

GIOVANNI V. ALBEROTANZA is a Partner with Rosenberg Martin Greenberg, LLP in Baltimore, Maryland. MICHAEL J. MARCH is an Associate with Rosenberg Martin Greenberg, LLP in Baltimore, Maryland.

Collection

Pre-Notice Levies: When the IRS Can Levy Before Notifying Taxpayers of Their Right to a Hearing

By Giovanni V. Alberotanza and Michael J. March*

A. Introduction

One of the most important rights a taxpayer has during the Internal Revenue Service (“IRS”) administrative collection process is to be notified of their right to a collection due process hearing before the IRS issues a levy. Generally, the opportunity to participate in this hearing is one of the last steps in the IRS collection process before a levy occurs. However, in certain circumstances the IRS may issue a levy before notifying a taxpayer of their right to a collection due process hearing. Tax practitioners should familiarize themselves with those circumstances so that they are not caught by surprise when a pre-notice levy is made against their clients.

B. General Rule: No Levy Unless Written Notice of Right to a Hearing Is Provided

Code Sec. 6331(a) authorizes the IRS to levy upon a taxpayer’s property or rights to property if that taxpayer is liable for any tax and neglects or refuses to pay that liability within 10 days after notice and demand for payment is made.

Code Sec. 6330(a)(1) provides the general rule that “[n]o levy may be made on any property or right to property of any person unless the [IRS] has notified such person in writing of their right to a hearing under this section before such levy is made.” The notice can be provided in person, left at the dwelling or usual place of business of the taxpayer, or sent by certified or registered mail to the taxpayer’s last known address.¹ The notice must include the amount of unpaid tax, the right of the taxpayer to request a hearing within 30 days, and the proposed action by the IRS.²

C. Four Exceptions

In certain limited circumstances, however, the IRS is not required to provide notice to the taxpayer of their right to a hearing before taking levy action. The IRS may issue such a “pre-notice levy” in situations where the IRS has:

- (1) Made a finding that the collection of tax is in jeopardy;
- (2) Served a disqualified employment tax levy (“DETL”);
- (3) Served a Federal contractor levy³; or
- (4) Served a levy on a State to collect the liability from a State tax refund.⁴

The IRS must still provide the taxpayer with the opportunity for a hearing within a reasonable period of time after the levy.⁵ We will address each exception in more detail below.

1. Jeopardy Levy

The IRS may issue a pre-notice levy when collection of the tax is in jeopardy.⁶ Grounds for a jeopardy levy may exist if the taxpayer is planning to quickly leave the United States or conceal themselves, the taxpayer is planning to place their assets beyond the reach of the federal government, or the taxpayer’s financial solvency is threatened.⁷ The determination as to whether collection of the tax is in jeopardy requires a highly factual analysis and approval must be obtained from the appropriate IRS group manager, IRS territory manager, and IRS Chief Counsel’s office before a jeopardy levy can occur.⁸ If approval is granted, then the IRS will issue a levy before providing notice to the taxpayer of their right to a hearing.⁹

Once the levy occurs, a taxpayer may have rights to file an appeal under Code Sec. 7429, a request for a collection due process hearing under Code Sec. 6330, or request a hearing under the IRS collection appeals program.¹⁰ A Code Sec. 7429 appeal focuses on whether the levy was reasonable based on the circumstances.¹¹ To that effect, within five days the IRS will provide the taxpayer with a written statement explaining why such a levy occurred.¹² Thereafter, the taxpayer has 30 days to request an administrative review.¹³ If the taxpayer does not agree with the determination of the administrative review, they can file an action with the U.S. District Court that has jurisdiction over the claim.¹⁴

2. Disqualified Employment Tax Levy

A DETL is a levy to collect employment taxes if the taxpayer already requested a collection due process hearing for unpaid employment taxes arising in the two-year period before the tax period for which the levy is served.¹⁵

The two-year lookback period is measured from the beginning of the period for which the DETL is served.¹⁶ It can be difficult to know whether a new client has previously filed a collection due process hearing. To resolve this potential difficulty, tax practitioners should request and carefully review IRS account transcripts, interview their clients about previous communications with the IRS, and ensure that they have reviewed all IRS notices carefully. It is important to

note that requests for an equivalent hearing or untimely collection due process hearings do not count as a basis for issuing a DETL.¹⁷

