

Office of Chief Counsel
Internal Revenue Service
memorandum

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subject: Rescission of Notice of the Right to a Section 6320 Hearing

Issue

May the Internal Revenue Service rescind a properly issued I.R.C. § 6320(a) notice?

Conclusion

Yes. The Service may rescind a properly issued section 6320(a) notice, but only if: (1) within the time period for requesting a Collection Due Process (CDP) hearing the Service agrees either to withdraw the Notice of Federal Tax Lien (NFTL) or release the federal tax lien; (2) the rescission is accomplished before the expiration of the time period for requesting a hearing; and (3) the taxpayer has not requested a Collection Due Process (CDP) hearing.

Discussion

The Internal Revenue Code neither expressly prohibits nor expressly provides for rescission of a notice of a right to a hearing under section 6320.¹ In general, the Service has the authority to rescind a section 6320 notice. The exercise of this authority, however, is circumscribed both by the statute, section 6320, and by the Treasury regulations promulgated thereunder.

Congress enacted section 6320 to provide taxpayers with the right to an independent administrative review and determination by the Service's Office of Appeals regarding the Service's decision to file a NFTL. The Service is required to notify the taxpayer of the taxpayer's right to a CDP hearing not more than five business days after the day of

¹ The Service uses Letter 3172, *Notice of Federal Tax Lien and Your Right to a Hearing Under IRC 6320* to satisfy the requirements of section 6320(a).

the filing of the NFTL. I.R.C. § 6320(a)(2)(C). Because of this statutory requirement, a properly issued section 6320 notice may be rescinded only if the Service agrees to withdraw the NFTL or release the federal tax lien.² Rescission of the section 6320 notice without a corresponding removal of the NFTL from the public record would deprive the taxpayer of the protection afforded by section 6320.³ The decision to withdraw the NFTL or release the tax lien must be made within the 30-day time period for requesting a hearing and should be accomplished as soon as practicable.⁴

A taxpayer is “entitled to only one” hearing with respect to the taxable period identified in the notice. I.R.C. § 6320(b)(2). Treasury regulations under section 6320 interpret this statutory provision to require that a taxpayer be afforded only one hearing opportunity for each tax and tax period. The regulations require the Service to provide a taxpayer with an opportunity for a CDP hearing by issuing a section 6320 notice. Treas. Reg. § 301.6320-1(a)(1). The notice must advise the taxpayer of the right to request a CDP hearing. I.R.C. § 6320(a)(3)(B). A taxpayer may request a hearing during the 30-day period beginning on the day after the five-business-day period described in section 6320(a)(2)(C). Treas. Reg. § 301.6320-1(b)(1). A taxpayer may have more than 30 days in which to request a hearing. See, e.g., I.R.C. §§ 7508(a) and 7508A. Once the time period to request a hearing expires, the requirement to provide the taxpayer with an opportunity to request a CDP hearing is satisfied. Unless the taxpayer timely submits a CDP hearing request, the taxpayer would no longer be entitled to a section 6320 hearing for that tax and tax period. For example, if the Service sends a subsequent section 6320 notice, then only the first notice would entitle the taxpayer to request a CDP hearing. Treas. Reg. § 301.6320-1(b)(2) Q&A-B1, Q&A-B4. A taxpayer forgoes the right to a CDP hearing under section 6320 with respect to the unpaid tax

² A “properly issued” section 6320 notice is one that is given in person, left at the taxpayer’s dwelling or usual place of business, or sent by certified or registered mail to the taxpayer’s last known address. I.R.C. § 6320(a)(2). If the Service determines that a section 6320 notice was not properly issued, then it must issue a substitute notice giving the taxpayer the right to request a hearing under section 6320. Treas. Reg. § 301.6320-1(a)(2) Q&A-A12. Rescission of the notice is not necessary when the notice is not properly issued.

³ Conversely, the rescission of the section 6320 notice is not required if the Service withdraws the NFTL. The taxpayer would still be entitled to a hearing to dispute the future filing of a NFTL and resolve collection of the unpaid tax.

