

The Role of Hardship in IRS Collection Cases

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Nina E. Olson, Esq.

Nina E. Olson is the Executive Director of the Center for Taxpayer Rights. From March 2001 to July 2019, Nina served as the National Taxpayer Advocate of the United States, an independent organization within the Internal Revenue Service, dedicated to assisting taxpayers resolve their problems with the IRS and making administrative and legislative recommendations to mitigate those problems systemically. She has submitted 39 annual reports to Congress, and testified before congressional committees over 60 times. Before serving as the National Taxpayer Advocate, Nina founded and directed The Community Tax Law Project, the first independent Low Income Taxpayer Clinic in the US. She also maintained a private legal practice, representing taxpayers in disputes with the IRS.



Nina has received many awards and recognitions, including the American Bar Association Section of Taxation's Distinguished Service Award for Lifetime Service, Pro Bono Award, and Jules Ritholz Memorial Merit Award for Outstanding Dedication, Achievement, and Integrity in the Field of Civil and Criminal Tax Controversies; the Tax Foundation's Public Sector Distinguished Service Award; and Pro Bono Awards from the Virginia State Bar, the Virginia Bar Association, and the City of Richmond Bar Association. In 2016 she was recognized by Tax Analysts as one of the Top 10 Outstanding Women in Tax (internationally).

Nina received her LLM in Taxation from Georgetown University Law Center, her JD from North Carolina Central University School of Law, and her AB (in fine arts) from Bryn Mawr College.

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Eric L. Green, Esq.

- The focus of Attorney Eric L. Green's practice is civil and criminal taxpayer representation before the Department of Justice Tax Division, Internal Revenue Service and state Departments of Revenue Services. He is a frequent lecturer on tax topics for many national organizations, including Insightful Accountant, CCH, the NAEA, the NATP, the ABA Tax Section and the Connecticut Society of CPAs. Attorney Green has served as adjunct faculty at the University of Connecticut School of Law. He was the author and lecturer of the CCH IRS Representation Certificate Program, and has served as a columnist for CCH's Journal of Practice & Procedure. He is the founder of Tax Rep LLC which coaches accountants and attorneys on building their own IRS Representation practices, and is the host of the weekly Tax Rep Network Podcast.
- Mr. Green is the author of The Accountant's Guide to IRS Collection, The Accountant's Guide to Resolving Tax Debts and The Accountant's Guide to Resolving Payroll Tax Debts. He is a contributing author for Advocating for Low Income Taxpayers: A Clinical Studies Casebook, 3rd Edition, and has also been quoted in USA Today, Consumer Reports, The Wall Street Journal's Market Watch, TheStreet.com and The Wall Street Journal.
- Attorney Green received his Bachelor of Business Administration degree in Accounting with a minor in International Business from Hofstra University and is an honors graduate from New England School of Law. He earned a Masters of Laws in Taxation (LL.M.) from Boston University School of Law.



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Agenda

- Overview of Collection
- IR 2020-248 – the IRS approach
- What is “uncollectible status”?
- The definition of hardship
- Impact on Offers-in-Compromise
- Refund offset issues
- Strategies for the practitioner

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Threat to Levy



Notice CPS04
 Tax year 2005
 Notice date March 2, 2009
 Social Security number [REDACTED]
 To contact us Phone [REDACTED]
 Call center number [REDACTED]
 Page 1 of 4

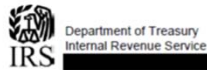


Notice of intent to levy
Intent to seize your property or rights to property
Amount due immediately: \$3,999.86

As we notified you before, our records show you have unpaid taxes for the tax year ending December 31, 2005 (Form 1040). If you don't call us immediately or pay the amount due by March 12, 2009, we may seize ("levy") any state tax refund to which you're entitled and apply it to the \$3,999.86 you owe. If you still have an outstanding balance after we seize any state tax refund, we may take possession of your other property or your rights to property.

Billing summary	
Amount you owed	\$2,902.68
Failure-to-pay penalty	284.26
Interest charges	812.92
Amount due immediately	\$3,999.86

Letter 11



Notice LT11
 Notice date March 2, 2009
 Taxpayer ID number [REDACTED]
 To contact us [REDACTED]
 Your caller ID [REDACTED]
 Page 1 of 5

Notice of intent to levy
Intent to seize your property or rights to property
Amount due immediately: \$ [REDACTED]

We haven't received a payment despite sending you several notices about your overdue taxes. The IRS may seize (levy) your property or your rights to property on or after April 1, 2009. Property includes:

Billing Summary	
Amount you owed	[REDACTED]
Additional penalty charges	[REDACTED]
Additional interest charges	[REDACTED]

Ways to Resolve Outstanding Debt

Installment Agreement

Uncollectable

Offer-in-compromise

Bankruptcy

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IR 2020-248

- The IRS understands that many taxpayers face challenges, and we're working hard to help people facing issues paying their tax bills," said IRS Commissioner Chuck Rettig. "Following up on our People First Initiative earlier this year, this next phase of our efforts will help with further taxpayer relief efforts."
- "We want people to know our IRS employees are committed to continue helping taxpayers wherever possible, including offering many options for those struggling to pay their tax bills," said Darren Guillot



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Helps Taxpayers who can Actually Pay

- Revises COVID-related collection procedures
- Intended to be helpful to taxpayers (especially those who have a record of filing their returns and paying their taxes on time)
- Short Term Payment Plan: up to 180 days to resolve (instead of 120 days)
- Flexibility for some taxpayers who are temporarily unable to meet the payment terms of an accepted Offer in Compromise
- 2019 Balance will be automatically rolled into the existing IA
- New “streamlined IA” of \$250,000 over the CSED

Strategy with IR 2020-248

Combine:

- Short Term of 180 days
- FTA
- Streamlined of \$250,000 over CSED

What is Hardship?

