

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: 20084602F

Release Date: 11/14/08

CC:SB:3:JAX:2:
GL-146301-07

UILC: 6343.00-00

date: December 19, 2007

to: SBSE Collection, South Atlantic Area, Maitland
Attn: Alysia B. Burgman, Territory Manager

from: Associate Area Counsel (Jacksonville, Group 2)
(Small Business/Self-Employed)

subject:

This memorandum responds to your request for advice on the seizure which occurred in this case.

ISSUES

1. Whether the Service may apply the proceeds from the sale of the jointly owned real property, out of which a business was operated by the taxpayer husband, when the proper written approval was not obtained.
2. What should be done with any excess proceeds, including whether is entitled to any portion of such proceeds.

CONCLUSIONS

1. The Service may only keep the proceeds from the sale and apply them to the liabilities of the taxpayers if the taxpayers request, in writing, that the Service do so. Otherwise, the Service must return the proceeds from the sale to the taxpayer since the seizure was in violation of law.
2. Since the proceeds from sale remain tenancy by the entirety property and is a judgment creditor of only the taxpayer husband, has no entitlement to excess proceeds of the sale.

FACTS

, a sole proprietor, was operating a located at and his spouse, , jointly owned the real property where the was operated. The property was held as tenancy by the entireties property. The had outstanding joint income tax liabilities totaling \$. also owed civil penalties totaling \$ for failing to file information returns (W-2's and W-3's). In an attempt to collect the outstanding liabilities, the IRS seized the real property where the was operated on . On , was served with notice of the upcoming sale. The sale was originally set for , but no bidders materialized. On , the IRS sold the real property at the County Courthouse to the highest bidder for \$. There are excess proceeds from the sale of approximately \$. has a judgment lien filed against . and may claim an interest in the proceeds of the sale. The redemption period expires on , at which time a deed will be issued to the purchasers.

Collection erroneously believed that the seizure did not require approval by Area Director and, as a result, did not secure his approval. TIGTA subsequently reviewed the seizure and determined that Collection should have obtained the area director's approval prior to the seizure. See I.R.C. § 6334(a)(13)(B)(ii), 6334(e)(2)(A); IRM 5.10.2.14(6).

LAW AND ANALYSIS

Issue 1

Section 6334(e)(2) provides in essence that certain business property other than a principal residence described in 6334(a)(13)(B) is exempt from levy unless the area director approves the levy in writing. Section 6334(a)(13)(B) describes "certain business property" as tangible personal property or real property (other than real property that is rented) used in the trade or business of an individual taxpayer. Clearly,

was using the real property in his trade or business, , and area director approval was required.

Section 6334 does not provide a remedy for violations of section 6334(e)(2); however, there are remedies that the taxpayer may pursue in other code provisions. Section 6343(d) authorizes the Service to return specific property levied upon, an amount of money equal to the amount of money levied upon, or an amount of money equal to the amount of money received by the United States from a sale of levied property if it is in the best interest of the United States and the taxpayer. Treas. Reg. 301.6343-3(d)(1) provides that if the IRS makes a levy in violation of the law, it is in the best interests of the United States and the taxpayer to release the levy and the IRS will return to the taxpayer any property obtained pursuant to the levy. When the release of

a levy and the return of property are required under paragraph 301.6343-3(d)(1), the property or the proceeds from the sale of the property received by the IRS pursuant to the levy must be returned to the taxpayer unless the taxpayer requests otherwise. Treas. Reg. 301.6343-3(d)(2) (emphasis added). Moreover, written permission from the taxpayer is required in order to credit the proceeds of the sale to any outstanding tax liability of the taxpayer, including the one with respect to which the levy was made. Treas. Reg. 301.6343-3(d)(2). Accordingly, unless the taxpayers request in writing that we keep the proceeds and apply them to their outstanding liabilities, the entire \$ received from the sale must be returned.

Section 7433 creates an action in federal district court for damages caused by an IRS employee's or officer's negligent, or reckless or intentional, disregard of a code or regulatory provision in connection with the collection of the taxpayer's tax liability. However, in order to prevail under section 7433, the taxpayer must show that the employee's or officer's actions were negligent, or reckless or intentional. The revenue officer's unlawful actions in this case certainly were not reckless or intentional. In addition, there is little to suggest that she was negligent; she sought advice before she seized the taxpayers' real property. In addition, the taxpayers would have to prove economic damages, and any award would be reduced by the amount that they could have mitigated their damages.

