



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

ACTION ON DECISION

Subject: Rothkamm v. United States, 802 F.3d 699 (5th Cir. 2015), *rev'g* 2014 WL 4986884 (M.D. La. Sept. 15, 2014)

Issues:

1. Whether a third party whose property was allegedly wrongfully levied upon is a taxpayer under section 7811 of the Code?
2. Whether section 7811(d) of the Code suspends the running of the limitations periods for filing a wrongful levy claim and a wrongful levy suit?

Discussion:

In March of 2012, the IRS served a levy under section 6331 on Mrs. Rothkamm's bank account to satisfy the unpaid federal tax liabilities of her husband. The bank honored the levy, and Mrs. Rothkamm sought assistance from the Taxpayer Advocate Service (TAS) by filing a taxpayer assistance order (TAO) application. Over five months later, TAS closed its case. Fourteen months after the date of the levy, Mrs. Rothkamm submitted her wrongful levy claim to the IRS. The IRS denied her claim as untimely because, under the version of section 6343(b) in effect at the time, wrongful levy claims had to be filed within nine months of the date of levy. In response, Mrs. Rothkamm filed a wrongful levy suit in federal district court, under section 7426(a)(1), arguing that her request for return of the levied proceeds was timely, as the nine-month period for filing the request for return of the levied funds was tolled under section 7811(d). The district court, without reaching the merits of the claim, dismissed the suit for lack of jurisdiction because the claim, and consequently the suit, were untimely under sections 6343(b) and 6532(c), respectively. The court held that section 7811(d) did not apply because Mrs. Rothkamm was not a "taxpayer" for purposes of section 7811 as she did not owe the taxes being collected and, even if she was a taxpayer, section 7811(d) did not toll the running of the limitations period for filing a wrongful levy claim. Mrs. Rothkamm appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit reversed the district court's decision, holding that Mrs. Rothkamm was a taxpayer for purposes of section 7811 and that her TAO application suspended the running of the limitations periods, under section 7811(d).

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OTHERWISE CITED AS PRECEDENT BY TAXPAYERS

The IRS agrees with the Fifth Circuit's holding that Mrs. Rothkamm is a "taxpayer" under section 7811. In United States v. Williams, 514 U.S. 527 (1995), the U.S. Supreme Court held that the term "taxpayer" can be interpreted broadly in some circumstances. Interpreting "taxpayer" as used in section 7811 to include wrongful-levy claimants is consistent with the purpose of section 7811, which grants authority to the National Taxpayer Advocate to issue a TAO if she determines that a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered.

The IRS disagrees with the Fifth Circuit's holding that section 7811(d) suspends the running of limitations periods related to wrongful levy claims or suits. Under section 6532(c), no wrongful levy suit can begin more than two years after the date of the levy, unless a request for the property's return was made under section 6343(b) within those two years. As noted, at the time of the levy on Mrs. Rothkamm's bank account, the period to request the return of property was only nine months.¹ If such a request is made, the time for filing suit is extended either by twelve months from the filing of the request or by six months from the disallowance of the request, whichever period is shorter. Section 7811(d) suspends "[t]he running of any period of limitation with respect to any action described in subsection (b) [the terms of the TAO]." Section 7811(b) provides that "[t]he terms of a Taxpayer Assistance Order may require the *Secretary* (emphasis added) ... (1) to release property of the taxpayer levied upon, or (2) to cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer..." Because a TAO may order only "the Secretary" to take action, and not the taxpayer, section 7811(d) does not toll deadlines applicable to a taxpayer. Nevertheless, the court determined that the language of section 7811(d) tolls actions taken by both the IRS and taxpayers.

The IRS's position is that section 7811(d) suspends the running of the limitations periods only for actions listed in subsection (b) that are performed by the IRS. The running of the limitations periods for actions taken by a taxpayer are not suspended under section 7811(d). Except for cases appealable to the Fifth Circuit, the IRS will not follow the holding in Rothkamm that section 7811(d) suspends the running of the limitations periods for third-parties to file wrongful levy claims or suits. Furthermore, outside the Fifth Circuit, the government will continue to defend its interpretation of section 7811(d) in cases involving this issue.

¹ Public Law 115-97 amended section 6532(c) by extending the nine-month period for bringing a wrongful levy action to two years. The amendment applies to levies made after December 22, 2017 (enactment date) and levies made on or before the enactment date if the nine-month period has not expired under section 6343(b). Pub. L. No. 115-97, Title I, § 11071, 131 Stat. 2054, 2091-92 (Dec. 22, 2017).

Recommendation: Acquiesce in part, Nonacquiesce in part

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