- A hardship exists if a taxpayer is unable to pay reasonable basic living expenses.
- These cases involve no income or assets, no equity in assets and insufficient income to make a payment without causing a hardship.
- The basis of a hardship determination is from information about the taxpayer provided on form 433A or 433B.
- For more information about economic hardship and reasonable basic living expenses, see <https://taxpayeradvocate.irs.gov/news/nta-blog-the-irs-is-not-doing-enough-to-protect-taxpayers-facing-economic-hardship>

How To Prove Hardship

- You will have to prove tax hardship to the IRS by submitting Form 433-A or 433-B.
- If the IRS determines that the taxpayer is unable to tap equity and has no available income after paying necessary, allowable expenses, they may deem the taxpayer to be uncollectible

433-A
Collection Information Statement for Wage Earners and Self-Employed Individuals

OMB No. 1545-0047
 Department of the Treasury
 Internal Revenue Service

Section 1 - Personal Information
 1a Full name of taxpayer and spouse if applicable
 1b Address (Street, City, State, ZIP code) (County or Municipality)
 1c Home Telephone Number
 1d Social Security Number
 1e Date of birth (month/day/year)
 1f Name, Age, and Relationship of Reporting Person
 1g Spouse's Social Security Number
 1h Spouse's Date of Birth (month/day/year)
 1i Spouse's Name, Age, and Relationship of Reporting Person
 1j Spouse's Social Security Number
 1k Spouse's Date of Birth (month/day/year)

Section 2 - Employment Information for Wage Earners
 2a Employer's Name
 2b Employer's Address (Street, City, State, and ZIP code)
 2c Date you were hired (month/day/year)
 2d Occupation
 2e How long with this employer (month/year)
 2f Annual gross pay (before taxes) (month/year)
 2g Number of weekly pay periods (month/year)
 2h Weekly pay (month/year)
 2i Number of hours worked (month/year)
 2j Hourly pay (month/year)
 2k Other income (month/year)
 2l Other income (month/year)

Section 3 - Other Financial Information (Attach copies of applicable documentation)
 3a All pay for a period of 12 months ending on the following date (month/year)
 3b Assets (Real estate, stocks, bonds, etc.)
 3c Liabilities (Mortgage, car loan, credit cards, etc.)
 3d In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)
 3e In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)
 3f In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)
 3g In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)
 3h In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)
 3i In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)
 3j In the past 12 months, have you been outside of the U.S. for 30 days or longer? (month/year)

Form 433-A (Rev. 2-2016)

Currently Not Collectable (CNC)

What is "CNC" status?

- CNC status allows people in financial hardship situations to defer paying their tax bill until their situation improves.

How is CNC status determined?

- For a taxpayer to qualify for CNC, they must demonstrate a financial hardship. After paying for the cost of living expenses there will be little to no room to pay off an outstanding tax debt.
- For more information on IRS use of "allowable living expenses" see National Taxpayer Advocate 2018 Annual Report to Congress, [A Study of the IRS's use of the Allowable Living Expense Standards](#).

Financial Guidelines

Expense	Actual or Allowable
Food, Clothing and Misc	National Standard
Housing and Utilities	Lesser of Actual or Local Standard
Automobile - Ownership	Lesser of Actual or National Standard
Automobile - Operating	Local Standard
Public Transportation	National Standard
Health Insurance	Actual
Out of Pocket Health Care Costs	Higher of Actual or National Standard
Court Ordered Payments	Actual
Child/Dependent care expenses	Actual (must be necessary)
Life Insurance	Actual (must be reasonable)
Current Year Taxes	FIT, FICA or SE, SIT, Local
Secured Debts	Actual
Delinquent State Taxes	Percentage of State v. Federal Debt

Benefits of CNC Status

- 10-year CSED continues to run (check the transcripts)
- No levy action
- NFTL may still be filed (Eric vs Fred)

Need for Compliance

- What is tax compliance?
- The role of compliance
- Usual order of battle: compliance then collection alternative proposal
- Lets discuss Vinatieri vs. Commissioner (133 T.C. No. 16, 12/21/2009), including role of raising economic hardship in Collection Due Process hearings. (see IRC 6320 and 6330)

Vinatieri v. Commissioner

- IRS issued final Notice of Intent to Levy
- TP timely requested a hearing under sec. 6330, I.R.C.
- TP submitted to the settlement officer Form 433-A
- The settlement officer stated in her log that TP meets the criteria to have her account reported as currently not collectible because of hardship
- However, R's Appeals Office issued a notice of determination to proceed with levy, stating that P was not entitled to collection alternatives because she had not filed her 2005 and 2007 Federal income tax returns (not in compliance)

