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

OFFICE OF
CHIEF COUNSEL

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CC:PA:CBS:Br1:LKWilliams
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January 29, 2001

MEMORANDUM FOR ASSOCIATE AREA COUNSEL SBSE - SAN FRANCISCO
CC:SB:7:SF:1
Attn: TRMackinson

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)
CC:PA:CBS:Br1

SUBJECT: _____

You have requested that we reconsider the conclusion in our November 2, 2000 memorandum (copy attached) that are entitled to a CDP hearing on the filing of a new notice of federal tax lien after the previously-filed notices of federal tax lien were erroneously released. You argue that the exception found in Treas. Reg. § 301.6323(g)-1(a)(3)(i) requires a different conclusion. Section 301.6323(g)-1(a)(3)(i) provides that a lien does not need to be refiled during the required refiling period if a suit to foreclose that lien has been commenced prior to the expiration of that refiling period. Based on this regulation, you contend that the new notice of federal tax lien did not need to be filed to establish our priority, because we did not lose our priority when the liens self-released. As a result, do not need to be given a CDP hearing on the lien filing.

We would agree with your analysis if the liens in this case had not self-released. The self-releasing lien form has been adopted for notices of federal tax lien filed after December 31, 1982. This form provides that "... unless notice of lien is refiled by the date [specified], this notice shall, on the day following such date operate as certificate of release as defined in I.R.C. § 6325(a)." Self-releasing liens operate the same as the filing of a certificate of release. Municipal Trust and Savings Bank v. United States, 114 F.3d 99, 102 (7th Cir. 1997), reh'g denied, 1997 U.S. App. LEXIS 16535 (7th Cir. 1997); Griswold v. United States, 59 F.3d 1571, 1579 n. 18 (11th Cir. 1995); In re Cole, 205 B.R. 668, 673 (Bankr. D. Mass. 1997). Moreover, the self-releasing lien was not contemplated when section 301.6323(g)-1(a)(3)(i) was adopted shortly after the passage of the Federal Tax Lien Act of 1966. Accordingly, it is our opinion that Treas. Reg. § 301.6325-1(f)(2) applies to the facts of this case, not section 301.6323(g)-1(a)(3)(i).

In addition, while we cannot find any case law specifically addressing the applicability of section 301.6323(g)-1(a)(3)(i) where the subject lien has been released after commencement of the suit, there are at least two district court decisions applying section 301.6325-1(f)(2) under these circumstances. United States v. Winchell, 793 F. Supp. 994 (D. Colo. 1992); United States v. Reid, 2000-1 U.S.T.C. ¶ 50,340; 2000 U.S. Dist. LEXIS 5106. Both cases held that pursuant to section 301.6325-1(f)(2)(iii)(b) the revocation of the erroneous lien release reinstated the lien but not the notice of federal tax lien. As such, the priority of the federal tax lien dated from the date a new notice of federal tax lien was filed after the revocation. Id.

Based on our conclusion that section 301.6325-1(f)(2) applies to the facts of this case, a new notice of federal tax lien needed to be filed in order to establish priority, as of the filing date, of our lien against a subsequent purchaser, holder of security interest in the property, mechanic's lienor, or judgment lien creditor. This new filing of a notice of federal tax lien entitles the to a CDP hearing under I.R.C. § 6320.

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

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OFFICE OF
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CC:PA:CBS:Br1:LKWilliams
GL-805109-00
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November 2, 2000

MEMORANDUM FOR ASSOCIATE AREA COUNSEL SBSE - SAN FRANCISCO
CC:SB:7:SF:1
Attn: TRMackinson

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)
CC:PA:CBS:Br1

SUBJECT: _____

This memorandum responds to your request for advice dated July 20, 2000. This document is not to be cited as precedent. I.R.C. § 6110(k)(3).

QUESTION PRESENTED

Do taxpayers have a right to a collection due process hearing (CDP) under I.R.C. § 6320 where after a collection suit was brought by the Department of Justice, the lien to be foreclosed was erroneously released, the release was then revoked and a new notice of federal tax lien was filed?

CONCLUSION

The taxpayers have a right to a CDP hearing under section 6320. The Internal Revenue Service (Service) Office of Appeals (Appeals), however, is limited in what it can consider at the hearing because of the pending collection suit. These limitations are set forth below.

BACKGROUND

On , the U.S. Attorney's office in San Francisco filed a suit to foreclose federal tax liens against a parcel of real property owned by , and a parcel of adjacent real property owned jointly by . The improvement made to the parcel owned by is used as the residence. The suit also seeks to reduce to judgment the federal income liabilities of Mr. for tax years 1982, 1983, 1984, 1988 and 1989. The liabilities for 1982, 1983, and 1984 were fixed by a closing agreement entered into by the Service and Mr. and Mrs. in settlement of contested deductions taken in connection with a tax shelter. Mrs. income tax liabilities for 1982, 1983, 1984, 1988, and 1989

were discharged in Chapter 7 bankruptcy, but the federal tax liens continue to attach to the parcels of real property. See

The case is set for trial in .

