

**Office of Chief Counsel
Internal Revenue Service**

Memorandum

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subject: Timeliness of Section 6320 Hearing Request – When Notices of Federal Tax Lien Are
“Filed”

ISSUE:

Whether the term “filing” or “filed” under sections 6320 and 6323 refers to the date when the NFTL reaches the correct state or local recording office or the date when the recording office records or indexes the NFTL?

CONCLUSION:

“File” or “filed” with respect to a NFTL refers to the date that the NFTL is presented to the state or local office for recording, not the date (which may be later) when the notice is recorded or indexed in the state or local records.

BACKGROUND

In the past, our office has interpreted the term “filing” or “filed” in sections 6320 and 6323 to mean recordation. We recently had reason to revisit this interpretation in connection with a request for legal advice about section 6323. Upon reexamination, we now conclude that filing a NFTL means delivering it to the local recorder’s office and not the act of indexing it in the local records. The date when a tax lien is filed under section 6320 is significant because it is the date used to measure the period the Service has to notify the taxpayer of the NFTL filing and the date used for determining whether a

taxpayer has timely requested review of the collection action.¹ Based on this new interpretation, changes may be needed in the procedures for informing taxpayers of the filing of the NFTL and the deadline by which to request a hearing under section 6320.

LAW AND ANALYSIS:

The Code does not directly answer the question of when a NFTL is filed. Section 6323(h)(5) defines "tax lien filing" as "the filing of a notice (referred to in subsection (a)) of the lien imposed by section 6321." Section 6323(a) suggests, however, that filing a NFTL is an act undertaken "by the Secretary." More important, the language of section 6323(f)(4) makes a distinction between filing and recordation or indexing.² Section 6323(f)(4) requires, under certain conditions, the "fact of filing" of a NFTL with respect to real property to be "entered and recorded." This indexing requirement applies only if state law provides that an instrument is not valid against a purchaser without knowledge of the instrument unless it is indexed in a manner that a reasonable inspection of the records will reveal its existence.

¹ Section 6320 states (in relevant part):

(2) Time and Method for Notice – The notice required under paragraph (1) shall be-

* * *

(C) sent by certified or registered mail to such person's last known address, not more than 5 business days after the day of the filing of the notice of lien.

(3) Information Included with Notice.—The notice required under paragraph (1) shall include in simple and nontechnical terms—

- (A) the amount of the unpaid tax;
- (B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2)

* * *

26 U.S.C. § 6320(a)(2)(C) and (a)(3)(B)(emphasis added).

² A number of non-Code authorities have defined the term "filing" or "file" Black's Law Dictionary, 628 (6th ed 1990), for example, includes in the definition of "filing" the act of delivering an instrument or other paper to the proper officer or official. The definition, however, does not include recordation or indexing. Decisions of the state courts are to the same effect. 76 C.J.S. Records, § 4 "Recorded" signifies the copying or transcription of a document into a permanent record, while the term "filing" signifies the mere delivery to the proper official. Rubin v Dept of Industrial Relations, 1985 Ala. Civ. App. Lexis 1180, 469 So.2d 657 (1985)(notice of appeal and affidavit of substantial hardship preserved claimant's appeal rights when circuit judge signed affidavit even though clerk failed to mark pleading or other paper as "filed" before appeal rights expired); Hamilton Dan Crye v. Edwards, 178 Ariz. 327, 873 P.2d 665 (1993)(party successfully showed that he attempted to renew default judgment by producing receipt from court and copy of affidavit, date-stamped by court; duty to file a paper was discharged when the filer placed the paper in the hands of the proper custodian at the proper time and in the proper place); State v. Noren, 1980 Utah Lexis 1075, 621 P.2d 1224 (1980)(defendant not guilty of fraudulent handling of recordable writings when articles of incorporation for financing company required to be "filed", as distinguished from "recorded", with secretary of state).

Case law interpreting section 6323 confirms the distinction between filing and indexing.³ Section 6323(f)(4) was added to the Code in 1978 to ameliorate the harshness of the decision in Adams v. United States, 420 F. Supp. 27 (S.D.N.Y. 1976). The district court held that the Service's mere presentation of a NFTL to a county clerk's office constituted filing the lien and that filing did not require recordation in the index. There, the Service presented NFTLs to the county recording clerk, who then failed to index them in the public record. Subsequently, the taxpayers sold their real property to Adams, who searched the public record and did not find the NFTLs. After Adams purchased the real property and discovered that it was encumbered with federal tax liens, he filed a quiet title action, claiming that the Service had failed to file its NFTLs as they had never been indexed in the public record.⁴ The district court held for the Government, reasoning that the Service met its filing requirement by presenting the NFTLs to the clerk. Congressional action to amend section 6323 to impose an additional indexing requirement for the validity of NFTLs under certain situations reinforces the interpretation of filing in section 6323 as separate and distinct from indexing.