Vinatieri v. Commissioner

- TP timely petitioned the tax court, and IRS filed a motion for summary judgment
- Court held for the TP, noting the Secretary must release a levy upon all, or part of, a taxpayer's property or rights to property if its determined that the levy is creating an economic hardship due to the financial condition of the taxpayer. IRC Sec. 6343(a)(1)(D)
- The regulations provide that a levy is creating an economic hardship due to the financial condition of an individual taxpayer and must be released "if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." Sec. 301.6343-1(b)(4),

Vinatieri v. Commissioner

Impact:

- May want to reverse the order of battle – file the 433 first if the TP is CNC
- Then clean up compliance issues
- **Don't forget CNC's impact for innocent spouse claims!**
- **Don't forget opportunity for successful Offer-in-Compromise after obtaining CNC status for your client!**
- For more information about OICs, see NTA 2017 Annual Report to Congress, [A Study of the IRS Offer in Compromise Program](#), and NTA 2018 Annual Report to Congress, [A Study of the IRS Offer in Compromise Program for Business Taxpayers](#).

Innocent Spouse: Factors for Equitable Relief

- Marital status.
- **Economic hardship.**
- Knowledge or reason to know.
- Non-requesting spouse's legal obligation.
- Significant benefit.
- Compliance with income tax laws.
- Abuse
- Physical/mental health
- Financial dominance

Form 8857 (Rev. 1-2016) Page 5

Note: If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

Part IV Tell us about your current financial situation (Continued)

22 How many people are currently in your household, including yourself? Adults _____ Children _____

23 Tell us your current average monthly income and expenses for your entire household.

Monthly income — If family or friends are helping to support you, include the amount of support as gifts below. Amount _____

Gifts	Amount
Wages (Gross pay)	
Pensions	
Unemployment	
Social security	
Government assistance, such as housing, food stamps, grants	
Alimony	
Child support	
Self-employment business income	
Rental income	
Interest and dividends	
Other income, such as disability payments, gambling winnings, etc. List each type below:	
Type _____	
Type _____	
Total Monthly Income	
Amount	
Monthly Expenses — Enter all expenses, including expenses paid with income from gifts. Amount _____	
Food and Personal Care:	
Food	
Housekeeping supplies	
Clothing and clothing services	
Personal care products and services	
Transportation:	
Auto loan/lease payment, gas, insurance, licenses, parking, maintenance, etc.	
Public transportation	
Housing and Utilities:	
Rent or mortgage	
Real estate taxes and insurance	
Electric, oil, gas, water, trash, etc.	
Telephone and cell phone	
Cable and Internet	
Medical:	
Health insurance premiums	
Out-of-pocket expenses	

Form 8857

- Often practitioners blow through or skip over
- This is an opportunity
- Similar planning that you would do for an Offer-in-Compromise
 - ~ Missing Expenses otherwise allowed

Innocent Spouse Administrative Record

- IRC 6015(e) provides that taxpayers may petition the Tax Court for review of an IRS determination of relief from joint and several liability under 6015(b) [aka traditional IS relief]; 6015(c) [aka relief for separated taxpayers]; or 6015(f) [aka equitable relief].
- Taxpayer First Act section 1203 added IRC 6015(e)(7), which provides that Tax Court review of any such determination shall be “de novo” (anew) but “shall be based upon –
 - (A) the administrative record established at the time of the determination, and
 - (B) any additional newly discovered or previously unavailable evidence.”

CNC vs Offer-in-Compromise

CNC client may not be an Offer client. Why?

- Equity in assets
- CNC – cannot pay now
- Offer – the amount to settle

Differences between CNC and OIC

- Equity in assets counted for an OIC
- Equity in assets won't be considered available if cannot tap for CNC (strategy: online three rejection letters from lenders)
- Equity in cars counted for OIC (less \$3,450 thank you Eric and Fred)
- Equity in cars (other than classic or collectors) not included on CNC
- Older vehicle additional expense of \$200 a month allowed only in OIC and not CNC (8 years or \$100,000 miles – IRM 5.8.5.22.3 (6))

OIC – No Relief for Hurting Taxpayers

- IRS generally uses current income
- If however, the drop in income is viewed as temporary, IRS will usually look at the last three years of returns
- So for businesses that are hurting now or for folks who have lost jobs, an Offer may not work because the loss is temporary
- IRS will create income based on averages
- Often forget to factor in the taxes...

Add'l OIC Considerations

- IRS generally will retain any payments made with offer (\$205 user fee, plus lump sum offer 20% payment or periodic payments) unless such payments are designated as "deposits".
- IRS will return any offer (but retain any payments) where the taxpayer has not remained in filing and payment compliance during the processing of the offer.
- "Returned" offers do not afford the taxpayer any appeal rights.
- "Rejected" offers allow an administrative appeal within 30 days of date of rejection.

