



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

DISTRICT COUNSEL

Attn:

FROM: Michael R. Arner  
Senior Technician Reviewer

SUBJECT:

This advice is in response to your phone call and memorandum concerning the above subject. This document is advisory only and is not to be relied upon or otherwise cited as precedent.

LEGEND

City:  
Taxpayer:  
SSN:  
Years: ,  
Assessment Amount: \$

ISSUE:

Whether the Service can levy upon and collect the assets in a taxpayer's 401(k) pension plan when the taxpayer has an immediate right to elect normal retirement benefits, but instead, elects to defer retirement.

CONCLUSION:

The Service may levy upon the assets in a taxpayer's 401(k) pension plan when the taxpayer has an immediate right to elect normal retirement benefits, but instead, elects to defer retirement. However, the Service may not force the plan administrator to immediately distribute any assets pursuant to the Service's levy until the taxpayer obtains an immediate right to commence receipt of benefits under the plan.

FACTS:

(“taxpayer”) has an unpaid joint income tax liability of approximately \$ \_\_\_\_\_ for the \_\_\_\_\_ and \_\_\_\_\_ tax years. The notices of federal tax lien were filed in \_\_\_\_\_ and \_\_\_\_\_. The taxpayer filed a Chapter 7 petition on \_\_\_\_\_, and received a discharge on \_\_\_\_\_. As a result, the taxpayer’s tax debt was discharged, however, the taxpayer’s property remains liable for the debt secured by the tax liens. 1/

The taxpayer is the Secretary and a Director of (“Company”). The taxpayer does not own any stock in the Company, rather \_\_\_\_\_ owners of the stock. The taxpayer is covered by the \_\_\_\_\_ 401(k) Plan (“Plan”), and has approximately \$ \_\_\_\_\_ in his 401(k) account. The Plan provides that the “normal retirement” age is 65 at which time a participant has the option of electing payment from his 401(k) account in the form of an annuity or a lump sum. The Plan also provides that with the consent of the Company’s Board of Directors, a participant may defer his retirement, but during such time the participant is not entitled to receive Plan benefits.

The taxpayer told the revenue officer (“RO”) that he did not elect normal retirement, but instead, elected to defer his retirement. The RO served the Administrative Committee of the Plan (“plan administrator”) with a notice of levy requesting that the funds in the taxpayer’s account be paid in a lump sum to the Service. 2/ The plan administrator will not honor the levy. The RO wants to know if the Service can elect normal retirement benefits on behalf of the taxpayer.

LAW AND ANALYSIS:

This is in response to your request that we review the Company Plan to determine if the Service can elect normal retirement benefits on behalf of the taxpayer.

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1/ I.R.C. § 6325(a)(1) does not require the Service to release valid tax liens when the underlying tax debt is discharged in bankruptcy because the liability for the amount assessed remains legally enforceable. In re Isom, 901 F.2d 744 (9th Cir. 1990). A discharge in bankruptcy prevents the Service from taking any action to collect the debt as a personal liability of the debtor. Id. However, the debtor’s property remains liable for a debt secured by a tax lien that is filed prior to the petition for bankruptcy. Id.

2/ Pursuant to \_\_\_\_\_, \_\_\_\_\_ of the Plan, the Board of Directors of the Company constitutes the Administrative Committee of the Plan. Thus, the

#### A. Attachment of the Federal Tax Lien

Pursuant to section 6321, a lien arises upon “all property or rights to property” of the taxpayer. I.R.C. § 6321. The federal tax lien attaches to a participant’s interest in an ERISA-covered plan if the participant has any vested benefit under the plan. Thus, the tax lien attaches to all present rights the taxpayer has under the plan. These may include the participant’s present right to future payment and the present right to elect a form of distribution although he has not yet exercised that right.

In the instant case, the Plan is an ERISA-covered plan and the taxpayer is fully vested, thus the tax liens attach to all the present rights the taxpayer has under the Plan. Furthermore, the tax liens survived the taxpayer’s bankruptcy case because the liability for the amount assessed remains legally enforceable. See case cited supra note 1. Thus, although the taxpayer’s personal liability for the taxes was discharged, his property rights under the Plan, an asset he had at the time he filed the petition for bankruptcy, remain liable for the debt secured by the tax liens. See case cited supra note 1.

