

INTERNAL REVENUE SERVICE

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MEMORANDUM FOR GEORGIA DISTRICT COUNSEL

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

SUBJECT: Taxpayers A & B

This responds to your memorandum dated April 9, 1999. This document is not to be cited as precedent.

LEGEND:

Taxpayer A:

Taxpayer B:

Date A:

Date B:

Date C:

Date D:

Date E:

Date F:

Date G:

Date H:

Date I:

Date J:

Date K:

Date L:

Date M:

Date N:

Date O:

Year A:

Year B:

Year C:

Year D:

Year E:

Amount A: \$

Amount B: \$

Amount C: \$

Location A:

ISSUE: Whether the Internal Revenue Service (the "Service") has a legal basis to proceed with the sale of two parcels of real estate seized on Date A.

CONCLUSION: The Service should release the seized property to the taxpayer.

FACTS:

The facts as you have provided them may be summarized as follows: On Date B, the Service made joint assessments against Taxpayers A and B for taxable years A, B, and C, and on Date C, the Service made a joint assessment against them for taxable year D. On Date D, the Service made an assessment against Taxpayer A alone for taxable year E.

On Date E, Taxpayer A died. He died intestate. On Date F, the Revenue Officer and met. They discussed the possibility of seizure of the property and other alternative options to seizure, including, for example, discharge of the assets to the non-liable heirs-at-law in exchange for the Service receiving a "reasonable" fair market value for those assets and an offer-in-compromise. Although it was unclear at the time of the meeting whether the administration of the estate had commenced, Taxpayer B signed a Form 900 waiver both on her behalf and as administratrix of Taxpayer A's estate, extending the collection statute of limitations. However, it was later discovered that the administration of the estate was commenced on Date A.

Because the collection statute of limitations was about to expire on Date G, at least for taxable years A, B, and C, and it was unclear whether Taxpayer B had the authority to extend the statute on behalf of Taxpayer A's estate by signing the Form 900 waiver, a levy was issued on Date H, for taxable years A, B, C, D, and E. When the levy was issued, the unpaid balances on the assessments and statutory additions totaled \$ amount A. ^{1/}

On Date A, the Service seized, inter alia, two parcels of real estate located in Location A, titled in Taxpayer A's name only. The only recorded encumbrances on the real estate were for delinquent county property taxes. One parcel of the real estate included the taxpayers' personal residence, which continues to be Taxpayer B's personal residence. The other parcel is unimproved land. The seizure occurred seven days before the expiration of the collection statute of limitations for taxable years A, B, and C. As mentioned above, Taxpayer A's estate was commenced on Date A, and Taxpayer B signed a Form 900 waiver on that date extending the statute of limitations for taxable years A, B, and C until Date I. She signed individually and as administratrix of the

^{1/} The assessments for taxable years B and D, i.e., \$ amount B and \$ amount C, respectively, have now been satisfied by levy from other assets.

estate.

On Date J, the notices of sale of the real estate were issued. The notices were issued beyond the normal 30-day period recommended by the Internal Revenue Manual to allow Taxpayer B and her attorney time to apply for discharges or subordinations or to submit an offer-in-compromise. However, no such proposals were made. The sale was scheduled for Date K. On the day of the sale, but before the time the sale was to commence, Taxpayer B filed a Chapter 7 bankruptcy petition in her individual capacity. Because of the automatic stay for bankruptcy proceedings and the possible interest Taxpayer B's bankruptcy estate might have had in the real estate based on her status as a surviving spouse, the sale was canceled. However, based on your office's recommendation, the levy and seizures were not released.

The Service filed a motion to lift the stay for administrative seizure and sale on Date L. However, the bankruptcy court had discharged Taxpayer B on Date M, although the final decree was not issued until Date N. Instead of the case being returned to the Revenue Officer, there was an internal audit review. The case was returned to the field in Date O. Between the date of the internal audit review and the case being returned to the field, the Restructuring and Reform Act of 1998 ("RRA 98") was enacted on July 22, 1998.

LAW AND ANALYSIS:

Because of Taxpayer B's discharge from bankruptcy, the following discussion is based on the collectibility against Taxpayer A, or his estate. The specific issue in this case is whether there is a legal basis to proceed with the sale of the two parcels of real estate, given the fact that the collection statute of limitations has now run and in view of the enactment of RRA 98.