Refund Offset Issues

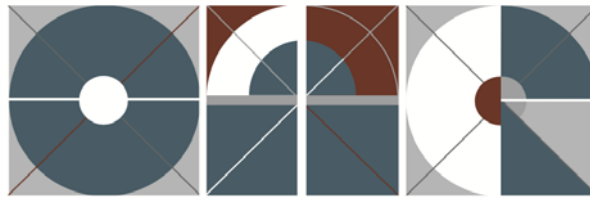
- IRC sec. 6402(a) provides the Secretary “may credit the amount of [a person’s] overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment.”
- The 6402(a) refund offset is *discretionary*.
- Refund offsets for past due child support, student loans, unemployment compensation or state taxes are *mandatory*.
- The IRS will offset any refund, including interest, *for tax periods extending through the calendar year in which the IRS accepts an offer-in-compromise*.

Refund Offset Bypass (OBR)

- A taxpayer can request a “bypass” of a refund offset for a past tax debt either from the IRS directly or through the Taxpayer Advocate Service (TAS).
- The taxpayer must show he/she is experiencing a financial hardship.
- “Hardship for purposes of an OBR is an economic hardship within the meaning of IRC 6343, and the corresponding Treasury regulations (i.e., unable to pay basic living expenses. Handle each OBR on a case-by-case basis. There is no exclusive list of expenses which would qualify a taxpayer for an OBR.” IRM 21.4.6.5.11.1

About the Center for Taxpayer Rights

The Center for Taxpayer Rights is a nonprofit organization dedicated to furthering taxpayer's awareness of and access to taxpayer rights. We accomplish our mission, in part, by educating the public and government officials about the role taxpayer rights plays in promoting compliance and trust in systems of taxation.



CENTER FOR TAXPAYER RIGHTS

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Donate

Support the Center for Taxpayer Rights

Please help us continue our work promoting taxpayer rights. Your tax-deductible contribution will enable us to:

- continue convening the International Conference on Taxpayer Rights,
- increase access to representation of low income taxpayers through the work of the Low Income Taxpayer Clinic Support Center, and
- promote the work of Taxpayer Advocates and Ombudsman throughout the world.

We can't do this work without your help!

<https://taxpayer-rights.org/>

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Questions



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133 T.C. No. 16

UNITED STATES TAX COURT

KATHLEEN A. VINATIERI, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 15895-08L.

Filed December 21, 2009.

R issued P a notice of intent to levy to collect P's unpaid Federal income taxes for 2002. P timely requested a hearing under sec. 6330, I.R.C.

P submitted to the settlement officer Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, indicating she had monthly income of \$800 and expenses of \$800, had \$14 cash on hand, and owned a 1996 Toyota Corolla four-door sedan with 243,000 miles and a value of \$300. If P's wages are levied on she will be unable to pay her reasonable basic living expenses. If her car is levied on, she will be unable to work.

The settlement officer stated in her log that P meets the criteria to have her account reported as currently not collectible because of hardship in accordance with the Internal Revenue Manual (IRM). However, R's Appeals Office issued a notice of determination to proceed with levy, stating that P was

not entitled to collection alternatives because she had not filed her 2005 and 2007 Federal income tax returns. P timely petitioned for review of that determination under sec. 6330(d), I.R.C. R filed a motion for summary judgment. P, proceeding pro se, did not file a cross-motion for summary judgment.

Under regulations prescribed by the Secretary, the Secretary must release a levy upon all, or part of, a taxpayer's property or rights to property if, inter alia, the Secretary has determined that the levy is creating an economic hardship due to the financial condition of the taxpayer. Sec. 6343(a)(1)(D), I.R.C. The regulations provide that a levy is creating an economic hardship due to the financial condition of an individual taxpayer and must be released "if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." Sec. 301.6343-1(b)(4), Proced. & Admin. Regs.

1. Held: Sec. 6343(a)(1)(D), I.R.C., and sec. 301.6343-1(b)(4), Proced. & Admin. Regs., require release of a levy that creates an economic hardship regardless of the taxpayer's noncompliance with filing required returns.

2. Held, further, a levy on P's wages or car would cause P to be unable to pay her reasonable basic living expenses, creating an economic hardship that would require release of the levy pursuant to sec. 6343(a)(1)(D), I.R.C., and sec. 301.6343-1(b)(4), Proced. & Admin. Regs.

3. Held, further, R's motion for summary judgment is denied because R's determination to proceed with the levy was wrong as a matter of law and, therefore, was an abuse of discretion.

Kathleen A. Vinatieri, pro se.

Martha J. Weber, for respondent.

OPINION

DAWSON, Judge: This matter is before the Court on respondent's motion for summary judgment filed pursuant to Rule 121.¹ Petitioner timely filed a petition pursuant to section 6330(d) appealing respondent's determination to proceed with collection by levy of petitioner's 2002 income tax liability. The issue to be decided is whether respondent's determination was an abuse of discretion.

Background

Petitioner resided in Tennessee when she filed the petition. Her residence is an apartment that she rents for \$600 per month.

On September 13, 2007, respondent sent petitioner a Final Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice). The underlying tax liability was attributable to unpaid self-assessed tax reported on her 2002 return. Petitioner timely requested a hearing on September 24, 2007, and the hearing was conducted through correspondence and by telephone with the settlement officer.

