



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

OFFICE OF
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MEMORANDUM FOR PACIFIC NORTHWEST DISTRICT COUNSEL

FROM: Michael R. Arner, Senior Technical Reviewer
(General Litigation)

SUBJECT: Levy on Social Security Payments After Judgment
Foreclosing Federal Tax Lien

This memorandum responds to your memorandum regarding the above subject.
This document is not to be cited as precedent.

LEGEND:

County A
State B
Date C
Date D
Date E

ISSUE(S):

1. Whether the Internal Revenue Service (IRS) may levy on social security payments of a taxpayer in reliance on a Notice of Federal Tax Lien (NFTL) after a judgment on a suit to foreclose the tax lien.
2. Whether the Federal Debt Collection Procedures Act (FDCPA) controls collection of the judgment received by the IRS on its suit to foreclose the tax lien.

CONCLUSION: The IRS may levy on social security payments in reliance on the NFTL (after filing a notice of revocation of the certificate of release) even though the Government has obtained a judgment in its suit to foreclose the lien. The FDCPA does not control collection of the judgment received by the IRS.

FACTS: The IRS filed a NFTL against the taxpayers in County A , State B and with the Secretary of State's Office, State B, in Date C. The IRS later filed a suit to

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foreclose the tax lien and obtained a judgment against the taxpayers in Date D. The IRS filed a certificate of release for the Clackamus County liens on Date E.. They later determined that this certificate of release was invalid. The IRS has not yet filed a revocation of the certificate of release. The taxpayers receive social security benefits upon which the IRS would like to levy.

LAW AND ANALYSIS

Levy on Social Security Benefits

I.R.C. § 6321 provides that a lien on all real and personal property arises when a taxpayer fails or refuses to pay after notice and demand. The lien arises upon assessment and continues until the liability is satisfied or becomes unenforceable due to lapse of time. This period is generally ten years, the period of limitations on collection provided for by I.R.C. § 6502(a). Section 6502 also permits the IRS to file a suit to collect the tax liability such as a suit to foreclose the tax lien as occurred in this case. ^{1/} Unlike state law, when the United States obtains a judgment, the federal tax lien does not merge into the judgment or the judgment lien. United States v. Overman, 424 F.2d 1142 (9th Cir. 1970). This is so because:

[i]f the assessment lien did not continue when it was reduced to judgment, the government might lose its priority under the lien as against competing creditors and take a new priority only as of the later date of the judgment. Also, ... the government could not enforce the lien but would have to pursue the more cumbersome process of foreclosing its judgment. . . . [T]he judgment merely confirms the validity of the lien.

M. I. Saltzman, IRS Practice and Procedure ¶ 14.07 (1981).

Congress amended section 6502 as part of the Technical and Miscellaneous Act of 1988 (TAMRA) Pub. L. 100-647 adding the following language:

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be

^{1/} A suit to foreclose a federal tax lien is initiated as an in rem action against a specific property in which the taxpayer has an interest. It allows the IRS to sell the entire property, not just the taxpayer's interest in it as would occur at a sale after a levy. Another type of action is a suit to reduce the tax assessment to judgment. The Government will institute a suit to reduce the tax assessment to judgment when the expiration of the statute of limitations on assessments is imminent and there is not enough time left for administrative collection. See Saltzman supra at ¶ 14.09.

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extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

The legislative history of the section 6502 amendment confirms that Congress intended the IRS to continue with administrative levies after judgment stating that “the period during which the tax may be collected by levy shall not expire as long as the tax is collectible.” H.R. Conf. Rept. No. 104, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5065-66.

The district counsel memorandum states that a NFTL was filed in Clackamus County in Date C. According to the district counsel attorney, the IRS inadvertently filed a certificate of release with respect to the Clackamus County lien. I.R.C. § 6325(f)(1)(A) states that the effect of a certificate of release is “that the lien referred to in such certificate is extinguished.” A NFTL with respect to personal property were filed with the Secretary of State in State B. I.R.C. ¶ 6323(f)(1)(A)(ii) requires filing a lien against personal property “in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated. . . .” But even if the NFTL with respect to personal property was properly filed, the certificate of release operates to release the lien filed in both places. Since we have been informed that the statute of limitations on collection is still open, the IRS may reinstate the lien by filing a revocation of the certificate of release pursuant to section 6325(f)(2). ^{2/} This revocation should be filed both in Clackamus County and with the Secretary of State. If the lien is reinstated by filing of a certificate of revocation of release, we conclude that the IRS can levy on the social security benefits of the taxpayer even after receiving a judgment against the taxpayer. ^{3/}

Federal Debt Collection Procedures Act

^{2/} If the lien was released due to self-releasing language on the lien document, the release may not be revoked pursuant to section 6325(f)(2) because the release cannot be considered erroneous or improvident as required by that section.

