*, 470 F.2d 1104, 1106 (4th Cir. 1973), *cert. denied*, 414 U.S. 865 (1973); *Reece v. Scoggins*, 506 F.2d 967, 970-71 (5th Cir. 1975); *Goodwin v. United States*, 935 F.2d 1061, 1065 (9th Cir. 1991); but see *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 377 F.3d 592, 597 (6th Cir. 2004).

¹¹ *Bartell*, 202 F.Supp. at 76; *Kulawy*, 917 F.2d at 729.

statute. The statute directs that the manner and conditions of the sale be prescribed by regulation. Requiring the minimum bid to be included in the published notice would seriously hamper the effectiveness of the regulation.

[REDACTED]

b. Notice of Sale

[REDACTED]

3. The Notice of Sale is not required to be identical to the published notice.

The Notice of Sale and the published notice do not have to be identical. Both the Notice of Sale and the published notice must be the same in all material respects and contain the content required by IRC § 6335. Immaterial differences with respect to words or phrases will not render the Notice of Sale or the published notice in violation of IRC § 6335.

Your email included an example where differences existed in the language describing payment terms. So long as the language describing the payment terms is equivalent such that the meaning is not changed, variations in words or phrases do not violate IRC § 6335. You also specifically asked about including the minimum bid in the Notice of Sale, but not the published notice and vice-versa. Because the minimum bid is not required to be listed on either the Notice of Sale or the published notice for the reasons explained above, including the minimum bid in one notice, but not the other, does not violate IRC § 6335.

[REDACTED]

In our opinion the minimum bid does not have to be included in the notices required by IRC § 6335. [REDACTED]

[REDACTED] Finally, although the Notice of Sale and the published notice do not have to be identical, they must be the same in all material respects. Please call Lisa Lafferty at (240) 613-6363 if you have further questions.

DEBORAH C. STANLEY
Assistant Division Counsel (GL)
(Small Business/Self-Employed)

By: _____
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