After the initiation of the suit, the notices of federal liens for three tax periods, 1982, 1983, and 1984, erroneously self-released. When the mistake was discovered, the Service issued a revocation of the certificate of release, in order to reinstate the assessment liens imposed by I.R.C. § 6321. 1/ A new notice of federal tax lien was filed in place of the erroneously-released notices of federal liens relating to the three tax years, and a CDP notice pursuant to section 6320 was issued to the taxpayers. As a result, Mr. and Mrs. made a single, timely request for a CDP hearing, in which they assert two challenges to the filing of the notice of federal tax lien: (1) the statute of limitations has expired and therefore the notice of federal tax lien and underlying assessment liens are no longer valid; and (2) is entitled to innocent spouse relief from the 1982, 1983, and 1984 liabilities.

ANALYSIS

Pursuant to section 6320, a taxpayer against whose property a notice of federal tax lien has been filed, on or after January 19, 1999, has the right to a CDP hearing. In this case, Mr. and Mrs. were entitled to receive a CDP notice under section 6320, because the filing was not merely a refilling as described in Temp. Treas. Reg. § 301.6320-1T(a)(2), Q&A-A6. The self-release of a notice of federal tax lien has the same effect as the filing of a certificate of release. Municipal Trust and Savings Bank v. United States, 114 F.3d 99, 102 (7th Cir. 1997), reh'g denied, 1997 U.S. App. LEXIS 16535 (7th Cir. 1997); Griswold v. United States, 59 F.3d 1571, 1579 n. 18 (11th Cir. 1995); In re Cole, 205 B.R. 668, 673 (Bankr. D. Mass. 1997). Consequently, the self-release extinguishes the lien, which can be reinstated through the filing of a notice of revocation of release. Treas. Reg. § 301.6325-1(f)(2)(iii)(b). Although the released federal tax lien can be reinstated, the released notice of federal tax lien, and the priority status the notice provides, cannot. Treas. Reg. § 301.6325-1(f)(2)(iii)(b); United States v. Winchell, 793 F. Supp. 994 (D. Colo. 1992). Thus, filing of a new notice of federal tax lien is necessary to render the assessment lien valid against a subsequent purchaser, holder of security interest in the property, mechanic's lienor, or judgment lien creditor. Treas. Reg. § 301.6325-1(f)(2)(iii)(b); I.R.C. § 6323(a). Because the previous priority status is lost upon release and a new notice of federal tax lien is required to

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1/ A certificate of revocation of a lien release must be filed prior to expiration of the collection statute of limitation. I.R.C. § 6325(f)(2). The statute of limitations for collecting taxes is tolled by the filing of a collection suit. United States v. Winchell, 793 F. Supp. 994, 997 (D. Colo. 1992); United States v. Reid, 2000-1 U.S.T.C. ¶ 50,340, 2000 U.S. Dist. LEXIS 5106. In addition, the statute of limitations was tolled during the the period of time Mrs. was in bankruptcy. I.R.C. § 6503(h). Therefore, the certificate of revocation was timely filed in this case.

establish priority as of the filing date, it is our conclusion that the filing of a notice of federal tax lien under the circumstances presented in this case entitles Mr. and Mrs. to a CDP hearing under section 6320.

Moreover, nothing in the Internal Revenue Code, or the legislative history of the IRS Restructuring and Reform Act of 1998, suggests that the taxpayer cannot receive such a hearing if his or her tax liability is the subject of a collection suit in a United States district court. Accordingly, the are entitled to a CDP hearing even though there is currently a suit to foreclose federal tax liens against their residence and to reduce tax assessments against Mr. to judgment. However, because of the pending matter in court, there are restrictions, discussed below, as to what the Office of Appeals may consider in the CDP hearing.

Once the Service has referred a case to the Department of Justice for defense or prosecution, only the Attorney General or his or her delegate has the authority to compromise the case. I.R.C. § 7122(a). See also IRM 34.11.1.5; United States v. LaSalle National Bank, 437 U.S. 298, 312 (1978); United States v. Wingfield, 822 F.2d 1466, 1476 n. 8 (10th Cir. 1987). In an Attorney General opinion to the Secretary of the Treasury, the Attorney General concluded that the Department of Justice has the authority to compromise not only the case pending before it, but "... any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts;...." 38 Op. Atty. Gen. 98 (1934); see also Executive Order No. 6166.