Petitioner first learned of the collection activity when her employer notified her about the proposed levy on her wages. When the settlement officer asked petitioner whether she wanted to

¹All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code.

enter into an installment agreement, petitioner said "she has nothing."² Petitioner told the settlement officer that she has pulmonary fibrosis and is dying. Because of her health she can only find part-time employment.

The settlement officer could not find a record that petitioner had filed a return for 2005. Petitioner explained to the settlement officer that the payroll company responsible for completing her 2005 Form W-2, Wage and Tax Statement, was no longer in business. She had attempted to get the tax information from the Internal Revenue Service (IRS), but the IRS had no information regarding her income for 2005.

The settlement officer told petitioner that she might be able to have her account placed in currently not collectible status. The settlement officer asked petitioner to submit a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and a diagnosis regarding her current health condition.

Petitioner sent a completed Form 433-A, indicating she had monthly income of \$800 and expenses of \$800, had \$14 cash on hand, and owned a 1996 Toyota Corolla four-door sedan with 243,000 miles and a value of \$300. The Form 433-A reported that

²Petitioner explained to the settlement officer that she had previously agreed to pay in installments and that she was told she would be sent envelopes for each payment, but she never received the envelopes or monthly bills.

petitioner did not own any other assets. Verification received by the settlement officer was consistent with the information petitioner provided in the Form 433-A. Petitioner was unable to obtain a written diagnosis of her medical condition from her physician because her physician would provide a diagnosis only in a claim for worker's compensation.

The settlement officer's log entry dated May 15, 2008, states:

TP [petitioner] meets the criteria to have account placed in CNC [currently not collectible] status per IRM 5.16.[1.]2.9 Hardship. The balance due is less than 10K and the TP has stated she has a terminal illness. CIS verification is not required. The TP has stated she has nothing and is not able to full pay or make payments. However, the TP is not in compliance. The TP has not filed a 2005 return and there is no record of the 2007 tax return being filed. The TP stated she does not have income information for 2005 and company that did payroll is no longer in business. TP stated she contacted IRS and they advised her they have no income information. There is no information per IRTRL. S/O [the settlement officer] contacted TP regarding filing of the 2007 return. The TP stated the return was filed late. The S/O requested the TP fax a copy of the return with the W-2. TP to fax information by 5-19-08. S/O asked TP if she obtained health diagnosis and the TP stated the doctor would only give her something if she is applying for disability. S/O requested income information for 2005 per IRPTRE.

The settlement officer's log entry dated May 20, 2008, states:

TP did not provide a copy of 2007 return and there is no record that the return has been filed per IDRS research. The TP was employed in 2007 and is currently employed. The 2005 return has not been filed. Since the TP is not in compliance, collection alternative cannot be considered. S/O will issue determination

letter. If the 2005 income information is received, the S/O will forward it to the TP.

Respondent issued petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination) dated June 2, 2008, sustaining the proposed levy action and stating that, because petitioner was not in compliance with filing the required tax returns, a collection alternative could not be considered. The notice of determination was reviewed and signed by the Appeals team manager. The attachment to the notice of determination stated:

The settlement officer inquired about a collection alternative and you stated you could not make payments. You stated you had pulmonary fibrosis and can only work part-time hours due to your health condition. The Settlement officer [who] advised you of the collection alternative however explained a collection alternative could not be considered because you were not in compliance with filing required tax returns. * * *

The attachment explained the balancing of efficient tax collection with concern regarding intrusiveness as follows:

Appeals has verified, or received verification, that applicable laws and administrative procedures have been met; has considered the issues raised; and has balanced the proposed collection with the legitimate concern that such action be no more intrusive than necessary by IRC Section 6330(c)(3).

Collection alternatives include full payment, installment agreement, offer in compromise and currently-not-collectible. However, since unfiled tax returns exist, the only alternative at present is to take enforced action by levying your assets. It is Appeals decision that the proposed levy action is appropriate. The proposed levy action balances the need for the efficient collection of the taxes with the

legitimate concern that any collection action be no more intrusive than necessary.

Neither the notice of determination nor the attachment reflect any consideration of the fact that the levy would create an economic hardship as stated by the settlement officer in her daily log and supported by the Form 433-A petitioner submitted.

Petitioner timely filed a petition in this Court challenging respondent's determination. Respondent filed the motion for summary judgment, and the Court ordered petitioner to file a response.³ Petitioner filed a response to respondent's motion for summary judgment but did not file a cross-motion for summary judgment.⁴ In her response petitioner describes her situation as follows:

³In the order we observed that our preliminary review of the record indicated that the proposed levy action involved a hardship situation and that petitioner needed the assistance of an attorney. We urged petitioner to contact the legal aid society or the local bar association pro bono services and provided their addresses and phone numbers.

⁴After petitioner filed her response to respondent's motion for summary judgment, respondent filed a motion to continue the case wherein respondent stated that petitioner was in the process of submitting a collection alternative to the IRS and that, if the alternative is accepted by the IRS, a trial in this case would not be necessary. The Court granted respondent's motion and directed the parties to file a status report on or before July 27, 2009. In a status report filed on July 17, 2009, respondent reported that respondent has not received any communication from petitioner and requested the Court to grant respondent's motion for summary judgment.

