

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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subject: Correcting a Notice of Federal Tax Lien

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ISSUE

What procedure should the Service use to correct a joint notice of federal tax lien mistakenly listing the name of a non-liable individual?

CONCLUSION

A corrected notice of federal tax lien deleting the mistakenly included name and referring back to the original notice should be filed.

LAW AND ANALYSIS

The following five procedures potentially provide relief to a taxpayer with respect to the Service's filing of a joint notice of federal tax lien: (1) Partial Release of Lien; (2) Administrative Appeal of the Filing of a Notice of Lien; (3) Partial Withdrawal of Lien; (4) Certificate of Non-attachment; and (5) Corrected Notice of Federal Tax Lien.

(1) Partial Release of Lien

A release of lien is permitted if the liability for the amount assessed (with interest) has been fully satisfied or has become legally unenforceable or a bond is furnished to the Service guaranteeing payment of the amount assessed (with interest) within the period of limitations on collection. I.R.C. § 6325(a)(1) and (2). The release of the federal tax lien extinguishes the underlying assessment lien and underlying tax liability. The

certificate of release of lien is "conclusive that the lien referred to in such certificate is extinguished." I.R.C. § 6325(f)(1)(A).

Some circumstances necessitate a partial release of lien even though the Code and regulations do not specifically provide for the remedy. See IRM 5.12.3.8. If a notice of lien merely mistakenly includes a person who was never liable for the tax, however, the "liability for the amount assessed" still exists and is legally enforceable. The non-liable individual was never responsible for the underlying tax liability and the federal tax lien itself never legally arose with respect to the non-liable individual. Therefore, a partial release of lien is not possible; the federal tax lien did not attach to the non-liable person's property.

Section 6325 assumes a valid lien existed when the Service filed the notice of lien. "The statutory scheme clearly contemplates the filing of the notice of federal tax lien whenever a lien has arisen." United States v. Griswold, 59 F.3d 1571, 1575 (11th Cir. 1995). A release of lien functions to clear a taxpayer's record once the liability has been paid or has become legally unenforceable. In this respect, section 6325 serves to undo what sections 6321 and 6323 previously accomplished. Its purpose is to publicly reverse the effect of the notice of tax lien and to inform the world that the once valid lien is no longer valid or enforceable.

IRM 5.12.3.8(2) states that, "[w]hen one taxpayer on a jointly filed return is determined not to be liable for the tax debt, a certificate of release for that taxpayer must be expeditiously issued. For example, a partial release is issued when there is a discharge in bankruptcy and only one person petitioned the court, an offer-in-compromise is requested by one party and the offered amount is accepted, or there is an innocent spouse determination." The partial release is utilized when the individual in question was initially liable for the underlying tax at the time of lien-filing but a subsequent event or determination found the person not responsible for the tax.

Thus, a partial release of lien is not issued when the Service mistakenly includes a non-liable person on the notice of lien filing because the underlying lien never arose with respect to the non-liable individual.

(2) Administrative Appeal of the Erroneous Filing of a Notice of Federal Tax Lien

A taxpayer may file an administrative appeal contesting the filing of a notice of lien. When an individual appeals a notice of lien filing, a certificate of release of lien must be expeditiously issued if the Secretary determines the filing of notice of lien was erroneous. I.R.C. § 6326. As indicated by legislative history, the certificate of release resulting from a finding of an erroneous notice of lien filing informs the public that the Service's lien filing was not warranted. "The imposition of a lien can literally destroy a taxpayer's credit rating and reputation and seriously inhibit business and personal affairs. The proposal to provide administrative appeals can significantly minimize these consequences." 134 Cong. Rec. 20, 29273 (1988) (statement of Mr. Byrd). Under

Treas. Reg. § 301.6326-1,¹ an appeal alleging error must be based on one of the following claims:

- (1) The tax liability that gave rise to the lien, plus any interest and additions to tax associated with said liability, was satisfied prior to the filing of notice of lien;
- (2) The tax liability that gave rise to the lien was assessed in violation of the deficiency procedures set forth in section 6213 of the Internal Revenue Code;
- (3) The tax liability that gave rise to the lien was assessed in violation of Title 11 of the United States Code (the Bankruptcy Code); or
- (4) The statutory period for collection of the tax liability that gave rise to the lien expired prior to the filing of notice of federal tax lien.

The mistaken inclusion of a non-liable individual does not fit within any provision within the regulation allowing the Service to find the notice of lien filing erroneous; the underlying liability has not been satisfied, no invalid assessment exists and the collection limitations period is unexpired. Therefore, the non-liable individual's appeal of the notice of lien filing will not result in a certificate of release of lien because there is no error within the purview of Treas. Reg. § 301.6326-1.

