

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:04
POSTS-146437-10

date: January 28, 2011

to: Acting Director, Collection Policy
(Small Business/Self Employed)

from: Senior Technical Reviewer, Branch 4
(Procedure & Administration)

subject: Application of Federal Contractor Levy Collection Due Process Provisions

By memorandum dated January 3, 2011, we previously provided guidance on the application of section 2104 of the Small Business Jobs Act of 2010 (SBJA), which amended I.R.C. §§ 6330(f) and (h)(2) to allow a post-levy collection due process (CDP) hearing with respect to “federal contractor levies”. This term is defined in section 6330(h)(2) as “...any levy if the person whose property is subject to levy (or any predecessor thereof) is a Federal Contractor.”

We concluded that a business or policy decision must be made as to whether to limit application of the amendments to sections 6330(f) and (h)(2) to continuous levies under I.R.C. § 6331(h) to reach payments made to federal contractors in accordance with the Federal Payment Levy Program (FPLP). Alternatively, a decision could be made to apply these amendments to any levies to reach any property of a federal contractor, under the general levy authority in I.R.C. § 6331(a).

The purpose of this supplemental guidance is to address further questions about implementation of the new federal contractor levy provisions.

1. How can these taxpayers be identified? Is there an authoritative definition of “federal contractor” that the Service would need to go by?

The definition and identification of “federal contractors” for purposes of these provisions is contingent upon the business or policy decision made as to their application.

If the decision is made to limit application to levies to reach payments made under the FPLP, “federal contractor” could be defined, for purposes of these provisions, as any person or entity receiving payment for providing property or services sold or leased to the Federal government.

If the decision is made to broadly apply these provisions to any levy on any property of a federal contractor, “federal contractor” will also need to be more broadly defined. We

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are aware of no authoritative or definitive definition of this term in the I.R.C., Federal Acquisition Regulations (FAR), or in any other statute or regulation. Furthermore, even if there were a definition elsewhere in the law, we know of no reason why the Service would be constrained by or required to use such definition in the context of the CDP provisions.

Where a term is not defined in the statute, it is appropriate to accord the term its “ordinary meaning”. Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 833 (9th Cir. 1996). And when there is no indication that Congress intended a specific legal meaning for a term, courts may look to sources such as dictionaries for a definition. Muscarello v. United States, 524 U.S. 125, 127-132 (1998). See also Huntsberry v. Commissioner, 83 T.C. 742, 747-748 (1984).

“Federal contractor” could be broadly defined, consistent with the ordinary meaning of the term, as a person or entity that contracts with the Federal government to provide property or services.¹



2. When issuing this levy, would the Service have to provide the “proof” that the taxpayer is a federal contractor?

Once procedures are implemented defining “federal contractor” for purposes of these provisions, the Service can proceed with levying in accordance with those procedures. The taxpayer will be entitled to request a post-levy CDP hearing during which the taxpayer could raise any issues relevant to the levy. I.R.C. § 6330(c)(2)(A). Accordingly, at the hearing the taxpayer could argue that it is not a “federal contractor” and was therefore entitled to pre-levy CDP rights. This is similar to the other post-levy CDP provisions. For example, the Service can determine a jeopardy levy was

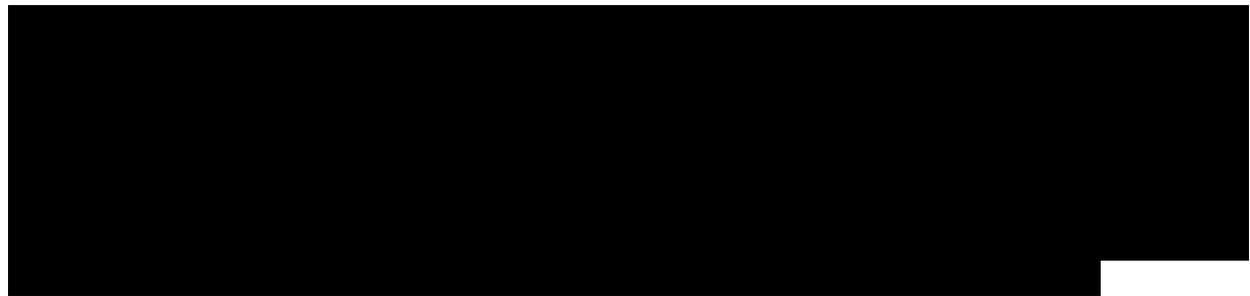
¹ While the FAR does not contain a definition of “federal contractor”, it does define “contract”: Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see part 16. 48 CFR 2.101.

appropriate and, at a post-levy hearing, the taxpayer can contest the jeopardy determination. Bussell v. Commissioner, 130 T.C. 222 (2008).

3. What happens when you are a contractor one day, and the next you are not?

The effective date of these amendments is for “levies” issued after September 27, 2010, the date of enactment of the SBJA. Accordingly, the relevant date is the date of a levy issued after September 27, 2010. If the taxpayer is a federal contractor at the time of such levy, the post-levy CDP provisions apply. Again, this is analogous to the other post-levy provisions, such as for jeopardy levies, where the jeopardy determination is made at the time of levy.

4. How would “or any predecessor thereof” be applied?



5. Can current post-levy CDP procedures (both in Collection and Appeals) under section 6330(f)(3) be applied for this new exception also, including the use of the current suite of post-levy CDP notices issued by the field, ACS, or FPLP?

We anticipate that the procedures for conducting the federal contractor post-levy CDP hearing should be substantially the same as the current post-levy proceedings. However, the post-levy CDP notices will likely need to be revised (or new notices created). The Letter 1058-D, for example, currently used for DETL levies, has specific language referring to the 2-year lookback period for unpaid employment taxes, which is not relevant in the case of a federal contractor levy.

6. Like all other levies, can the Service use its discretion in the issuance of this levy as well?

Yes. Section 6330(f) is drafted as an exception to the ordinary pre-levy CDP requirements. In this context, we are not precluded from continuing to use pre-levy CDP procedures for federal contractor levies, however we decide to apply these provisions.

If you have any further questions, please call Branch 4 (Procedure & Administration) at (202) 622-3630.