Office of Chief Counsel
Internal Revenue Service

# memorandum

CC:SB:5:DEN:2:GL-133321-02
FJLockhart

date: August 2, 2002

to: Connie Hough, Acting LTA
Denver, Colorado

from: Area Counsel
(Small Business/Self-Employed:Area 5)

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subject: **Taxpayer:** [redacted]
**SSN:** [redacted]

**Related to: Withdrawn Advisory Opinion in Response to Request Concerning Application of I.R.C. § 6402(d): GL-118676-02**

This advisory opinion is in response to your March 28, 2002, request to us for an advisory opinion concerning the application of I.R.C. § 6402(d), as supplemented by your memorandum to us dated June 17, 2002. We have restated the issues presented to us based upon the facts set forth in your request. As indicated above, this advisory opinion is given in place of the withdrawn Advisory Opinion in Response to Request Concerning Application of I.R.C. § 6402(d)

**STATEMENT WITH RESPECT TO ADVICE GIVEN TO AN LTA**

The following advice is advice to a local taxpayer advocate's office. Pursuant to I.R.C. § 7803(c)(4)(A)(iv), a local taxpayer advocate ("LTA") has the discretion not to disclose to the IRS contact with, or information provided by, a taxpayer. There are no statutory limitations on the nature and extent of the information that can be withheld from the IRS pursuant to an LTA's exercise of discretion under I.R.C. § 7803(c)(4)(A)(iv). Determining what information to withhold from the IRS and what to disclose is a determination to be made by the LTA and not this Office. Although the IRS Restructuring and Reform Act of 1998 makes it clear that LTAs may seek the assistance of Counsel as they perform their duties, the statute is explicit that the determination whether to disclose information belongs to the LTA. The following advice is based upon and limited to information provided to this Office by the LTA. Such information may or may not disclose the name and taxpayer identification number of the taxpayer. Such information may include factual assertions, determinations of ultimate fact,

underlying legal conclusions and conclusions of law as applied to the facts, which this Office may not be capable of verifying or controverting given the degree of disclosure involved. To such extent, this Office accepts and relies upon such assertions, determinations and conclusions in rendering the following advice.

**ISSUES**

1. Is the Internal Revenue Service authorized to apply the offsetting provisions of I.R.C. § 6402 to amounts paid and applied as tax into "balance due" accounts (thus diverting the same to any of the statutorily specified nontax debts of the taxpayer) absent the existence of overpayments in the accounts?

2. Is the Internal Revenue Service authorized to return payments received in response to a legally authorized levy, where such payments have been applied as tax payments to "balance due" accounts of the taxpayer and do not result in overpayments in the accounts?

**CONCLUSIONS**

1. The Internal Revenue Service has no authority to apply the offsetting provisions of I.R.C. § 6402 to amounts paid and applied as tax into "balance due" accounts absent the existence of overpayments in the accounts.

2. The Internal Revenue Service has the authority to return payments received in response to a legally authorized levy, where such payments have been applied as tax payments to "balance due" accounts of the taxpayer and do not result in overpayments in the accounts, but such authority is limited to being exercised under one of the alternative sets of circumstances described in I.R.C. § 6343(d) and must be pursuant to a determination made within, or to a taxpayer request for such a determination made within, 9 months of the date of the issuance of the levy.

**FACTS**

[redacted] (the "taxpayer") had and has unpaid tax liabilities for several different taxable years, specifically, for federal income taxes for calendar years [redacted], [redacted] and [redacted]. On [redacted], one of the Internal Revenue Service's Automated Collection Service ("ACS") sites properly issued and served a notice of levy, consisting of a continuous levy on salary or wages pursuant to I.R.C. § 6331(e), upon the taxpayer's employer. All

appropriate and legally required notices in advance of the levy were given.

On [redacted], the taxpayer presented the Service with information upon which the ACS site made a determination that the taxpayer's accounts should be classified as currently not collectible, for hardship reasons and that the levy should be released. On [redacted], a levy release was entered into the ACS system, and the ACS site sent the employer several notices that the levy was released. However, before the time that the employer acknowledged receiving any such notice[1], the employer withheld and remitted to the Ogden Service Center ("OSC") portions (one remittance being $[redacted] and the other being $[redacted]) of two of the employee's salary checks. These two payments were received by the Service on [redacted]. The OSC posted these remittances as tax payments to two of the taxpayer's accounts, each of which accounts was in an underpayment status both before and after the tax payments were applied.

On [redacted], upon learning of the posting of these remittances as tax payments, the ACS site requested manual refunds from the OSC. Thereafter, the OSC input "refund requests" of these two payments without coding the requests to bypass the refund offsets required by I.R.C. § 6402. As a result, the remittances apparently were credited or set aside to a state support enforcement agency on account of the Service previously having been sent notice of an outstanding support obligation of the taxpayer.