(3) Partial Withdrawal of Notice of Lien

Section 6323(j) allows the Service to withdraw a notice of lien filing in the following circumstances:

- (1) The filing of the notice was premature or otherwise not in accordance with administrative procedures of the Secretary;
- (2) The taxpayer has entered into an installment agreement under section 6159, unless the agreement provides otherwise;
- (3) Withdrawal of the lien will facilitate collection of the tax liability; or
- (4) Withdrawal of the notice is in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

The purpose of section 6323(j) is to provide a mechanism for withdrawing the notice of lien when release of the lien itself is not an option because the individual remains responsible for the liability. Accordingly, partial withdrawal of the notice of lien may indicate that the individual whose name is being withdrawn is still liable for tax. Although the notice is withdrawn, confusion may ensue regarding whether an unrecorded lien remains on the individual's property.

Withdrawal of the notice is only appropriate when the individual remains responsible for the underlying liability. The treasury regulation issued under section 6323(j) illustrates

¹ Treas. Reg. § 301.6326-1 embodies Congress's view of what is considered an erroneous notice of lien filing. The relevant Senate Finance Committee Report states, "If the IRS determines that filing of a notice of lien was erroneous (i.e., the tax liability that gave rise to the lien had been satisfied or the liability had been assessed in violation of the restrictions on assessment in section 6213 pertaining to deficiency assessments or in Title 11), the IRS is required to immediately issue a certificate of release of lien and include in the certificate a statement that the filing of the lien was erroneous." S. Rep. No. 100-309, at 12 (1988).

this point by providing examples discussing the four conditions authorizing withdrawal of a notice of lien. In each example, withdrawal is authorized but the taxpayer remains responsible for the underlying tax liability. Treas. Reg. 301.6323(j)-1(b)(5) Examples 1-4. In the present scenario, the Service knows the individual is not responsible for the underlying tax. Therefore, a partial withdrawal is not suitable to remedy the situation in which a non-liable person is included on the notice of lien.

[REDACTED]

[REDACTED]

[REDACTED]

(4) Certificate of Nonattachment

A certificate of nonattachment is "conclusive that the lien of the United States does not attach to the property of the person referred to in such certificate." I.R.C. § 6325(f)(1)(D). Section 6325(e) grants the Secretary authority to issue a certificate of nonattachment of lien if "because of confusion of names or otherwise, any person (other than the person against whom the tax was assessed) is or may be injured by the *appearance* that a notice of lien filed under section 6323 refers to such person." [Emphasis added]. IRM 5.12.3.24 states that "[a] person will submit an application for a certificate of nonattachment when, due to a similarity of names, there is uncertainty whether a filed NFTL attaches to the applicant's property." Further, the IRM provides that a certificate of nonattachment will be issued "[i]f it is determined that the applicant is not the taxpayer whose name appears on the NFTL and that the NFTL did not attach or does not now attach to the applicant's property." See IRM 5.12.3.24.1.

Here, the notice of lien actually refers to the non-liable person rather than merely creating the appearance that the notice of lien refers to the non-liable person. The Service intentionally, albeit incorrectly, includes the non-liable individual on the NFTL rather than the inadvertent and unintentional inclusion contemplated by section 6325(e). As such, the certificate of nonattachment remedy does not squarely fit within the circumstance which the Service typically issues a certificate of attachment. Accordingly, although the certificate of nonattachment may be a viable option that operates to protect the taxpayer's interest in this circumstance, the corrected notice is preferable.

(5) Corrected Notice of Federal Tax Lien

Counsel has concluded that filing a corrected notice deleting the mistakenly included name and referring back to the original notice is the proper procedure to rectify the situation which a non-liable person is mistakenly included on the notice of federal tax lien. While there is no specific authority for filing a corrected notice, such a filing is entirely in keeping with the purpose of a notice statute. The Service has effectively used the corrected notice to rectify mistakes on the notice of lien filing. See Pratt v. United States, 50 Fed. Cl. 469, 472 (2001) (IRS issued corrected notice because the "original notice had incorrectly also named Mrs. Deborah A. Tejada as an owner of the property"); In re Gault, 136 B.R. 736, 737 (E.D. Tenn. 1991) (IRS issued a corrected notice listing only husband after the original notice included both husband and wife). In addition, we note that the Manual has long included provisions for correcting notices. Succinctly stated, whenever an action occurs because of a mistake of fact or bookkeeping error, that mistake can be corrected so long as doing so does not prejudice the taxpayer. Bugge v. United States, 99 F.3d 740 (5th Cir. 1996); Crompton-Richmond Co. v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1970) (referring to the nonstatutory common law clerical error exception to prohibitions on reversing a completed transaction).

The IRM provides the Service should file a corrected notice removing the non-liable taxpayer's name from the original lien when an individual is included on a notice of lien filing but should not have been included because the taxpayer was never assessed a tax liability. See IRM 5.12.3.36. Further, the IRM instructs that if the Service determines a NFTL should be corrected, then a new NFTL should be filed. See IRM 5.12.2.6.11.

The use of the corrected notice provides adequate protection for the individual mistakenly included on the notice of lien filing. It provides notice to third parties that the lien does not attach to the non-liable individual while also preserving the Service's interest in the underlying assessment lien and collection of the tax liability.

Based on the foregoing, the corrected notice of federal tax lien is the most appropriate remedy.

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