



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

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MEMORANDUM FOR PERRY T. FOSTER
ASSISTANT REGIONAL COUNSEL (GL)

FROM: Lawrence H. Schattner
Chief, Branch 3 (General Litigation)

SUBJECT: - Counsel Approval under I.R.C. 7429

This responds to an undated memorandum to you from District Counsel, Southern California. This document is not to be cited as precedent.

Issue:

Whether there is a conflict between IRM 5.11.1.2.2.3 and I.R.C. § 7429(a)(1)(A).

Conclusion:

There is no conflict between IRM 5.11.1.2.2.3 and I.R.C. § 7429(a)(1)(A). The approval of Counsel is not required under section 7429(a)(1)(A) when the Service makes a levy based upon a finding of jeopardy without giving the taxpayer a new warning that enforcement action may take place, and such levy occurs more than 180 days after the last notice of intent to levy was issued.

Facts:

District counsel is concerned that new IRM 5.11.1.2.2.3 may be in conflict with I.R.C. § 7429(a). This section requires the approval of Counsel for all jeopardy and termination assessments and for levies made less than 30 days after notice and demand for payment. The IRM contains a requirement for giving another warning when the last notice of intent to levy is more than 180 days old. An exception to this requirement of providing another warning of enforcement action is when

collection of the tax is in jeopardy. District Counsel argues that the IRM does not require Counsel approval where there is a finding of jeopardy and a levy is made more than 180 days after a notice of intent to levy is served without sending another warning letter. District counsel believes that not requiring Counsel approval in writing under this exception may be viewed as an attempt to circumvent the statutory requirement that Counsel approve jeopardy levies.

Analysis:

Section 7429(a) as amended by section 3434 of RRA 98 provides in part as follows:

No assessment may be made under section 6851(a), 6852(a), 6861(a), or 6862, and no levy may be made under section 6331(a) less than 30 days after notice and demand for such payment is made, unless the Chief Counsel for the Internal Revenue Service (or such Counsel's delegate) personally approves (in writing) such assessment or levy.

IRM 511.1.2.2.3 (01/19/99),¹ Timeliness of Notice, provides in part as follows:

(1) The purpose of the Notice of Intent to levy described 1.2.1:(3) is to warn the taxpayer that continued failure to respond can be expected to result in enforcement. However, when a long time passes after the notice is issued and there has not been enforcement, the notice loses its effectiveness as a warning.

(2) If a notice of intent to levy is over 180 days old, it is no longer timely. At this point, the taxpayer will get a new warning of enforcement action before a notice of levy is issued.

a. This warning must be documented in the case file. It may be given orally (in person or by phone) that there is a deadline (not necessarily thirty days) after which there will be enforcement, or given in writing if the taxpayer can not be contacted.

Exception: Collection is in jeopardy. There is jeopardy only if one of the conditions exists that would allow a jeopardy assessment. See Policy Statement 4-88. The group

¹ The memorandum from district counsel refers to an earlier revision dated 09/04/98. The latest revision makes it clear that only those jeopardy situations described in 3.1:(3) and 3.3:(7) require counsel's approval.

manager, and the next level manager, must approve the jeopardy levy. See 3.1:(3) and 3.3:(7) to determine if Counsel's approval is required. The taxpayer can discuss the levy with the group manager, the Taxpayer Advocate, and the Appeals Officer.

Section 7429(a)(1)(A) on its face only requires that Counsel approve jeopardy and termination assessments and levies made less than 30 days after **notice and demand** is made. However, a levy made more than 30 days after **notice and demand** is made, but less than 30 days after **notice of intent to levy** has been issued based on a finding of jeopardy under section 6331(d)(3) is also subject to the requirements of section 7429(a)(1)(A). We are not sure why Congress apparently failed to recognize the distinction between the **10-day notice and demand** period referred to in section 6331(a) and the **30-day notice of intent to levy** period referred to in section 6331(d)(2). We note that the same language appears in the earlier version of section 7429(a)(1).² However, the Service has always treated a levy made more than 30 days after **notice and demand** is made, but less than 30 days after **notice of intent to levy** as being a levy for which Counsel approval was required. Moreover, although this levy is not technically subject to the requirement in section 7429(a)(1)(A) as amended by RRA 98, the IRM makes it clear that a levy made more than 30 days after **notice and demand** but less than 30 days after **notice of intent to levy** is a levy which requires Counsel approval in writing.³ Furthermore, Treas. Reg. § 301.7429-1 takes the position that the taxpayer is entitled to notice and judicial and administrative review of a levy made less than 30 days after the notice required by section 6331(d).

