



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR SOUTHERN CALIFORNIA DISTRICT COUNSEL

FROM: Alan C. Levine, Chief, Branch 1
(General Litigation)

SUBJECT: Notice of Intent to Levy/CDP Notice Issued During
Automatic Stay
Taxpayer:

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

LEGEND:

Taxpayer X
Date A
Date B
Date C
Amount A
Amount B
Amount C
Date D
Date E
Date F
Date G

ISSUE(S):

1. Whether a Notice of Intent to Levy and Notice of Your Right to a Hearing pursuant to I.R.C. § 6330 issued after commencement of the bankruptcy violates the automatic stay in bankruptcy provided in 11 U.S.C. § 362.

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2. Whether the taxpayer had a right to dispute the underlying liability pursuant to I.R.C. § 6330(c)(2)(B) because he did not receive a statutory notice of deficiency pursuant to I.R.C. § 6213.

CONCLUSION:

1. A Notice of Intent to Levy and Notice of Your Right to a Hearing violates the automatic stay because it is an act to collect a claim that arose before the commencement of the bankruptcy case in violation of 11 U.S.C. § 362(a)(6).

2. The taxpayer is entitled, pursuant to I.R.C. 6330(c)(2)(B), to dispute the underlying tax liability because the tax liability in dispute arose from filed income tax returns for _____ and Date B for which no statutory notice was issued.

FACTS:

On Date C, the taxpayer filed a federal income tax return for _____ showing a refund of \$ Amount A. He then filed an amended return that showed a tax liability of \$Amount B. The taxpayer filed a timely federal income tax return for Date B showing a tax liability of \$ Amount C. The Internal Revenue Service (Service) properly assessed the tax liabilities and sent the taxpayer proper notice and demand under I.R.C. § 6303. The taxpayer entered into an installment agreement with regard to the Date A and Date B tax liabilities but made no payments on the installment agreement. The Service sent the taxpayer a Notice of Intent to Levy pursuant to I.R.C. § 6331(d) in Date D informing the taxpayer that he had defaulted on his installment agreement and that the Service intended to levy. It does not appear that the Service took any action prior to January 19, 1999, 1/ as a result of that notice.

The taxpayer filed a Chapter 7 petition in bankruptcy on Date E . I.R.C. § 6330 became effective on January 19, 1999. Pursuant to section 6330, the Service sent the taxpayer a Notice of Intent to Levy and Notice of Your Right to a Hearing (known as a Collection Due Process Notice or CDP Notice) (Form 1058) on _____. The taxpayer timely sent a Request for a CDP Hearing (Form 12153) which was timely received by the Service.

The Appeals Officer contacted the taxpayer by mail to schedule a CDP hearing. In that letter, the Appeals Officer set forth I.R.C. § 6330(c)(2)(B) as his legal basis for informing the taxpayer that, by law, he could not raise the underlying liability

1/ Prior to January 19,1999, the effective date of section 6330, enacted by the Internal Revenue Service Restructuring and Reform Act of 1998, taxpayers did not have a right to a collection due process hearing prior to levy.

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because he had received “notices.” The Appeals Officer did not specify to which notices he was referring, but it appears that he was referring to the statutory notice of deficiency mentioned in section 6330(c)(2)(B). The taxpayer met with the Appeals Officer on Date G, and set forth his reasons for challenging the underlying liability. The Appeals Officer has requested assistance from your office with respect to the wording of a proposed Notice of Determination.

LAW AND ANALYSIS

CDP Notice as Violation of Automatic Stay

In our view, the issuance of a section 6330 CDP Notice by the Service is a violation of the automatic stay in bankruptcy in violation of 11 U.S.C. § 362(a). In the present case, both Date A and Date B are prepetition years. Hence, any attempt to collect from the taxpayer-debtor would violate the automatic stay. A debtor is protected from “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. . . .” 11 U.S.C. § 362(a)(6). The Service will generally issue a CDP Notice pursuant to section 6330 only when it has identified a levy source and levy is the next planned action. Section 6330(a)(3)(C) directs that the CDP Notice inform the taxpayer of the Service’s proposed action, *i.e.*, the proposed levy.

We conclude that issuance of a CDP Notice during bankruptcy is in violation of the automatic stay; therefore, the CDP Notice is void. In re Schwartz, 954 F.2d 569 (9th Cir. 1992) (violations of the automatic stay are void). Taxpayers have the right to request a CDP hearing under section 6330 only if they do so within thirty days of the date on the CDP Notice. If the CDP Notice is void, the taxpayer does not have a right to a CDP hearing and the Service may not issue a Notice of Determination on the basis of a hearing held pursuant to a void CDP Notice. In addition, we believe there has been no statutory suspension of the limitations period on collection in this case pursuant to I.R.C. § 6330(e) because no valid CDP Notice was sent and the taxpayer, therefore, does not have the right to request a CDP hearing, which would cause the Service to suspend the statute.

Once the taxpayer is no longer in bankruptcy, the Service may send a valid CDP Notice. To avoid any confusion, we recommend delivering a new, valid CDP Notice to the taxpayer in person and explaining to the taxpayer that his prior CDP hearing was held in violation of the automatic stay of 11 U.S.C. § 362(a)(6). He should, therefore, sign a new Request for a CDP Hearing (Form 12153) and Appeals will grant him a new CDP hearing.

We do not agree with your suggestion that actions taken by the Appeals Officer that are analogous to settlement discussions or compromise agreements might be permissible during the pendency of a bankruptcy. This approach fails to recognize

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that the very issuance of a CDP Notice pursuant to section 6330 was a step by a revenue officer to collect or recover a liability owed to the Government. As such it is a violation of the automatic stay and is void. If the Service intends to enter into settlement discussions or a compromise agreement while a taxpayer is in bankruptcy, there are alternative courses of action that do not include sending a CDP Notice.

Right to Dispute the Underlying Liability

When the taxpayer in this case receives a valid CDP Notice, he has a right to dispute the underlying tax liability. I.R.C. § 6330(c)(2)(B) permits a taxpayer to raise the underlying liability at a CDP hearing if he “did not receive any statutory notice of deficiency for such tax liability or did not otherwise have any opportunity to dispute such tax liability.” (Emphasis added.) The tax liability in this case arose from filed tax returns. The Service did not issue a statutory notice of deficiency with regard to these tax liabilities for _____ and Date B; rather they were self-assessed. It appears from the facts presented that the taxpayer has never had an opportunity to meet with the Service to discuss the merits of his tax liabilities. The Service could issue a new CDP Notice to the taxpayer since we understand that the applicable statute of limitations on assessment is still open. We agree with your proposed recommendation that the Appeals Officer turn the case over to the Examination Division for resolution.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

We can identify no other litigating hazards that would change or qualify the conclusions reached in this memorandum. Please modify your advice to reflect the conclusions reached in this memorandum.

If you have any further questions, please call Branch 1.

cc: Assistant Regional Counsel (GL) (Western Region)