⁴ Rescission of the section 6320 notice is not necessary if the lien is released under section 6326(b) and Treas. Reg. § 301.6326-1(b). If the tax has been paid in full or the collection statute of limitations has expired, then the Service can no longer pursue collection and no NFTL can be filed in the future. If the NFTL and underlying tax lien are invalid due to an invalid assessment, the taxpayer will be entitled to a new section 6320 notice if and when a new assessment is made and a NFTL is filed to collect that assessment. Section 6320(b)(2) provides that a taxpayer is entitled to only one hearing “with respect to the taxable period to which the unpaid tax specified in subsection 6320(a)(3)(A) relates.” The section 6320 regulations interpret this phrase to mean the tax assessment the Service is attempting to collect. See Treas. Reg. § 6320-1(d)(2) Q&A-D1 (taxpayer is entitled to a new hearing about an additional assessment of tax even if the taxpayer has already had a CDP hearing about a different assessment for the same tax period). Although not provided for explicitly in the regulations, the reasoning of Q&A-D1 supports the required issuance of a new section 6320 notice upon the filing of a NFTL listing an entirely new assessment made to replace an invalid assessment.

and tax periods shown on a CDP notice if the taxpayer does not timely request a CDP hearing. Treas. Reg. § 301.6320-1(c)(2) Q&A-C7.

Because the regulations have interpreted the statute to provide one and only one hearing opportunity, the Service may not offer a taxpayer more than one opportunity to request a CDP hearing for any tax and tax period to which the unpaid tax relates. Once the Service has issued a section 6320 notice and the time period for requesting a hearing has expired, the Service lacks authority to rescind the section 6320 notice.

The regulations also circumscribe the Service's ability to rescind a section 6320 notice after a taxpayer timely submits a CDP hearing request. Once a timely CDP request is submitted, the regulations allow for only two possible ways in which the matter may be resolved, *to wit*, the taxpayer may withdraw the hearing request or Appeals must issue a notice of determination. Treas. Reg. § 301.6320-1(f)(1) ("[u]nless the taxpayer provides the IRS a written withdrawal of the request that Appeals conduct a CDP hearing, Appeals is required to issue a Notice of Determination in all cases where a taxpayer has timely requested a CDP hearing."⁵ Accordingly, the Service is only permitted to rescind a properly issued CDP notice before the taxpayer requests a CDP hearing within the 30-day period.

The Service is not required to rescind a section 6320 notice if the NFTL is ineffective. The validity of a section 6320 notice does not depend on the effectiveness of the related NFTL.⁶ Cf. Treas. Reg. § 301.6320-1(a)(2) Q&A-A12 (validity of a NFTL is not conditioned on the issuance of a section 6320 notice). For example, if a recording office never receives a NFTL, then the section 6320 notice would still be valid. Accord Graham v. Commissioner, T.C. Memo. 2008-129 at *7 ("Nothing in the statute, the accompanying regulations, or the legislative history indicates that the Secretary is prohibited from notifying a taxpayer of the filing of an NFTL before the NFTL is actually recorded."). If a NFTL is void because it was filed in violation of the bankruptcy automatic stay (11 U.S.C. § 362(a)), then the section 6320 notice is nevertheless effective.⁷ In both instances, the taxpayer would still be entitled to a hearing to dispute

⁵ Accord, Treas. Reg. § 301.6320-1(e)(3) Q&A-E8 A(ii) ("[b]ecause taxpayers are encouraged to discuss their concerns with the IRS office collecting the tax, certain matters that might have been raised at a CDP hearing may be resolved without the need for Appeals consideration. Unless as a result of these discussions, the taxpayer agrees in writing to withdraw the request that Appeals conduct a CDP hearing, Appeals will still issue a Notice of Determination.").

⁶ A section 6320 notice would be invalid if it is not properly issued (as described in footnote 2, supra) or if the inadequacy of the content of the notice prevents the taxpayer from exercising his right to a hearing. For example, a section 6320 notice is invalid if it is sent to an address other than the taxpayer's last known address. See Space v. Commissioner, 2009-230. If a section 6320 is invalid, then the taxpayer is entitled to another section 6320 notice. See Treas. Reg. § 301.6320-1(a)(2) Q&A-A12.

⁷ During the pendency of the bankruptcy automatic stay, it would be advisable to suspend the CDP hearing. Actions taken during the hearing may risk violating the stay. Because the section 6320 notice is valid in providing the taxpayer with the one opportunity for a hearing required under the statute, the hearing could resume after the stay is no longer in effect.

the future filing of a NFTL and resolve collection of the unpaid tax. Appeals should be able to make a determination after taking proper account of any issues raised by the taxpayer, after verifying that all legal and administrative procedural requirements for NFTL filing are satisfied and after performing the balancing analysis required by section 6330(c)(3)(C). See I.R.C. § 6320(c).

Although the Service is not required to rescind a properly issued section 6320 notice, it may for policy reasons decide to rescind. The notice may be rescinded only if the Service agrees to withdraw the NFTL or release the lien and the rescission occurs before the expiration of the time period to request a hearing and before the taxpayer submits a CDP hearing request. Any policy delineating the circumstances under which a valid section 6320 notice may be rescinded should be made in furtherance of sound tax administration.

Please call P&A Branch 3 or 4 if you have any further questions.