

INTERNAL REVENUE SERVICE

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MEMORANDUM FOR NEW JERSEY DISTRICT COUNSEL

FROM: Kathryn A. Zuba /s/ *Kathryn A. Zuba*
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Waiver of Right to Receive a Termination Letter

This responds to your request for advice in the above referenced matter, submitted to our office via electronic mail on April 10, 2000. This opinion is advisory in nature and should not be cited as precedent.

ISSUES:

1. Can a taxpayer authorize the Service to levy on a specific property of the taxpayer to collect taxes subject to an installment agreement and still retain his or her Collection Due Process rights under I.R.C. § 6330.
2. Can a taxpayer waive the prohibition on levy set forth in I.R.C. § 6331(k)(2).

CONCLUSION:

1. No. The taxpayer must exercise his or her right to a section 6330 Collection Due Process (CDP) hearing prior to the issuance of the first levy.
2. Yes. As long as the taxpayer has waived or exercised his or her CDP rights under section 6330, the taxpayer may waive the restriction on levy set forth in section 6331(k)(2) and may permit the Service to levy upon a specific property while the installment agreement is still in effect.

BACKGROUND:

You were asked by the New Jersey Collection division to draft two collection waivers for use by taxpayers paying their tax liabilities in installments pursuant to section 6159 of the Code. The first of the two waivers would allow the taxpayer to authorize the Service

to levy on a specific item or piece of property (i.e., a selected account receivable) during the time the Service is prohibited from levying by operation of section 6331(k)(2). The other waiver would remove the prohibition on levy set forth in section 6331(k)(2) in its entirety.

In addition, the New Jersey Collection division also inquired whether a taxpayer may authorize the Service to levy on a specific item or piece of property prior to receiving its CDP notice as required by section 6330 and before exercising or waiving its rights to a CDP hearing for that particular year and tax.

LAW & ANALYSIS:

Generally, unless the statute provides otherwise, a taxpayer may waive rights granted to the taxpayer by the Internal Revenue Code. In order to be valid, a waiver must be knowing and voluntary. Thus, before a taxpayer is asked to waive any of his or her rights under either section 6330, 6331, or 6159, the taxpayer should be informed of his or her rights and of the consequences of a waiver of those rights.

Prior to the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), the Service was generally prohibited from levying upon the taxpayer's property to collect the tax liability that was the subject of an installment agreement. See Treas. Reg. § 301.6159-1(d). The Service could and sometimes would, however, provide that a levy would be served during the pendency of an installment agreement. Id. Furthermore, provided the Service complied with all other provisions of the Code, the Service could levy upon the taxpayer's property immediately following the termination of the installment agreement.

The enactment of RRA placed additional notice and process requirements on the Service relating to both levies and installment agreements. First, section 6330 of the Code requires the Service to provide, at least 30 days before the first levy, a Collection Due Process (CDP) notification and the opportunity for an independent hearing and possible subsequent appellate court review to persons whose property the Service intends to levy for the payment of tax.¹ The taxpayer is entitled to only one CDP notice per tax per each taxable period and can exercise his or her right to a hearing only before the first levy. The taxpayer may not wait until the subsequent levy before exercising his or her rights under section 6330.

Additionally, section 6331(k)(2) prohibits levies during an installment agreement. Specifically, section 6331(k)(2)(C) prohibits levies during the time an installment agreement is in effect. Section 6331(k)(2)(D) further prohibits levies during the thirty days after an installment agreement is terminated and provides that the prohibition on levy continues if an appeal remains pending at the end of that thirty day period.

¹ This requirement applies to levies initiated after January 19, 1999.

Consequently, the Service must now wait a minimum of sixty days from the issuance of the termination letter under section 6159(b)(5) before it can levy upon the taxpayer's property to collect the tax subject to the installment agreement.²

While section 6330 does not explicitly provide for a waiver of CDP rights, this office has previously concluded that a taxpayer may waive his or her right to a CDP hearing within the 30-day period prescribed by section 6330(a)(2) after receiving the required CDP notice. The taxpayer may not, however, waive the notice itself. This is because in order for the taxpayer to knowingly and voluntarily waive his or her right to a CDP hearing, the taxpayer must first be aware of that right and the consequences of a waiver.³

Assuming that the taxpayer in your hypothetical has received the required CDP notice and has either waived or exercised his rights to a CDP hearing prior to entering into the installment agreement, that taxpayer may then authorize the Service to levy on its asset or assets while the installment agreement is in effect. We strongly recommend, however, that such waivers be specific (i.e., limited to a particular asset) and not general. A policy and/or practice of obtaining unrestricted waivers of the section 6331(k)(2) prohibition on levies may be perceived as an attempt to circumvent the explicit language of the statute. Furthermore, in the rare situation where the taxpayer desires the Service to levy on more than one asset, the taxpayer can and should execute a separate waiver for each levy. This will ensure that the Service does not take any collection action not intended or authorized by the taxpayer. This will also ensure that taxpayers will not experience a hardship as a result of an unexpected levy causing them to default the installment agreement. If the New Jersey Collection division, nonetheless, feels it necessary to obtain a wholesale waiver of section 6331(k)(2) prohibition on levy, we recommend that they discuss this issue with the Assistant

² Note that the Service has made an administrative decision not to levy for 90 days after the mailing of the termination letter (CP 523) required by I.R.C. § 6159(b)(5)(A). See IRM 5.14.8.4(3).

³ Similarly, while the taxpayer may waive the 30-day period set forth in section 6159(b)(5)(A) or the right to an independent administrative review set forth in section 6159(d), the taxpayer may not waive its right to the termination letter required by section 6159(b)(5). Furthermore, the date an installment agreement is terminated, currently determined only in reference to the termination letter, is a very important date for many reasons, some of which may not be initially evident. For example, the date of termination determines the first date the Service may levy upon the taxpayer's property to collect the tax previously subject to the installment agreement. I.R.C. § 6331(k)(2). Likewise, the date the installment agreement is terminated is also used to determine the proper rate of interest under section 6651. Accordingly, it is imperative that before an installment agreement is terminated, the taxpayer is given a termination letter as required by section 6159 of the Code.

Commissioner (Collection) and obtain their concurrence.

In addition, a waiver of the section 6331(k)(2) prohibition on levy must be separate from the waiver of the CDP rights. The waiver should clearly state the asset to be levied upon and if applicable, the time frame for effectuating the levy. While the taxpayer may execute such a waiver at any time, the Service may not request such waiver as a condition of entering into the installment agreement. Finally, regardless of whether the taxpayer executes or wishes to execute a waiver of section 6331(k)(2) prohibition on levy before or after the taxpayer defaults on the installment agreement, the taxpayer must still be provided with a notice of termination before the Service terminates the installment agreement. I.R.C. § 6159(b)(5).

As always, we hope the advice provided herein is helpful. If you have any questions or comments, please call the attorney assigned to this matter at 202-622-3620.

cc: Chief, Branch 1 (Collection, Bankruptcy & Summonses)