Section 7429(a)(1)(A) does not require the approval of Counsel in every case where the Service has determined that collection of tax is in jeopardy. For instance, section 6331(g) (no levy on appearance date of summons), and section 6331(k)

² Congress and district counsel seem to confuse "notice and demand" and "notice of intent to levy." Section 6303 requires issuance of notice and demand within 60 days after an assessment is made. Section 6331(d)(1) requires a notice of intent to levy be given to the taxpayer at least 30 days before the levy is made.

³ IRM 5.11.3.1:(3) lists the circumstances under which a jeopardy levy can occur without a jeopardy assessment: (1) after tax is assessed, but before the notice and demand is issued; (2) after the notice and demand is issued, but before ten days have passed; (3) after the ten day notice and demand period ends, but before the thirty day notice of intent to levy (section 6331(d)) and notice of a right to a hearing (section 6330(a)) have been issued, or (4) after the notice of intent to levy and notice of a right to a hearing have been issued, but before the thirty days have passed. IRM 5.11.3.3:(7) restates the requirement in IRC section 7429(a)(1)(A) that Counsel approve in writing jeopardy levies described in subsection 3.1:3.

(no levy while certain offers are pending or installment agreement is pending or in effect), both contain exceptions for levying when the Service finds that collection is in jeopardy. In these situations the notice and demand for payment and notice of intent to levy would ordinarily have been sent more than 30 days previously, and in some cases more than 180 days. In those situations, the approval of Counsel would not be required under section 7429(a)(1)(A), under the regulation, or under the Service's own guidelines because the levy would occur more than 30 days after notice and demand for payment and more than 30 days after notice of intent to levy was given.

Prior to its amendment by RRA 98, section 7429(a)(1) already contained the reference to levies made "less than 30 days after notice and demand for payment." The only change brought about by RRA 98 is the requirement that Counsel approve in writing such levies. It is our position that a taxpayer would not be entitled to judicial review of a levy made more than 30 days after notice and demand for payment, and more than 30 days after notice of intent to levy without the approval of Counsel where the Service made a finding that collection of tax was in jeopardy. Our position is consistent with judicial decisions on this point. See, Vonderheide v. United States, 80 AFTR 2d 8194 (S.D. Ohio, 1997) - taxpayer not entitled to judicial review under section 7429 where levy was made more than 30 days after notice and demand for payment; Friko Corp. v. Commissioner, 26 F.3d 1139 (D.C. Cir. 1994) - section 7429(b)(2)(B) does not confer jurisdiction to the Tax Court to review all levies made while a petition is pending but only jeopardy levies made under section 6331(a) less than 30 days after notice and demand payment is made. It is our position however, that under Treas. Reg. § 301.7429-1 a taxpayer is entitled to judicial review of a levy made less than 30 days after notice of intent to levy.

The 180 day period after which a warning of enforcement action is provided for under IRM 5.11.1.2.2.3:(3) is a self-imposed administrative requirement. There is no statutory requirement that a taxpayer be given a new notice of intent to levy after 180 days. Nor do the regulations require a new notice. Once a notice of intent to levy is issued complying with the requirements of section 6331(d)(1) and 30 days has expired, a levy may be issued without a finding of jeopardy under section 6331(d)(3), and the levy is not subject to the requirements of section 7429(a)(1)(A). The warning provided in the IRM after 180 days, while it provides in essence the same information as a notice of intent to levy, is not intended as a substitute for the notice requirement in section 6331(d). Instead, the Service has decided to give such additional warnings as a matter of good business practices, and these warnings should not be construed as triggering statutory obligations under section 7429. While the Service has decided not to issue these warnings if jeopardy exists and labels a levy served under these circumstances as a "jeopardy levy." it is clear that these so-called "jeopardy levies" are not the same jeopardy levies subject to the requirements of section 7429. If the Service has otherwise satisfied the time periods specified in sections 6330, 6331(a), and 6331(d)(2) before levying, Counsel's approval is not required since a levy made after those time periods would

not be made less than 30 days after notice and demand for payment, and less than 30 days after notice of intent to levy.

As district counsel noted, Counsel has always reviewed and approved all jeopardy and termination assessments and jeopardy levies described in sections 6331(a) and 6331(d) although we were not required to do so by law. When requested to do so, Counsel should continue to review and approve jeopardy and termination assessments and jeopardy levies under the aforementioned sections. However, Counsel approval of levies made more than 30 days after notice of intent to levy should not be viewed as being required by section 7429(a)(1)(A), and the taxpayer would not be entitled to judicial or administrative review of such levies under section 7429(a) or the regulations.

If you have any questions, please call me at (202) 622-3630.