We agree with your analysis that the fact that the collection statute of limitations in I.R.C. § 6502(a) has now run does not preclude proceeding with the sale, as the Service issued levies and seized the property at issue prior to that expiration. See United States v. Cleveland, 94-2 U.S.T.C. ¶ 50421 (N.D. Ill. 1994). We also agree that there is nothing in RRA 98 which would prohibit proceeding with the sale.

However, the fact that the property was seized in Date A, originally scheduled for sale in Date K, and has been held for over two years since the seizure presents a concern. I.R.C. § 6335 sets forth the requirements for sale of seized property. Section 6335(d) provides that:

[t]he time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

Section 6335(e) sets forth other procedures pertaining to the manner and condition of sale. In particular, section 6335(e)(2) requires the Secretary to prescribe by regulations the manner and other conditions of the sale of property seized by levy. Such regulations are to provide, among other conditions, “[u]nder what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month.)” (Emphasis added). I.R.C. § 6335(e)(2)(F).

The Treasury Regulations reiterate the language of the statute. Specifically, Treas. Reg. § 301.6335-1(c)(2) provides:

When it appears to the district director that an adjournment of the sale will best serve the interest of the United States or that of the taxpayer, the district director may adjourn, or cause the internal revenue officer conducting the sale to adjourn, the sale from time to time, but the date of the sale shall not be later than one month after the date fixed in the original notice of sale. (Emphasis added.)

The timing of adjournments of sales has been recently addressed by the Ninth Circuit in Anderson v. United States, 44 F.3d 795 (9th Cir. 1995). In Anderson, a property owner brought an action to enjoin a sale of real property seized. A sale had been properly scheduled for an earlier date. At that time, several bidders showed up but none of them had the required 20 percent cash or equivalent down payment. Accordingly, the revenue officer decided to postpone the sale for approximately one month. On the date of the rescheduled sale, no bidders showed up. The revenue officer again postponed the sale. The Ninth Circuit held that, because the sale did not take place within 40 days of the public notice or a month thereafter, the Government was bound to release the property back to its owner, pursuant to I.R.C. § 6335(e)(1)(D). I.R.C. sections 6335(d) and (e) only allow the Government to adjourn the sale for one month.

The Government argued that there was a distinction between “adjournment” and “postponement” for purposes of section 6335. In Anderson, the Government argued that the sale was not adjourned but was postponed, which can be done without limitation. The court rejected this distinction.

Under the Ninth Circuit’s interpretation of I.R.C. § 6335, a sale is deemed to begin when the Government is scheduled to appear, and at that point, can be adjourned to be completed in some manner no later than one month from that date. Under the Ninth Circuit’s interpretation, a sale can begin and can be adjourned prior to the time it is sold to someone, purchased by the Government, or released to the taxpayer as long as the sale is completed within one month from the original date of sale. The Ninth Circuit’s position has been adopted by the Service.

In the present case, the sale of the seized property was originally scheduled for Date K. Because Taxpayer B filed for Chapter 7 bankruptcy on the date of the scheduled sale, the sale was canceled. According to the facts as provided by the revenue officer, the

bankruptcy was filed 1 hour and 9 minutes before the time of the scheduled sales. The revenue officer, therefore, did not have time to notify bidders that the sale was canceled and numerous bidders showed up.

The sale was deemed to begin on Date K, the date on which the Government was scheduled to appear. 2/ The sale could only be adjourned for one month from that date. Although the Service was precluded by the automatic stay in bankruptcy from rescheduling the sale until after Date N and the Service was arguably prevented from rescheduling the sale during the period of time this case was under internal audit review, the case was returned to the field in Date O. It has now been over two years since the time the property was seized. As discussed in Anderson, the policy adopted by Congress in drafting section 6335 requires the Service to “fish or cut bait.” 44 F.3d at 799. We conclude, therefore, that I.R.C. sections 6335(d) and (e), as interpreted by the Ninth Circuit in the Anderson case, require the Service to release the seized parcels of real estate to Taxpayer A’s estate.

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

2/ We realize that there is a possible argument for a distinction from the Anderson case because the sale in this case was “canceled” before the scheduled time of the sale on Date K. However, we think this would be an overly technical distinction, given that the fact that the sale was canceled could only be communicated to potential bidders once they showed up at the appointed time. We would not make the argument, therefore, that the sale should not be deemed to begin on Date K. See Anderson, 44 F.3d at 799 (rejecting Government’s argument that a “sale” does not take place until someone bids on the property.)