^{3/} Congress settled the issue of whether the IRS could levy on social security benefits in 1984 when it amended I.R.C. § 6334(c) to read: “Notwithstanding any other law of the United States (*including section 207 of the Social Security Act*) no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).” (Emphasis added.) Section 207 of the Social Security Act (42 U.S.C. § 407(a)) states: . . . none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment or other legal process”

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In 1990 Congress enacted the FDCPA (28 U.S.C. § 3001 et. seq.) to “create a comprehensive statutory framework for the collection of debts owed to the United States government.” H.R. Rep. 736, 101st Congr. 2d Sess. 23 (1990). Section 3001 provides:

(a) In general.-- Except as provided in subsection (b), the chapter provides the exclusive civil procedures for the United States—

(1) to recover a judgment on a debt;

Prior to enactment of the FDCPA, the Federal Rules of Civil Procedure (Fed. R. Civ. P. 64 and 69) governed the collection of federal judgments. Those rules provided that the federal government must collect a federal civil monetary judgment by recourse to the collection law of the state where the cause of action arose. The FDCPA was enacted in response to serious enforcement problems experienced by the Department of Justice in collecting federal debts in the various states pursuant to Rules 64 and 69. While Congress hoped to streamline the collection process to make enforcement activity more efficient, it clarified that:

the Act was crafted not to supersede already existing Federal laws that specify other procedures applicable with respect to the recovery of claims *or judgments* involved in the particular subject matter areas addressed in those statutes. (Emphasis added.)

H.R. Rep. 736, supra 24. 4/ Subsection 3001(b) generally permits other existing law to apply:

(b) Limitation.-- to the extent that another Federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law, those procedures shall apply to such claims or judgment to the extent those procedures are inconsistent with this chapter.

Likewise, subsection 3003(b) specifically states that

“this chapter shall not be construed to curtail or limit the right of the United States under any other Federal law . . .

(1) to collect taxes or to collect any other amount collectible in the same manner as tax.”

4/ See United States v. Pierce, 1998 U.S. Dist. Lexis 18396 (E.D. N.C. 1998) for an explanation of the legislative history in a non-tax case.

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The FDCPA can apply to federal tax cases. 28 U.S.C. § 3002(3)(B); Markham v. Fay, 74 F.3d 1347 (1st Cir. 1996). In Markham, the IRS was attempting to collect taxes as part of a derivative claim in bankruptcy and later in an interpleader action that the United States removed to federal court. The court held that the FDCPA applied because the IRS was not “recovering on a judgment by levy . . . [nor was it] an action in federal court to enforce a lien pursuant to 26 U.S.C. § 7403.” Id. at 1354.

When suit is brought under I.R.C. § 7403, the procedures of Title 26 apply. United States v. Bantau, 907 F. Supp. 988 (D. N.D. Tex. 1995); United States v. Carney, 796 F. Supp. 700 (E.D.N.Y. 1992). Carney involved an action by the government to reduce the federal tax assessments to judgment and to foreclose on federal tax liens. The court stated that “although the purpose of the FDCPA is to create a comprehensive statutory framework, Congress did carve out a number of areas to which the FDCPA does not apply.” The court found that “that the government retains its authority under other law to collect taxes.” Id. at 703. In Bantau, the government brought a transferee liability case against the taxpayer. Citing 28 U.S.C. § 3003(b), the court noted:

Inasmuch as this is a suit for the collection of taxes, the statute of limitations found in the FDCPA is not applicable. The government attempts to collect pursuant to the Internal Revenue Code and is therefore bound by the ten-year statute of limitations found in the IRC at 26 U.S.C. § 6502(a)(1).

Id. at 990. These two district court cases harmonize with the circuit court opinion of Markham since the court in that case stated that the action was not brought under section 7403. See also United States v. Simmons, 1998 U.S. Dist. Lexis 9116 (D. E.D. Ca. 1998) (In an I.R.C. § 7403 action the 10-year statute of limitations of I.R.C. § 6502 applied not the shorter six-year time frame of the FDCPA); but see Van Campen v. United States, 1997 U.S. Dist. Lexis 11384 (D. Kan. 1997) (government asserted fraudulent transfer pursuant to 28 U.S.C. § 3304 of real property encumbered with federal tax lien and government was allowed to foreclose tax lien on transferor’s one-half interest).

The judgment against the taxpayers in this case arose from an I.R.C. § 7403 suit to foreclose federal tax liens. Based on the above analysis, we conclude that the IRS is not restricted to the procedures of the FDCPA, but may collect on the judgment pursuant to any Title 26 procedures. The FDCPA does not apply; therefore, the taxpayer may not invoke 28 U.S.C. § 3014 to exempt his social security benefits. Section 3014 protects from execution social security benefits that qualify as exempt property pursuant to 11 U.S.C. § 522(d). Social security benefits are subject to levy

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pursuant to the Internal Revenue Code since these benefits are not one of the enumerated exemptions from levy in I.R.C. § 6334.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

We can identify no other litigating hazards that would change or qualify the conclusions reached in this memorandum.

If you have any further questions, please call Susan Watson at 202-622-3610.