Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:4:MIL:GL-116321-02
GWBezold

date: June 5, 2002

to: Appeals Team Manager
Milwaukee Appeals Office

from: Area Counsel
Small Business/Self-Employed:Area 4

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subject: **Jeopardy Levy Determination More Than 30 Days After CDP Hearing Request**

Taxpayer: [redacted]
SSN:
Address:

This memorandum responds to your request dated March 20, 2002.

ISSUES

Whether a levy made more than 30 days after a request for a CDP hearing is a "jeopardy levy" for purposes of I.R.C. §§ 6330, 6331, and 7429.

CONCLUSIONS

A levy based on a finding of jeopardy by the Service under the last sentence of I.R.C. § 6331 and that occurs more than 30 days after a request for a CDP hearing is a jeopardy levy as contemplated by I.R.C. § 6330(f). It is not, however, a jeopardy levy subject to the administrative and judicial review procedures of I.R.C. § 7429 because it is made more than 30 days after "notice and demand" for payment. Accordingly, the taxpayer has two possible routes for review; as part of the ongoing CDP case or through a claim for refund procedures.

ANALYSIS

Your office currently has a CDP under consideration attributable to a Final Notice of intent to levy issued to the taxpayer on [redacted]. The taxpayer timely requested a CDP

hearing. The CDP case pertains to income tax liabilities for the years [redacted], [redacted], [redacted], [redacted], and [redacted], all of which were self-assessed, in excess of $[redacted] including interest and penalties. The Service made notice and demand for payment of the latest tax in [redacted], notice and demand for the other years occurred in [redacted] or prior. In January of [redacted] after seeking and receiving approvals Compliance served jeopardy levies and provided the notices required by I.R.C. § 7429. The taxpayer has now filed a request under I.R.C. § 7429 for review of the jeopardy levies.

Upon review of the taxpayer's I.R.C. § 7429 request you believe two questions are raised for which you seek advice. They are: 1) whether the [redacted] levies are actually "jeopardy levies"; and 2) if they are not jeopardy levies what action should be taken regarding Compliance's I.R.C. § 7429 notices and the taxpayers' formal request under that section. Your concerns are generated by the IRM passages set forth below.

5.11.3.1(3)

A jeopardy levy without a jeopardy assessment can happen:

1. after the tax is assessed, but before the notice and demand is issued;
2. after the notice and demand is issued, but before ten days have passed;
3. after the ten day notice and demand period ends, but before the thirty day notice of intent to levy and notice of a right to a hearing have been issued; or
4. after the notice of intent to levy and notice of right to a hearing have been issued, but before thirty days have passed.

8.7.2.3(6)

a. An appeal right exists under I.R.C. § 7429 as well as under CDP, and there may be an interplay between the two statutes.

b. A taxpayer is entitled to a hearing under I.R.C. § 7429 only when the IRS has made a traditional jeopardy levy. As it relates to CDP, a traditional jeopardy levy is one that is either before a CDP notice has been issued or sooner than 30 days after one has been issued. There are other limitations on jeopardy levy hearing rights that are not covered here, so consult Counsel when in doubt.

c. In a traditional jeopardy levy, a taxpayer will be entitled to a Jeopardy Levy hearing under I.R.C. § 7429 and a CDP haring, too.

d. If Compliance finds that Collection is in jeopardy and commences levy action while an AO or SO is holding a CDP Hearing (or after the CDP hearing was requested), then the Appeals' employee will incorporate the appropriateness of the levy (reasonableness of finding jeopardy) in the CDP hearing. There is no separate right to an I.R.C. § 7429 hearing at this point in time.

e. Counsel anticipates that an abuse of discretion standard will apply in these cases also. If the CDP request is late and an Equivalent hearing (EH) is underway, Appeals will incorporate the levy action into the EH.

Under I.R.C. § 6330(f), if the Service makes a finding pursuant to the last sentence I.R.C. § 6331(a) that the collection of tax is in jeopardy, then the pre-levy notification portions of I.R.C. § 6330 do not apply and the taxpayer shall be given the opportunity for a CDP hearing within a reasonable time after the levy. That section allows for levy action during the pendency of a CDP hearing. Davis v. Commissioner, 115 T.C. 35, fn. 2 (2000). Under the last sentence of I.R.C. § 6331 if the Service makes a finding that the collection of tax is in jeopardy a levy may be made immediately and without regard to the normal 10 day waiting period after notice and demand. The Service must have the approval of Counsel before making a jeopardy levy within 30 days of notice and demand. I.R.C. § 7429(a)(1)(A). Once the Service serves a jeopardy levy, it must provide certain information to the taxpayer. I.R.C. § 7429(a)(1)(B). The taxpayer may seek administrative review of the action taken and finally judicial review. I.R.C. §§ 7429(a)(3)(B) and (b).

The primary impetus for your questions is IRM 8.7.2.3(6)d which states that a taxpayer is not afforded any review rights under I.R.C. § 7429 if the Service issues a jeopardy levy during the pendency of a CDP hearing. IRM 8.7.2.3 creates a dichotomy of jeopardy levies, traditional meaning those issued before a CDP notice or before the 30 days has run after issuance and (by implication) nontraditional that includes all others. The IRM sections interpret this provision to mean a jeopardy levy during the pendency of a CDP hearing is not a jeopardy levy subject to I.R.C. § 7429 and the taxpayer may include the jeopardy issue in the pending CDP (or follow claim for refund procedures). That interpretation attempts to harmonize the provisions of I.R.C. §

6330, 6331, and 7429 with the common sense conclusion that a taxpayer's acts can put collection in jeopardy at any given time and the Service should have the ability to levy in those situations.

The provisions of I.R.C. § 7429 specifically limit its applicability to levies made within 30 days of notice and demand. Prior to the enactment of I.R.C. § 6330, any levy after that time period was not a jeopardy levy and the administrative and judicial review procedures of I.R.C. § 7429 were unavailable. See Vonderheide v. United States, 80 A.F.T.R.2d 8194 (S.D. Ohio 1997), aff'd without published opinion, 178 F.3d 1297 (6th Cir. 1999), reported in full, 1999 U.S. App. LEXIS 5068; 99-1 U.S.T.C. (CCH) P50,409;83 A.F.T.R.2d (RIA) 1533; Friko Corp. v. Commissioner, 26 F.3d 1139 (D.C. Cir. 1994). The Service, however, takes the position that a taxpayer is entitled to I.R.C. § 7429 review for a levy made less than 30 days after the notice of intent to levy required by I.R.C. § 6331(d)(1). Treas. Reg. § 301.7429-1. These are the traditional jeopardies levies described in the IRM. The Service interprets the jeopardy levy reference in I.R.C. § 6330(f) to reflect Congress's understanding that jeopardy can arise more than 30 days after notice and demand for payment and more than 30 after notice of intent to levy. In such a case, I.R.C. § 7429 does not apply. Accordingly, the IRM provides for administrative and judicial review of the non-traditional jeopardy levies contemplated by I.R.C. § 6330 as part of the CDP process. Cf. CCA 199949032. (b)(7)a [redacted]

If you have any questions, please contact me at Ext. 4240.

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