#### B. Property Subject to Levy

Section 6331(a) authorizes the Service to levy upon “all property or rights to property” of a taxpayer to collect delinquent taxes. I.R.C. § 6331(a). Except for a levy on salary or wages, a levy extends only to property rights and obligations that exist at the time of levy. Treas. Reg. § 301.6331-1. Obligations exist when the liability of the obligor is fixed and determinable, although the right to receive payment thereof may be deferred until a later date. Id.

Accordingly, even if a retirement plan is not in pay status, if a present right to future payment on an obligation exists, the levy reaches that present right. See Rev. Rul. 55-210, 1955-1 C.B. 544 (lien attaches to entire unqualified right to receive future benefits; only one notice of levy needs to be served to effectively reach benefits subsequently payable). 3/ Similarly, if a present right to elect distribution exists, the levy reaches that present right. However, this is not to suggest that the Service should attempt to compel the taxpayer to retire so that benefits become payable. Rather, where a taxpayer is retiring or has retired and therefore has the right to receive a distribution, the levy reaches that right, whether or not the taxpayer has elected distribution.

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3/ Levying on the present right to future payment would not require immediate distribution by the plan administrator. Honoring the levy would only be required when the benefits become payable to the taxpayer under the terms of the plan. See IRM Handbook 9.1(2) and 9.2(3).

Here, the RO served a notice of levy upon the plan administrator shortly after the taxpayer's birthday. However, the taxpayer has deferred his retirement in accordance to \_\_\_\_\_, \_\_\_\_\_ of the Plan. Pursuant to \_\_\_\_\_ the taxpayer does not have a right to receive benefit payments until he ultimately retires, 4/ and the Service should not attempt to compel the taxpayer to retire. Nevertheless, the taxpayer does have a present right to future payments. The notice of levy served by the RO reaches that right, and it is not necessary that a second notice of levy be served. However, the plan administrator is not required to honor the levy until the benefits become payable to the taxpayer under the terms of the Plan, i.e., when the taxpayer retires. 5/

### C. Spousal Consent

Careful consideration must be given where the Service seeks collection from a retirement plan that, absent waiver, requires benefits to be paid in the form of a joint and survivor annuity. In these cases, the Service may only levy upon that joint and survivor annuity, and may not elect another form of benefit for collection purposes without the consent of a spouse. See I.R.C. § 417. This rule is the same regardless of whether the tax liability is a separate liability of the plan participant or a joint tax liability.

In this case the taxpayer is married, and \_\_\_\_\_, \_\_\_\_\_ of the Plan requires that benefits be paid in the form of a joint and survivor annuity unless a participant's spouse consents to a waiver. At this time, it is unknown whether the taxpayer's wife has consented to a waiver. Assuming she has not, the Service must obtain her consent before electing a lump sum distribution on behalf of the

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4/ \_\_\_\_\_ of the Plan is ambiguous, in any case, this is our interpretation of the section.

5/ This case is distinguishable from a similar case, Chief Counsel Advisory number 199936041, where we concluded that the Service could levy and collect the assets in a taxpayer's pension plan. In that case the taxpayer was no longer working and he had a present right to receive early retirement benefit payments. The levy reached that right even though the taxpayer had not elected distribution. In this case, however, the taxpayer has deferred retirement and thus does not have a present right to receive normal retirement benefit payments. Instead, the levy reaches his present right to future payments that become payable when he ultimately retires.

taxpayer. 6/ Otherwise, the Service must effect collection through the joint and survivor annuity.

#### D. Course of Action

In sum, a levy on the taxpayer's 401(k) pension plan is appropriate since he is not cooperating and there are no other viable sources for collecting his tax liability. The RO should explain to the plan administrator that when the taxpayer retires any benefit payments due should be turned over to the Service. If the plan administrator fails to honor the levy when the benefits become payable then we suggest an action to enforce the levy, or a lien foreclosure action if the plan administrator has a good faith belief that there may be a claim against the taxpayer's retirement benefits superior to the federal tax lien.

If you have any further questions, please contact General Litigation, Branch 1 at (202) 622-3610.

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6/ The Internal Revenue Manual provides that the Service should use discretion in levying on the income from retirement plans and that the corpus of a plan (as contrasted with income from the plan) should be levied upon only in flagrant cases. See IRM 5.11.6.1 and 5.11.6.2 respectively. Flagrant circumstances exist in this case because the taxpayer has a history of sheltering assets from the reach of the Service.