

Internal Revenue Service

memorandum

CC:EL:GL:Br1:RMFerguson
GL-114852-97

date: November 25, 1997

to: National Director, Collection Field Operations CP:CO:C
Attn: Arthur Aron

from: Chief, Branch 1 (General Litigation) CC:EL:GL:Br1

subject: Withholding when Retirement Accounts are Levied

This is in response to your July 30, 1997, request for our views as to whether levy proceeds from certain retirement plans must be reduced to account for withholding for current income taxes required under the Code. [REDACTED]

[REDACTED] We take the position that, where a plan administrator is legally required to withhold funds from a plan distribution, a levy will only reach the proceeds which remain after such withholding.

Section 6331 of the Code authorizes the Service to levy upon all property and rights to property of a taxpayer in satisfaction of that taxpayer's delinquent tax liability. The only property that is exempt from levy is the property enumerated in I.R.C. § 6334(a). Section 6334(c) of the Code provides that, notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically exempted under section 6334(a).

Section 3405(c) of the Code was amended by the Unemployment Compensation Amendments of 1992 ("UCA"), Pub. L. No. 102-318, § 522(b), 106 Stat. 314-315 (July 3, 1992). As of January 1, 1993, distributions from I.R.C. § 401(a) qualified plans, section 403(a) annuity plans, and section 403(b) tax-sheltered annuities became subject to new withholding requirements under section 3405(c)(1), pursuant to changes made by the UCA. Post-UCA section 3405(c) requires withholding at a rate of 20% on any distribution that is

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eligible to be rolled over but that is not transferred directly to an eligible transferee plan. 1/ Payees cannot elect to forgo withholding on such distributions. Treas. Reg. § 31.3405(c)-1 Q&A 2. Plan administrators may be held liable for payment of tax required to be withheld. I.R.C. § 3405(d).

The congressional intent behind the new withholding provisions was to facilitate the preservation of retirement benefits by requiring plans to transfer eligible rollover distributions directly to an IRA or another qualified plan. Congress made the withholding requirements mandatory in order to ensure that taxpayers who choose not to make direct trustee-to-trustee transfers of distributions are able to satisfy their tax liabilities. 138 Cong. Rec. S8177 (daily ed. June 15, 1992) (statement of Sen. Bentsen).

Thus, the levy and withholding provisions of the Code are seemingly in conflict. Pursuant to the levy provisions, a plan administrator is required to turn over a taxpayer's entire property interest in a plan distribution, less any portion of that distribution which may be exempt under section 6334(a). See I.R.C. §§ 6334(a)(8), 6334(a)(9). Pursuant to the withholding provisions, however, a plan administrator may be required to withhold a portion of that distribution for current taxes.

It is a basic tenet of statutory construction that where two statutory provisions are in conflict, the more specific statute controls. The more specific provision in this ~~scenario is section 3405. Accordingly, we do not take the~~ position that the Service's general levy authority overrides the specific Code requirements for withholding from retirement plan distributions.

We think that this position is consistent with Policy Statement P-5-29 ("P-5-29"). As you discuss, P-5-29 provides that as a matter of "administrative expediency," a levy generally will only be deemed to reach a taxpayer's "take home" pay, unless it is determined that a taxpayer is voluntarily allotting his or her pay to an extent that would defeat the purpose of the levy. [REDACTED] DP

1/ In our view, amounts distributed from a qualified plan pursuant to levy will satisfy the applicable definition of an eligible rollover distribution set forth in section 402(c)(4) and accordingly, will be subject to section 3405(c).

[REDACTED] We read this policy statement to primarily address voluntary withholding controlled by the taxpayer. This has been the focus of subsequent private letter rulings issued by the Service addressing the applicability of P-5-29. In Private Letter Ruling 9511043 (Dec. 21, 1994), the Service provides examples of when changes in deductions from a taxpayer's gross pay will not be challenged by the Service as an attempt to defeat the purpose of a levy. The examples cited include changes which are outside of a taxpayer's control, such as an increase in a contribution to a 401(k) plan based on a percentage of income when a taxpayer's income increases.

[REDACTED]

DP

The stated purpose of P-5-29, however, is "administrative expediency," and not concern with whether a taxpayer will be able to catch up on his or her taxes. The goal of administrative expediency would also support allowing a plan administrator to withhold for income taxes as that administrator would otherwise do in the ordinary course of business. Furthermore, as previously discussed, in the case

2/

[REDACTED]

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GL-114852-97

of a levy on a retirement plan administrator is not
merely withholding base administrative expediency of
complying with a taxpayer payment allocations.
The administrator is with use withholding is
required under the Code

Accordingly, we consider levy proceeds from a
retirement fund should account for any
withholding required under 405. Please feel free to
call Robin Ferguson, at if you have any further
questions or comments.



AN C. LEVINE

cc: Associate Chief Counsel Branch 7

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