The Acting Local Taxpayer Advocate ("LTA") takes the position that the OSC erred in not requesting a bypass offset while inputting the manual refund request. Accordingly, the LTA believes that a new refund request, coded to bypass the support offset, should be issued and that a refund should be issued pursuant to I.R.C. § 6343. One of the key tenets of the LTA's position is that the OSC's reliance on I.R.C. § 6402 is misplaced because no

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[1] The reason for the delay in honoring the levy release appears to be unknown. The facts presented to us state, "Subsequent to the mailing of the first levy release [which the employer denies receiving] and the employer's receiving a faxed copy of the levy release, the employer mailed two payments to the IRS. The IRS agrees that the intent was to release the levy prior to the payments being mailed and has agreed to refund the payments to the taxpayer."

overpayment in the accounts to which the levy payments posted ever existed.[2]

The OSC declined to honor the LTA's request in reliance upon an August 1, 2001, advisory opinion (WTA-N-124317-01.WLI#1) from Branch 1 of the Administrative Provisions and Judicial Practice Division of the Office of Chief Counsel. As stated by the LTA, "The Ogden campus has indicated that they will not bypass the offset without an opinion from counsel on whether this refund [sic] is an overpayment subject to 6402(d)."

Based upon the following analysis, on [redacted], we requested the LTA to take whatever actions are necessary to reverse the support offset prior to the amount being paid to the taxpayer's support obligee.

**ANALYSIS**

It is axiomatic that a taxpayer is not entitled to a refund unless the tax liability from which the refund is sought has been overpaid. As stated by the United States Supreme Court, "An overpayment must appear before refund is authorized." Lewis v. Reynolds, 284 U.S. 281, 283 (1932).

Neither the Internal Revenue Code nor the Treasury Regulations provide a comprehensive or all-inclusive definition of the term "overpayment." However, the United States Supreme Court has given us the general definition of the term.

> [W]e read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or the revenue agents. Whatever, the reason, the payment of more than is rightfully due is what characterizes an overpayment.

Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947). More recently, the Supreme Court restated its prior interpretation as follows: "The common sense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all." United States v. Dalm, 494 U.S. 596 609 (1990).

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[2] In making this argument the LTA states, "[t]he taxpayer had a balance due prior to the levy payments being applied and still had a balance due after the levy payments have been applied."

Thus, while I.R.C. §§ 6401(a), (b) and (c) clarify the meaning of the term "overpayment" in given situations, which situations are not applicable to the instant case, the same do not modify or overrule the general case law definition. This interpretation is reinforced by the regulations applicable to I.R.C. § 6401. A fair reading of I.R.C. § 6401 and Treas. Reg. § 301.6401-1 is that the statute describes two specific situations which are encompassed by the term "overpayment" and a third situation which is not automatically excluded from the scope of the term. There is no indication in the statute or the regulations that the statute is intended to give a comprehensive or all-inclusive definition of the term "overpayment."

The meaning of I.R.C. § 6402 thus must be approached with the Supreme Court definitions of "overpayment," as well as the specific statutory definitions of I.R.C. § 6401, as a backdrop. I.R.C. § 6402 authorizes the Service to make refunds, credits and offsets and gives priorities for the order in which such refunds, credits and offsets may or shall be made. However, it is clear from each provision of I.R.C. § 6402 that the prerequisite for the statute's application is the existence of an overpayment.

Absent the expiration of the statute of limitations on collection, if the payments and credits to a taxpayer's account do not exceed his tax liability, there can be no overpayment. This is true even if, for whatever reason, the taxpayer's entire tax liability is not currently due or his ability to pay the liability does not currently exist. For example, prior to the enactment of I.R.C. § 7422(j) by the Internal Revenue Service Restructuring and Reform Act of 1988, an overpayment of an installment of tax by an estate holding I.R.C. § 6166 installment payment privileges was not considered an overpayment of tax, either within the meaning of I.R.C. §§ 6402 and 6511 or for refund jurisdiction purposes, until the entire estate tax liability was paid. Estate of Baumgardner v. Commissioner, 85 T.C. 445 (1985), acq. 1986-2 C.B. 1; Rocovich v. United States, 933 F.2d 991 (Fed. Cir. 1991); Abruzzo v. United States, 24 Cl.Ct. 668 (1991).

Because it is our understanding that a hardship determination and a determination that a tax liability is not currently collectible would not (and did not, here) have the effect of "zeroing out" a taxpayer's tax liability or liabilities, we do not believe that either of the subject tax accounts has been in an overpaid status nor that an overpayment of tax has existed in these accounts after the service of the subject levies. Without such an overpayment the offset provisions of I.R.C. § 6402 are not applicable. And by the same logic no refund of these payments to the taxpayer would be authorized or allowable.