To Whom It May Concern,

I don't know what you want to know cause I don't understand all the legal stuff you sent me. I can't afford a lawyer. And the closest legal aid is in Knoxville 30 miles away. My poor car will not go that far. So I will start at the beginning of my story and see if you can help me.

I was in an unhealthy relationship for many years. During a great deal of that time my husband was doing alcohol and drugs. I had 2 children plus his 3 to take care of. I had been doing janitorial work at a strip mall * * *. It was the only place that I could work that I could take my [then] 3 year old daughter with me. I could not support my family and pay day care. * * * My husband took care of bills and such cause he demanded that I turn over my money. We even got a divorce during that time cause I was not obeying him. * * *

Now I am not looking for sympathy just understanding. Do you know how hard it is to be a single parent? * * * I have a high school education and nothing else.

It was nearly five years before I was notified of a problem by the I.R.S. Danny [petitioner's former spouse] was suppose to be doing taxes. He even made me sign a form that because he made more money he could claim my kids on his taxes cause we were no longer legally married.

I got all the W-2's from the I.R.S. except 2005 that they still have not sent me. That is why they are not done. I did all those taxes and forfeited the refunds. I do not remember what that total came to. But it was enough to pay I would say most of back taxes. The 2007 taxes were late and I don't know why they didn't arrive. I sent a second copy in as soon as my son gave me my copy. He had my copy for college financial aid and he lost them for a bit of time.

I am not a rich person. I work in a job so I can be home with my daughter. I left my husband in July after he threatened to beat my daughter with a baseball bat. Beating me is one thing but I could not have him beating my girl. So I am a single parent again. Right

now we have not had much work in nearly a year. I have rent of 600 a mo. Utilities of 150 and get food stamps or I wouldn't eat. I make about 700-800 [per] month. There are no better jobs in our town. My daughter is only 11 so its not like I can leave her alone at night or on weekends. D.H.S. says it's not even legal. She is too young. There is no child care and I have no family here. I have pulmonary fibrosis that makes me sick all the time and the diagnosis says I have about 10 yrs to live. Right now I can work thank God.

I did my taxes this year [for 2008] and you are getting a little over \$4,700. I'm not asking for much just a break. You can have my tax returns [refunds ?] I don't care. Well I do that is a tremendous loss but oh well. I don't have any money to send you on a monthly basis. Can we stop all the penalties. They are killing me. I will never be able to pay it off. * * * I let a relationship screw me up. I am truly sorry for that and am begging for a lifeline here. You can come to my home and see for yourself. I don't have fancy t.v.'s or even cable except for internet. I can't afford a phone. My clothes have holes in them. I even cut my own hair. If I could pay this off faster I would just to stop the nightmares it gives me.

Discussion

A. Summary Judgment

Summary judgment is used to expedite litigation and avoid unnecessary and expensive trials. The Court will render a decision on a motion for summary judgment if the pleadings, answers to interrogatories, depositions, admissions, and other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. Rule 121(b). Because the effect of granting a motion for summary judgment is to decide the case against a party without allowing that party an

opportunity for a trial, the Court should grant the motion only after a careful consideration of the case. Associated Press v. United States, 326 U.S. 1, 6 (1945); Kroh v. Commissioner, 98 T.C. 383, 390 (1992).

For purposes of respondent's motion for summary judgment, respondent has the burden of showing the absence of a genuine issue as to any material fact. Petitioner is afforded the benefit of all reasonable doubt, and the material submitted by both sides is viewed in the light most favorable to petitioner. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Kroh v. Commissioner, supra at 390.

Respondent moves the Court for summary judgment on the ground that the settlement officer did not abuse her discretion in rejecting collection alternatives and determining to proceed with levy because petitioner was not in compliance with the filing requirements. Petitioner asks that the levy not be sustained because, if her wages are taken, she will be unable to pay her basic living expenses; and, if her car is taken, she will not be able to work.

B. Collection of Federal Taxes by Levy

If a taxpayer liable for Federal taxes fails to pay the taxes within 10 days after notice and demand, section 6331 authorizes the Secretary to collect the tax by levy upon all property and rights to property (except any property that is

exempt under section 6334) belonging to the taxpayer or on which there is a lien for the payment of the tax.

Section 6343(a)(1) provides that, under regulations prescribed by the Secretary, if the Secretary has determined that the levy is creating an economic hardship due to the financial condition of the taxpayer, the Secretary must release a levy upon all, or part of, a taxpayer's property or rights to property.⁵ Sec. 6343(a)(1)(D). The regulations provide that a levy is creating an economic hardship due to the financial condition of an individual taxpayer and must be released "if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." Sec. 301.6343-1(b)(4), *Proced. & Admin. Regs.*

A taxpayer alleging that collection of the liability would create undue hardship must submit complete and current financial data to enable the Commissioner to evaluate the taxpayer's qualification for collection alternatives or other relief.