When seized property is sold by the IRS, the provisions of section 6335 must be followed. These provisions include the requirements that proper notice be given to the owner, that proper notice be given to the public, that the sale take place not less than 10 days nor more than 40 days from the time public notice was given, that certain rules are followed regarding setting a minimum price for the property, and that the sale be conducted by public auction or public sale under sealed bids. I.R.C. §§ 6335(a) – (e). If it would be in the best interest of the United States or the taxpayer to adjourn the sale, it may be adjourned as long as a new date of sale is set within one month of the date of the original notice of sale. Treas. Reg. 301.6335-1(c)(2). In the case of real property sold as provided in section 6335, a deed to the real property shall be executed to the purchaser as long as the property is not redeemed by the taxpayers or any other persons having an interest in the property within 180 days after the sale of the property. I.R.C. § 6338(b). Since the IRS only has the authority to redeem property when a sale has been conducted to satisfy a lien on the property prior to the federal tax lien, the IRS cannot redeem the property in this case. See I.R.C. § 7425(d). If the proceedings of the sale are substantially in accordance with the provisions of law, the executed "deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto." I.R.C. § 6339(b)(2).

All requirements set forth in section 6335 pertaining to the sale were followed in this case, as the taxpayers were given the proper notice of the sale, proper public notice was given, a minimum price was properly set, the sale was made to the highest bidder at auction, and the sale occurred within one month of the original notice of sale, on

which date no bidders appeared. Accordingly, any challenge to the validity of the sale by either the taxpayers or the purchaser likely would be unsuccessful since the sale proceeded in accordance with all provisions of the law and the Code provides other specific remedies for the revenue officers unlawful levy under sections 6343(d) and 7433. Provided neither the taxpayers nor any other party redeems the property prior to _____, the taxpayers' interest in the property will be properly conveyed to the purchaser of the property upon issuance of a deed.

Issue 2

If the taxpayers request that the proceeds be applied to their outstanding liabilities, there will be approximately \$ _____ in excess proceeds remaining. The federal tax lien attaches to all property and rights to property held by the taxpayer. I.R.C. § 6321. Pursuant to United States v. Craft, the federal tax lien even attaches to a taxpayer's interest in property held as a tenancy by the entireties. Craft, 535 U.S. 274 (2002). However, this rule does not apply to other creditors, such as _____.

In Florida, entireties property cannot be reached to satisfy a debt of only one spouse. Beal Bank, SSB v. Almand and Associates, 780 So.2d 45 (Fla. 2001); Winters v. Parks, 91 So.2d 649, 651 (Fla. 1956). It is also well established that the proceeds from the sale or rental of tenancy by the entireties property are also held as a tenancy by the entireties and are owned by both the husband and wife. Dodson v. National Title Ins. Co., 31 So.2d 402, 404 (Fla. 1947); Passalino v. Protective Group Securities, Inc., 886 So.2d 295,297 (Fla. Dist. Ct. App. 2004); Miller v. Rosenthal, 510 So.2d 1127, 1128 (Fla. Dist. Ct. App. 1987); Brown v. Hanger, 368 So.2d 63, 64 (Fla. Dist. Ct. App. 1979). Moreover, transferring the proceeds to a trustee in an escrow account does not terminate the unities of title. Passalino, 886 So.2d at 297; see also Snyder v. Dinardo, 700 So.2d 726 (Fla. Dist. Ct. App. 1997). Similarly, the proceeds from sale of the real property in this case remain tenancy by the entireties property and belong to both the taxpayers. Accordingly, since _____ only has a judgment lien against the taxpayer husband, _____'s lien does not attach to any of the excess proceeds from the sale of the taxpayers' property. Thus, the entire amount of excess proceeds should be returned to the taxpayers.

We are enclosing a letter to the taxpayers for your use which requests that they inform the Service of whether they want the proceeds returned to them or whether they give permission for the proceeds to be applied to the liabilities at issue. They are requested to inform the Service of their decision by _____, since the regulations require the money to be returned within 9 months from the date of levy. Treas. Reg. 301.6343-3(e). If no response is received, the proceeds should be returned to the taxpayers in accordance with the regulations cited above. We have also enclosed a proposed letter which the taxpayers may use to make the request by simply signing and mailing back to your office. Please enclose this letter, along with a pre-addressed envelope, with your letter to the taxpayers.

Please call

if you have any further questions.

ROBERT W. DILLARD
Associate Area Counsel
(Small Business/Self-Employed)

By: _____
Lauren B. Epstein
Senior Attorney (Jacksonville, Group 2)
(Small Business/Self-Employed)

Attachment (2):
Proposed letters for mailing to taxpayers

Cc: Advisory Unit,