Case law decided after the 1978 amendment further bears out the conclusion that filing does not mean indexing. In Hanafy v. United States, 991 F. Supp. 794 (N.D. Tex. 1998), a couple purchased a parcel of real property and recorded the warranty deed furnished by the seller, unaware that the Service had filed NFTLs for unpaid

³ The distinction between "filing" and "indexing" is well established under state law. See, e.g. Radway v. Selectmen of Dennis, 266 Mass. 329, 165 N.E. 410 (1929)(municipality's order of taking of property not recorded in strict compliance with statute; order was offered for filing but failed because no recording fee accompanied it). Thus, an instrument is deemed filed or "recorded" when deposited for recording with the proper official, even though it is not then actually recorded, is defectively recorded or recorded in the wrong book. Rubin, supra; Wicktor v. County of Los Angeles, 177 Cal. App.2d 390, 2 Cal Rptr. 352 (1960)(decedent's mailing of card to retirement office with designation of beneficiary was a "filing"; after receipt of the instrument, act of filing was a ministerial one and omission by office employee could not affect rights of one who presented document for filing); T A. Schomer v. R.L. Craig Co., 137 Cal.App. 620, 31 P 2d 396 (1934)(written findings of court transcribed and handed to clerk were filed in records of court and neither clerk's omission or misplacing of item destroyed presumption of filing); Village of Crotty v. Domm, 338 Ill. 228, 170 N.E. 308 (1930)(effective date of ordinance making public improvements to street was the date filed with clerk for recording, not the date of the recording); Central Ceiling & Partition, Inc. v Dept of Commerce, 249 Mich. App. 438, 642 N.W.2d 397 (2002)(filing of lien and acceptance by recorder of deeds sufficient when county official failed to record items by assigning book and page numbers); Fisher v. Reamer, 146 W.Va. 83, 118 S.E.2d 76 (1961)(under state mechanic's lien law, "filing" with county clerk was tantamount to recordation; cases interpreted statute to mean that paper recorded at moment properly lodged with clerk, without regard to book in which entered); Benson et. al. v Wood Motor Parts Corp., 115 W.Va. 200, 174 S.E. 895 (1934)(same), Glading v. Frick, 88 Pa. 460 (1879)(act of depositing paper in recorder's office and fee payment sufficient), but see General Motors Acceptance Corp. v. Bracket & Shaw Co., 84 N.H. 348, 150 A. 739 (1930)(party seeking benefit of recording laws incurred risk that item would not be properly recorded; conditional sales contract and affidavit not recorded correctly due to clerk's omission and thus filing party did not create legal notice of encumbrance).

⁴ Pursuant to IRC § 6323, as against purchasers of property subject to a federal tax lien, ". . . the lien shall not be valid against any purchaser . . . until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary "

employment tax against the seller 15 days earlier. The county clerk's office failed to scan the NFLTs into the computerized indexing system. The district court rejected the couple's argument that the NFLTs failed to comply with section 6323(f)(4) under the theory that Texas law required the indexing of liens or judgments before they could be valid against a purchaser without notice.

The district court in Hanafy cited the Texas Property Code's provision addressing the validity of an unrecorded instrument affecting real estate, observing that the statute's use of the phrase "*filed for record as required by law*" was clearly distinguishable from separate provisions of the Texas statutes dealing with indexing requirements for recorded deeds. Accordingly, the district court held that section 6323(f)(4)'s indexing requirement did not apply.

Based on the authorities discussed above, the term "filing" or "filed" under sections 6320 and 6323 means the date the NFLT is presented to the state or local official for recording or indexing.⁵ The filing date is the date the NFLT is received by hand delivery, in the mail or through electronic transmission by the local recording office.⁶

We look forward to assisting you with implementation of any procedural changes required as a result of this correction in interpretation.

⁵ See also Davis v. United States, 705 F Supp. 446 (C D Ill. 1989)(discussing state's "race-notice" recording act and IRC § 6323(f)'s distinction between indexing and filing); Meckes v. Reynolds Metals Company, 604 F.Supp. 598 (N.D. Ala. 1985), aff'd, 776 F.2d 1055 (11th Cir. 1985)(administrative claim under Age Discrimination in Employment Act not properly filed because claimant sent it to wrong office; "... To file a paper requires delivery to the proper office ...").

⁶ There is no common law mail-box rule or statutory rule similar to section 7502 applicable to the filing of NFLTs.