



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR SBSE ASSOCIATE AREA COUNSEL (NEWARK)

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

SUBJECT: I.R.C. § 2057 Federal Estate Tax Lien on Personal Property

This memorandum responds to your e-mail request for advice, pertaining to the special estate tax election under I.R.C. § 2057. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

ISSUES:

1. For personal property located in New Jersey used to secure the section 2057(i)(3)(P) lien, what would be the proper manner to describe such property on the Form 668H?
2. Is the client required to forward to Counsel for legal review each and every section 2057(i)(3)(P) lien filing request?
3. Would a section 2057(i)(3)(P) lien on personal property be enforceable against either a competing creditor who executed and levied upon the asset or a purchaser of the asset, while the section 2057(i)(3)(P) lien was in effect?
4. If personal property subject to a section 2057(i)(3)(P) lien is either sold/transferred or executed and levied upon by a creditor within the 10-year recapture period imposed under I.R.C. § 2032A(c)(1), what would be the effect on the recapture tax?

CONCLUSIONS:

1. The personal property description should be sufficient as long as it reasonably identifies what is described.
2. Counsel review is required if the only property securing the section 2057(i)(3)(P) lien is personal property or if the lien is secured by real and personal property, but the real property in itself is inadequate to fully secure the lien.
3. The section 2057(i)(3)(P) lien, once filed, would be enforceable against a subsequent purchaser or creditor who purchases/executes against the subject property. There are practical concerns with seeking such enforcement, however, as further discussed below.

4. The recapture tax would be triggered, unless the sale was to a member of the qualified heir's family, in the ordinary course of business, a like-kind exchange, or an involuntary conversion.

DISCUSSION:

The Taxpayer Relief Act of 1997, P.L. 105-34, added a new estate tax election, current section 2057, which permits estates meeting certain requirements to deduct from the gross estate the value of qualified family-owned business interests (up to \$675,000). For section 2057 elections, section 2057(i)(3)(P) provides the mechanism for establishing, by reference to I.R.C. § 6324B, a lien for the collection of the additional estate tax imposed if a recapture event, described in section 2057(f), occurs: "Rules similar to the following rules shall apply: ... (P) Section 6324B (relating to special lien for additional estate tax)." Section 2057(i)(3)(P). Thus, a lien arises by operation of law under section 2057(i)(3)(P) at the time the section 2057 election is made. See I.R.C. § 6324B(b).

For purposes of the section 2057 election, all family members who have acquired from the decedent an interest in a qualified family-owned business (qualified heirs), and all other persons with an interest in business property to which the section 2057(i)(P)(3) lien is to attach, must sign an agreement consenting to the creation and filing of the lien. Section 2057(b)(1)(B); section 2057(h); section 2057(i)(3)(H); I.R.M. 5.5.8.3.1(2); Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return, Schedule T. The property that will be subject to the section 2057(i)(3)(P) lien is listed in an attachment to the agreement. We have been advised by the Office of Associate Chief Counsel (Passthroughs and Special Industries) that section 2057 encompasses both real and personal property.

You have been contacted by your local Technical Support Advisory Unit with several questions pertaining to the filing of a section 2057(i)(3)(P) lien on both real and personal property. We will address each issue raised in turn, below.

1. How should personal property be described on the Form 668H?

The section 2057(i)(3)(P) lien is filed on Form 668H, Notice of Federal Estate Tax Lien, as modified pursuant to guidance issued to all Compliance Area Directors on May 4, 2001. There are no specific requirements in section 2057 or section 6324B to govern how personal property should be described in the lien notice.

We take the position that a description of personal property should be sufficient as long as it reasonably identifies what is described. For example, the description should not merely provide the name of the qualified family-owned business corporation but should sufficiently reference the property used to secure the section 2057(i)(3)(P) lien, i.e., the number of shares of stock held in XYZ corporation. We don't believe that such exact and detailed information as serial or i.d. numbers is required, however.

2. When is Counsel review of the section 2057(i)(3)(P) lien required?

Technical Support does not need to seek the concurrence of Counsel in every case in which the property subject to the section 2057(i)(3)(P) lien consists, in any part, of personal property. If both real and personal property are available, and a lien on the real property can adequately secure the Government's interest, there is no requirement to seek Counsel's advice. However, if the real property involved is inadequate, or if only personal property is involved, you should contact Counsel for assistance in adequately protecting the Government's interest.

3. Would a section 2057(i)(3)(P) lien on personal property be enforceable against a subsequent purchaser of, or creditor who executed against, such property?