⁵The regulations provide a method whereby a taxpayer may inform the Secretary that a levy is creating an economic hardship and request that the levy be released. See sec. 301.6343-1(c), *Proced. & Admin. Regs.* "A taxpayer who wishes to obtain a release of a levy must submit a request for release in writing or by telephone to the district director for the Internal Revenue district in which the levy was made." *Id.* However, service center directors and compliance center directors (to whom requests by taxpayers are not made) who have determined that a levy is creating an economic hardship must also release the levy and promptly notify the taxpayer of the release pursuant to sec. 301.6343-1(a), *Proced. & Admin. Regs.*

Picchiottino v. Commissioner, T.C. Memo. 2004-231. The regulations provide that, for purposes of determining the taxpayer's reasonable amount of living expenses, any information that is provided by the taxpayer is to be considered, including the following:

(A) The taxpayer's age, employment status and history, ability to earn, number of dependents, and status as a dependent of someone else;

(B) The amount reasonably necessary for food, clothing, housing * * *, medical expenses * * *, transportation, current tax payments * * *, alimony, child support, or other court-ordered payments, and expenses necessary to the taxpayer's production of income * * *;

(C) The cost of living in the geographic area in which the taxpayer resides;

(D) The amount of property exempt from levy which is available to pay the taxpayer's expenses;

(E) Any extraordinary circumstances such as special education expenses, a medical catastrophe, or natural disaster; and

(F) Any other factor that the taxpayer claims bears on economic hardship and brings to the attention of the director.

Sec. 301.6343-1(b)(4)(ii), Proced. & Admin. Regs.

C. Section 6330 Procedures

Section 6330(a) provides the general rule that no levy may be made on any property or right to property of any taxpayer unless the Secretary has provided 30 days' notice to the taxpayer of the right to an administrative hearing before the levy is carried out. If the taxpayer makes a timely request for an

administrative hearing, the hearing is conducted by the IRS Office of Appeals (Appeals Office) before an impartial officer. Sec. 6330(b)(1), (3).

The taxpayer may raise any relevant issue during the hearing, including appropriate spousal defenses and challenges to "the appropriateness of collection actions", and may make "offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise." Sec. 6330(c)(2)(A). The taxpayer also may raise challenges to the existence or amount of the underlying tax liability if he/she did not receive a notice of deficiency for that liability or did not otherwise have an opportunity to dispute it. Sec. 6330(c)(2)(B).

During the hearing the Appeals officer must verify that the requirements of applicable law and administrative procedure have been met, consider issues properly raised by the taxpayer, and consider whether any proposed collection action balances the need for the efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. Sec. 6330(c)(3). The Appeals Office then issues a notice of determination indicating whether the proposed levy may proceed.

Under section 6330(d)(1) the taxpayer may petition this Court to review the determination made by the Appeals Office.

See sec. 301.6330-1(f)(1), Proced. & Admin. Regs. Where, as in this case, the underlying tax liability is not at issue, we review the Appeals Office's determinations regarding the collection action for abuse of discretion. Goza v. Commissioner, 114 T.C. 176 (2000). An abuse of discretion occurs if the Appeals Office exercises its discretion "arbitrarily, capriciously, or without sound basis in fact or law." Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

When a taxpayer establishes in a pre-levy collection hearing under section 6330 that the proposed levy would create an economic hardship, it is unreasonable for the settlement officer to determine to proceed with the levy which section 6343(a)(1)(D) would require the IRS to immediately release. Rather than proceed with the levy, the settlement officer should consider alternatives to the levy.

Respondent argues under the holdings of Rodriguez v. Commissioner, T.C. Memo. 2003-153, and McCorkle v. Commissioner, T.C. Memo. 2003-34, that there is no abuse of discretion if a settlement officer rejects collection alternatives because the taxpayer was not in compliance with the filing requirements for all required tax returns.⁶

⁶Generally, the IRS will not grant an installment agreement, accept an offer-in-compromise, or report an account as currently not collectible if any tax return for which the taxpayer has a filing requirement has not been filed. See Internal Revenue

Generally, we have found the Commissioner's policy requiring individuals seeking collection alternatives to be current with filing their returns to be reasonable.⁷ However, taxpayers in those cases have had sufficient income to meet basic living expenses. See, e.g., Speltz v. Commissioner, 124 T.C. 165, 178 (2005) (taxpayers claimed hardship because the tax liability was disproportionate to the value that they received from initial stock offerings and because they had already been forced to change their lifestyle), affd. 454 F.3d 782 (8th Cir. 2006); Peterson v. Commissioner, T.C. Memo. 2009-46 (the Court upheld rejection of taxpayers' offer of \$20,000 to compromise \$70,000 liability where, although they had minimal income from Social Security retirement and disability payments, they had reasonable collection potential of \$68,000 from two parcels of real property valued at \$80,000); Fangonilo v. Commissioner, T.C. Memo. 2008-75 (Commissioner's refusal to treat taxpayer's tax liability as

⁶(...continued)
Manual pts. 5.14.1.4.1(4)-(6) (Sept. 26, 2008) (installment agreements); 5.8.3.13(1), (2), (4) (Sept. 23, 2008) (offers-in-compromise); 5.16.1.1(5) and (6), 5.16.1.2.9(8) (May 5, 2009) (currently not collectible), 5.1.11.2.3 (June 2, 2004) (general collection procedures).