We note that the LTA has cited I.R.C. § 6343 as authority for returning the levy payments to the taxpayer. The LTA has also directed us to the proposed regulations under I.R.C. § 6343(d).

In enacting I.R.C. §§ 6343(b) and (d) Congress has made a modification to the Supreme Court's "required overpayment" holdings in Lewis v. Reynolds, supra, and Jones v. Liberty Glass, supra. The legislative history to these provisions makes this apparent. See, for example, H.R. Report 104-506, 104th Cong., 2d Sess. 33 (1996), 1996-3 C.B. 49, 81.

I.R.C. § 6343(b) authorizes, but does not require, the Service, inter alia, to return an amount of money equal to an amount of money received in response to a wrongful levy. Similarly, I.R.C. § 6343(d) authorizes, but does no require, the Service to return an amount of money equal to a amount of money received in response to a lawful levy, where the circumstances surrounding the levy meet one of four statutorily defined sets of conditions. One of these statutorily defined sets of conditions occurs when the taxpayer or the National Taxpayer Advocate consents to the return of the property, and the return of the property is in the best interest of the taxpayer, as determined by the Taxpayer Advocate, and is also in the best interests of the United States, as determined by the Commissioner. I.R.C. § 6343(d)(2)(D), as amplified by Prop. Treas. Reg. § 301.6343-3(c)(4). However, when the money is returned pursuant to I.R.C. § 6343(d), as opposed to when it is return pursuant to I.R.C. § 6343(b), no interest is payable thereon. I.R.C. § 6343(d)(2), flush language; Prop. Treas. Reg. § 301.6343-3(i).

Since the requirements of I.R.C. § 6343(d)(2)(D) have been met in this case, it is permissible for the Service to return $[redacted] (the sum of the two levy payments, in the amounts of $[redacted] and $[redacted] made by [redacted]'s employer) to [redacted].

Further, we believe that the return of $[redacted] to [redacted] in this case would be consistent with another provision of I.R.C. § 6343 enacted shortly after I.R.C. § 6343(d), the legislative history of this related provision, and the Service's interpretation of the purpose of I.R.C. § 6343(d) as contained in the notice of proposed rule making published for Prop. Treas. Reg. § 301.6343-3.

Under I.R.C. § 6343(e), which provision was enacted by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998), several years after the enactment of I.R.C. § 6343(d), the Service is required to release a continuing wage levy as soon as practicable upon reaching agreement with the taxpayer that the tax is not collectible. The Conference Committee report and the Senate report to I.R.C. § 6343(e)

elaborates on its meaning. "The IRS is not to intentionally delay until after one wage payment has been made and levied upon before releasing the levy." H.R. Conf. Rep. No. 105-599, 105th Cong., 2d Sess. 279 (1998), 1998-3 C.B. 747, 1033. "Congress believes that taxpayers should not have collection activity taken against them once the IRS has determined that the amounts are uncollectible." S. Rep. No. 105-174, 105th Cong., 2d Sess. 79 (1998), 1998-3 C.B. 537, 615.

As a preamble to Prop. Treas. Reg. § 301.6343-3, the notice of proposed rule making, N.P.R.M. (REG-101520-97), describes the purpose of I.R.C. § 6343(d) as follows: "Section 501(b) of the Taxpayer Bill of Rights 2 (TBOR2), Public Law 104-168 (110 Stat. 1452), amended section 6343 to authorize the IRS to return property in certain cases and, to the extent possible, but without payment of interest, return the taxpayer to the same position as if the levy had not been issued." N.P.R.M. (REG-101520-97), 66 Fed. Reg. 10249, 10250 (proposed February 14, 2001) (to be codified at 26 C.F.R. pt. 301).

While it is not entirely clear in this case whether the pay periods with respect to which the levied wage payments were made ended before or after the [redacted] taxes were determined to be not currently collectible, it is clear that almost two months elapsed between the levy release date and the date the payments were received by the Service. Congress appears to have been concerned with delays of this type and duration when I.R.C. § 6343(e) was enacted, even though, admittedly, I.R.C. § 6343(e) addresses delays in releasing the levy, rather than the Service's acceptance of payments after the levy has been released, after an uncollectiblity determination has been made. However, it does seem clear that in this case the Service's returning money to the taxpayer equal to the levied payments will, to the extent possible, but without payment of interest, return the taxpayer to the same position as if the levy had not been issued.

Please feel free to contact Fritz Lockhart, undersigned, at 303.844.3258 if you have questions or are in need of further assistance.

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