



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

OFFICE OF
CHIEF COUNSEL

October 17, 2000

Number: **200103026**
Release Date: 1/19/2001

CC:PA:CBS:Br1
GL-706113-98
UIC 50.29.00-00
52.00.00-00
49.02.00-00
63.38.00-00
9999.98-00

MEMORANDUM FOR KANSAS-MISSOURI DISTRICT COUNSEL

CC:MSR:KSM:STL
Attn: Thomas Pliske

FROM: Michael R. Arner
Chief, Branch 1 CC:PA:CBS:B01

SUBJECT: Reduce Tax Claim to Judgment

You requested our views on the viability of referring cases to the Department of Justice for lien foreclosure against a taxpayer's interest in a 401(k) plan in the following situation: The taxpayer has received a discharge in bankruptcy, but has an interest in a 401(k) plan that was treated as exempt property in the bankruptcy. Although certain taxes were discharged against the taxpayer personally, the tax lien, filed pre-petition, is enforceable against the plan. In re Isom, 901 F.2d 744 (9th Cir. 1990). In your memorandum, you mentioned that, in addition to the foregoing situation, Special Procedures function (SPf) is interested in referrals to reduce tax liabilities to judgment in non-bankruptcy cases where the collection statute of limitations is close to expiration.

This document is advisory only and is not to be relied upon or otherwise cited as precedent.

Conclusion

(1) Referral for lien foreclosure would be appropriate under the circumstances you set forth, and we believe that the Department of Justice would not be averse to such referrals.

(2) An action to reduce tax liabilities to judgment would be appropriate, as it usually is, where the collection statute of limitations is about to expire.

Discussion

Currently in bankruptcy situations, Collection serves notices of levy on 401(K) plans post-discharge. In your memorandum you indicated that the levies are often returned without remittances because the taxpayer “does not have any distrainable rights or interest in the funds at the time the levy is served” and that “the taxpayer’s rights do not vest, for levy purposes,” until after the collection statute expiration date (CSED). In light of this, you believe that SPf intends to forward these cases to your office for suit referral. Before addressing the advisability of lien foreclosure, we wish to clarify what you mean when you state that the taxpayer has no distrainable rights and has not yet vested. If that were the case, there would be no property to which the federal tax lien initially attached. 1/ Therefore, we believe that you mean that the taxpayer is vested, but is not eligible for an immediate distribution and will not be eligible until after the CSED. In such cases the taxpayer does have a distrainable right—the present right to future distribution. However, the plan is not obligated to turn over the proceeds until the taxpayer has the present right to an immediate distribution. It appears that SPf’s rationale for seeking referral of such cases is concern over the CSED occurring before the taxpayer is entitled to distribution. However, we note that the Internal Revenue Code requires only that a proceeding be brought or a levy be made within the period of limitations. I.R.C. § 6502 (a). It does not require the completion of administrative collection within ten years. See, e.g., In re Girard, 57 B.R. 66 (Bankr. E.D. Mich. 1985). Therefore, in cases where the Service has levied on the taxpayer’s interest in a plan, the Service’s position is protected by virtue of that levy. 2/

Where the Service has not levied, an even in those cases where the Service has and is therefore protected, lien foreclosure is appropriate, and we believe that the Department of Justice would be amenable to such referrals. 3/ In bringing lien foreclosure actions, the government could obtain a judicial determination of the taxpayer’s interest in the plan. While property is often ordered sold in foreclosure actions, the sale of the property is not required by I.R.C. § 7403. See United State v. Rodgers, 461 U.S. 677 (1983) (court concludes that “§ 7403 does not require a district court to authorize a forced sale under absolutely all circumstances, and that some limited room is left in the

1/ A plan participant has no right at all to receive accrued plan benefits until he is vested in the plan. Vesting occurs when the participant acquires a nonforfeitable right to part or all of his accrued benefits. In other words, it is vesting that creates his ownership of plan benefits. In 401(k) plans, the participant is always vested in his own contributions, while vesting in employer contributions requires satisfaction of service or other requirements specified under the terms of the plan.

2/



3/ We know of one live case, currently in the Northern Trial Section.

statute for the exercise of reasoned discretion”). 4/ In addition, although the government’s position is protected by its ability to bring a failure to honor levy suit should a plan not comply with the levy at the appropriate time, we note that protection rests solely on an outstanding levy on the plan. Thus, we believe that a prudent course of action would be to seek judicial enforcement of the lien. If the levy were mistakenly released (or found to be defective) beyond the CSED, the Service would have no opportunity to levy again or to bring suit. Thus, there would be no means to collect from the plan.

In your memorandum, you also indicated that in non-bankruptcy cases, SPf is interested in referrals to reduce tax liabilities to judgment where the statute of limitations is close to expiration. This scenario is very similar to the typical case where the government would seek to obtain a judgment against the taxpayer. One distinction is that here there would be an administrative remedy available to the Service – it could levy on the plan. However, a levy would be ineffective (until such time as the taxpayer had a right to immediate payment). [REDACTED]

In addition, we note that the same rationale for bringing a lien foreclosure action despite the presence of a levy in the bankruptcy context applies in the non-bankruptcy context.

If you have questions or comments concerning the foregoing, please contact Branch 1 at (202) 622-3610.

4/ [REDACTED]

[REDACTED] Rather, we assume that SPf is seeking to ensure payment at such time that the taxpayer becomes presently entitled to distribution from the Plan. Bringing a lien enforcement action will not accelerate the taxpayer’s distribution from a Plan; nor will it entitle the Service to a form of distribution not available to the taxpayer.