3. A Federal Contractor Levy

If the taxpayer is a federal contractor, then the IRS can issue a pre-notice levy.¹⁸ “Federal contractors are any person or entity who currently has a contract with the federal government to sell or lease property, goods or services. This does not include a taxpayer who was in the past a federal contractor but currently is not involved in any contractual relationship with the federal government.”¹⁹

A federal contractor levy is a continuous levy on federal payments which are disbursed by the Bureau of Fiscal Service.²⁰ This can include federal employee retirement benefits, any payments related to contractor or vendors doing business with the federal government (including defense contracts), federal employee travel advances or reimbursements, social security benefits, federal salaries, Medicare, and military retirement.²¹

Applicability of a federal contractor levy is automatically identified by IRS computer systems.²² However, an IRS revenue officer can also identify federal contractor cases.²³ If a levy is issued, then the IRS will send the taxpayer a post levy notice of their right to a hearing.²⁴

4. Levy on a State Tax Refund

The IRS may issue a pre-notice levy on an individual’s state tax refund.²⁵ Again, the IRS uses an automated process to match federal tax delinquent accounts against a database of state tax refunds.²⁶ If your client’s state tax refund is levied, then the state will issue a notice advising of the levy, and provide an opportunity to appeal the levy. However, if the IRS previously issued a notice of intent to levy and the right to a hearing, a new appeal right will not be provided.²⁷ Currently, the IRS can only levy on an individual’s state tax refund, but may be able to levy on business state tax refunds in the future.²⁸

D. Conclusion

Practitioners should review these circumstances with their clients to determine whether the IRS can issue a pre-notice levy. In many cases, a pre-notice levy can be avoided by proactive measures such as submitting an installment agreement request, offer-in-compromise, or by contacting the IRS early in the administrative collection process to propose an alternative to levy. If the IRS issues a pre-notice levy, practitioners should review options for appeal with their clients to determine their best course of action going forward.

ENDNOTES

* The authors can be reached at galberotanza@rosenbergmartin.com

¹ See Code Sec. 6330(a)(2).

² See Code Sec. 6330(a)(3).

³ This is referred to as the Federal Payment Levy Program or FPLP.

⁴ This is referred to as the State Income Tax Levy Program or SITLP.

⁵ See Code Sec. 6330(f); see also IRM pt. 5.111.3.2(6) (Nov. 9, 2017).

⁶ See Code Sec. 6330(f); see also Reg. §301.6330-1(a)(2)(ii).

⁷ Reg. §301.6861-1; Reg. §1.6851-1; see also IRM pt. 5.1715.2.1 (Dec. 29, 2009).

⁸ See IRM pt. 5.1715.2.1 (Nov. 29, 2009); IRM pt. 5.11.3.4 (Nov. 20, 2017).

⁹ IRM pt. 5.11.3.4(4) (Nov. 20, 2017).

¹⁰ IRM pt. 5.11.3.2(2)-(4) (Nov. 20, 2017).

¹¹ See Code Sec. 7429(a)(3).

¹² See Code Sec. 7429(a)(1)(B).

¹³ See Code Sec. 7429(a)(2).

¹⁴ See Code Sec. 7429(b)(2).

¹⁵ See IRM pt. 5.19.4.3.1.1(1) (Aug. 4, 2014).

¹⁶ IRM pt. 5.1.9.3.14(4) (Nov. 12, 2014).

¹⁷ IRM pt. 5.1.9.3.14(2) (Nov. 12, 2014).

¹⁸ See Code Sec. 6330(f); see also Reg. §301.6330-1(a)(2)(ii).

¹⁹ IRM pt. 5.11.1.6.2(2) (Aug. 1, 2014).

²⁰ See *Federal Payment Levy Program, Small Business and Self Employed* (July 23, 2018), available online at www.irs.gov/businesses/

small-businesses-self-employed/federal-payment-levy-program.

²¹ *Id.*

²² IRM pt. 5.11.1.6.2(3) (Aug. 1, 2014).

²³ *Id.*

²⁴ *Id.*

²⁵ See Code Sec. 6330(f); see also Reg. §301.6330-1(a)(2)(ii).

²⁶ See *Federal and State Levy Programs, Small Business and Self Employed* (Apr. 23, 2018), available at www.irs.gov/businesses/small-businesses-self-employed/federal-and-state-levy-programs.

²⁷ *Id.*

²⁸ *Id.*

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