Notice of a section 2057(i)(3)(P) lien must be filed in order to protect the Government's interest in the subject property. The filing of a notice of a section 6324B lien is governed by I.R.C. § 6324A(d)(1). Section 6324B(c)(1); Treas. Reg. §20.6324B-1(d). Because section 2057(i)(3)(P) makes applicable rules similar to section 6324B, section 6324A(d)(1) would also apply to a section 2057(i)(3)(P) lien. Section 6324A(d)(1) requires that a notice of lien meeting the requirements of I.R.C. § 6323(f) be filed in order for the lien to be valid against any purchaser, holder of security interest, mechanic's lien or judgment lien creditor.

Accordingly, as long as the section 2057(i)(3)(P) lien notice is filed in accordance with section 6323(f), the section 2057(i)(3)(P) lien will have priority over a subsequent purchaser, holder of security interest, mechanic's lien or judgment lien creditor. The section 2057(i)(3)(P) lien is, therefore, enforceable against a purchaser of, or creditor who executes by levy against, the subject property.

There are practical problems associated with the enforcement of the section 2057(i)(3)(P) lien against personal property, however. The Internal Revenue Service (the "Service") may have no way of knowing the section 2057(i)(3)(P) lien property has been transferred or executed upon. The Service may not, therefore, be able to locate the purchaser or creditor in possession of the property in order to enforce its lien interest.

Accordingly, it is preferable, whenever possible, to obtain an agreement to use real property to secure the section 2057(i)(3)(P) lien. The "interest" in the qualified family-owned business may include the underlying real property itself and is not limited to the type of ownership interest in the property such as shares of stock.

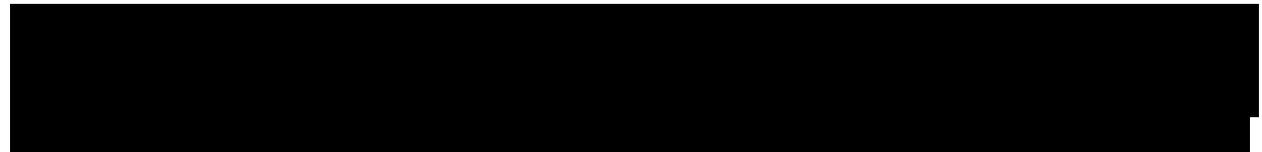
We have been informally advised of certain offices entering into additional agreements which may be effective to secure the Service's interest and prevent transfer of the section 2057(i)(3)(P) lien property in some cases. For example, we have learned that one office has drafted an escrow agreement which may be executed by the Service, the estate representative, the qualified heirs, and an escrow agent. Pursuant to such agreement, shares of stock used as section 2057(i)(3)(P) property are deposited with and held by an escrow agent bank, to be held and distributed by such agent only in accordance with certain terms and conditions. The agreement provides that in the

event of tax recapture under section 2057(f) (described in item 4 below), the Service may pursue enforcement including requiring the administrative sale or delivery to the Service of the escrow property. The agreement further provides for termination of the escrow agreement upon the lapse of the time period for recapture under section 2057(f) or upon full payment of all estate taxes owed. Upon termination and agreement by the Service, the shares may be released to the qualified heirs if all taxes have been satisfied. You may wish to consider the use of a similar agreement, contingent upon local law.

4. What is the effect upon the recapture tax if the section 2057(i)(3)(P) lien property is sold/transferred or executed upon by levy?

Section 2057(f)(1)(B) provides for the imposition of a recapture tax if, within 10 years after the date of the decedent's death and before the date of the qualified heir's death, the qualified heir "disposes" of any portion of a qualified family-owned business interest (other than by a disposition to a member of the qualified heir's family or through a qualified conservation contribution under section 170(h)).

We coordinated this question with the Office of Associate Chief Counsel (Passthroughs and Special Industries). It is that office's position that, in general, the sale or transfer of the section 2057(i)(3)(P) lien property would trigger the recapture tax, pursuant to section 2057(f)(1)(B), unless the sale: (i) was to a member of the qualified heir's family; (ii) was through a qualified conservation contribution; (iii) qualifies as a § 1031 transaction (like-kind exchange); (iv) qualifies as a § 1033 transaction (involuntary conversion); or (v) was in the ordinary course of business. It is also that office's position that a third party levy would trigger section 2057(f)(1)(B) recapture. See Priv. Ltr. Rul. 9333002 (concluding that foreclosure proceedings instituted by mortgagee over taxpayer's property did not constitute a disposition under section 2032A(c)(1)(A) since no transfer of the property had taken place); Rev. Rul. 89-4, 1989-1 C.B. 298 (holding that an estate's sale of specially valued real estate to halt a foreclosure constitutes a disposition for purposes of section 2032A(c)).



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