Because of the pending suit, Appeals does not have the authority to settle or compromise the tax liabilities. IRM 8.1.1.4.7.8; see also Ferrel v. United States, 1994 U.S. Dist. LEXIS 14194 (W.D. Wa.) (Service cannot act on an administrative refund claim once the matter has been referred to the Department of Justice for litigation). This includes challenges to tax liabilities based on the expiration of the collection statute of limitations and innocent spouse relief, as asserted by Mr. and Mrs. in their CDP hearing request. 2/

2/ Even if Appeals could consider a liability challenge, should be precluded from raising innocent spouse relief because she has raised the issue before in a judicial proceeding in which she meaningfully participated. Temp. Treas. Reg. § 301.6320-1T(e)(1) and (e)(3), Q&A-E4. Mrs. asserted her entitlement to innocent spouse relief under I.R.C. § 6013(e), now codified as part of I.R.C. § 6015, in a 1995 bankruptcy adversary proceeding, .

(continued...)

In addition, Appeals cannot consider any offer involving the release of the federal tax liens or withdrawal of the notice against the two parcels. Because these parcels are the subject of the collection suit, the settlement authority belongs to Department of Justice, not Appeals. The assessment liens are necessary to the suit because these are the liens being foreclosed. See Treas. Reg. § 301.6325-1(f)(2)(iii)(b); c.f. United States v. Berg, 190 F.R.D. 539, 545 (E.D. Cal. 1999) (notice of federal tax lien does not need to be refiled after the filing of lien foreclosure suit in order to foreclose lien, because assessment lien remains attached to property); Title Guar. Co.of WY Inc. v. Internal Revenue Service, 667 F. Supp. 767, 771 (D. Wyo. 1987) (same). The filed notice is necessary to the suit because it protects the priority of the federal tax lien against subsequent purchasers and lienors of the property. 3/ Any requests for release or withdrawal, therefore, must be directed to the Department of Justice.

As a result of these limitations, Appeals would only be able to consider in the CDP hearing only offers involving the discharge from the federal tax liens, pursuant to I.R.C. § 6325(b), of property owned by the other than the parcels in the suit. For example, such offer could be a bond, or a lump sum payment of tax liabilities, in an amount equal to the value of the tax liens on the property. Nevertheless, before Appeals concludes any agreement with the taxpayers, it must obtain Justice Department approval. IRM 8(13)10, subsection 613.7.

Because of the split jurisdiction between the Justice Department and Appeals, and the potential for confusion, we would recommend that Appeals simply wait until the conclusion of the district court action before holding the CDP hearing requested by the

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2/(...continued)

). The bankruptcy court held she was not entitled to innocent spouse relief from her 1982, 1983, and 1984 income tax liabilities. The court's holding was affirmed on appeal to the district court, , and the district court's decision was affirmed by the Ninth Circuit Court of Appeals in .

3/ Filing a notice of lis pendens as an alternative to filing a notice of federal tax lien would probably not be sufficient to protect the Government in this situation. At least one court has held that the priority of judgment lien creditors is not affected by a lis pendens because lis pendens is not intended to give them notice. R.I.O. Inc. v. Anderson, 50 Wn. App. 459, 798 P.2d 1136, 1138 (Wash. Ct. App. 1988). However, the lis pendens would probably protect the priority of an unfiled federal tax lien against subsequent purchasers and holders of a security interest. See United States v. Woodtke, 627 F. Supp. 1034, 1042 (N.D. Iowa 1985); cf. Theo. H. Davies & Co. v. Long & Melone Escrow, 876 F. Supp. 230, 234 (D. Hawaii 1995); Nat'l Acceptance Co. of America v. Mardigian, 259 F. Supp. 612, 617 (E.D. Mich. 1966); Lebanon Savings Bank v. Hollenbeck, 29 Minn. 332, 13 N.W. 145 (Minn. 1882).

. If the Government prevails and Mr. or Mrs. or both decide to appeal the court's decision, the hearing would have to be delayed until the conclusion of the appeal. It is our understanding that Appeals does not wish to keep a case in its inventory any longer than necessary. However, we believe the unique circumstances of this case warrant the delay in holding the hearing until the exhaust their right to appeal any adverse district court decision.

Once the litigation is concluded, the taxpayers may raise at the CDP hearing any issues not resolved by the district court. For example, if the Government prevails on all issues and the property is sold for an amount less than Mr. and Mrs. liabilities, then Mr. , whose liability has been reduced to judgment, may request an installment agreement or submit an offer-in-compromise with respect to the remaining unpaid liability. However, the should be advised that Appeals may not consider any challenge to liability or any issue decided by the district court. I.R.C. §§ 6320(c), 6330(c)(2)(B), and 6330(c)(4).

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