⁷In Estate of Atkinson v. Commissioner, T.C. Memo. 2007-89, we found reasonable requirements that an entity seeking collection alternatives to full payment, including reporting an account as currently not collectible, filing any outstanding tax returns and submitting a full financial statement and verification information for analysis. Mandatory release of levy creating an economic hardship applies only to individuals. Sec. 301.6343-1(b)(4), *Proced. & Admin. Regs.*

currently not collectible was not an abuse of discretion where although taxpayer's income was not sufficient to meet his stated monthly living expenses, he had a liquid asset worth more than his tax liability); Willis v. Commissioner, T.C. Memo. 2003-302 (taxpayers' ability to make some payments toward their cumulative liability made them ineligible to have the cumulative liability classified as currently not collectible); Rodriguez v. Commissioner, T.C. Memo. 2003-153 (taxpayer had not filed returns for 12 years and did not submit all of the financial information supporting her offer-in-compromise that the settlement officer requested); Ashley v. Commissioner, T.C. Memo. 2002-286 (taxpayer had income in excess of expenses and sufficient equity in his real property to pay his tax liability in full).

We have found no cases addressing the requirement that the taxpayer be current with filing returns in a levy case involving economic hardship under section 6343(a)(1)(D) and section 301.6343-1(b)(4), *Proced. & Admin. Regs.* Neither section 6343 nor the regulations condition a release of a levy that is creating an economic hardship on the taxpayer's compliance with filing and payment requirements. The purpose of section 6330 is to "afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property." S. Rept. 105-174, at 67 (1998), 1998-3 C.B. 537, 603 (emphasis added). A determination in a hardship case to proceed

with a levy that must immediately be released is unreasonable and undermines public confidence that tax laws are being administered fairly. In a section 6330 pre-levy hearing, if the taxpayer has provided information that establishes the proposed levy will create an economic hardship, the settlement officer cannot go forward with the levy and must consider an alternative.

D. Appeals Office's Determination To Proceed With Levy of Petitioner's Assets

The financial information petitioner submitted on the Form 433-A, which was consistent with other information the settlement officer obtained, showed that if petitioner's wages are levied on, she will be unable to pay her basic living expenses; and, if her car is levied on, she will not be able to work. After analyzing petitioner's financial information, the settlement officer concluded that the levy would create an economic hardship and so stated in her log. However, the settlement officer determined collection alternatives to the levy, including an installment agreement, an offer-in-compromise, and reporting the account as currently not collectible, were not available because petitioner had not filed her 2005 and 2007 returns. The settlement officer's determination to proceed with the levy was reviewed and approved by the Appeals team manager who signed the notice of determination. Although the attachment to the notice of determination shows that the Appeals team manager was aware of petitioner's financial situation and health problems, the Appeals

team manager signed the notice of determination to proceed with the levy because petitioner had not filed her 2005 and 2007 returns. Proceeding with the levy would be unreasonable because section 6343 would require its immediate release, and the determination to do so was arbitrary. The determination to proceed with the levy was wrong as a matter of law and, therefore, was an abuse of discretion. Respondent is not entitled to summary judgment, and respondent's motion will be denied.

An order denying respondent's
motion will be issued.

26 U.S. Code § 6343. Authority to release levy and return property

U.S. Code Notes

(a) RELEASE OF LEVY AND NOTICE OF RELEASE

(1) IN GENERAL Under regulations prescribed by the Secretary, the Secretary shall release the levy upon all, or part of, the property or rights to property levied upon and shall promptly notify the person upon whom such levy was made (if any) that such levy has been released if—

(A) the liability for which such levy was made is satisfied or becomes unenforceable by reason of lapse of time,

(B) release of such levy will facilitate the collection of such liability,

(C) the taxpayer has entered into an agreement under section 6159 to satisfy such liability by means of installment payments, unless such agreement provides otherwise,

(D) the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer, or

(E) the fair market value of the property exceeds such liability and release of the levy on a part of such property could be made without hindering the collection of such liability.

For purposes of subparagraph (C), the Secretary is not required to release such levy if such release would jeopardize the secured creditor status of the Secretary.

(2) EXPEDITED DETERMINATION ON CERTAIN BUSINESS PROPERTY

In the case of any tangible personal property essential in carrying on the trade or business of the taxpayer, the Secretary shall provide for an expedited determination under paragraph (1) if levy on such tangible personal property would prevent the taxpayer from carrying on such trade or business.

(3) SUBSEQUENT LEVY

The release of levy on any property under paragraph (1) shall not prevent any subsequent levy on such property.

(b) RETURN OF PROPERTY If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return—

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 2 years from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United

States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(c) INTEREST Interest shall be allowed and paid at the overpayment rate established under section 6621

(1) in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or

(2) in a case described in subsection (b)(3), from the date of the sale of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

(d) RETURN OF PROPERTY IN CERTAIN CASES If—

(1) any property has been levied upon, and

(2) the Secretary determines that—

(A) the levy on such property was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the levy was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the return of such property will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the National Taxpayer Advocate, the return of such property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States,

the provisions of subsection (b) shall apply in the same manner as if such property had been wrongly levied upon, except that no interest shall be allowed under subsection (c).

(e) RELEASE OF LEVY UPON AGREEMENT THAT AMOUNT IS NOT COLLECTIBLE

In the case of a levy on the salary or wages payable to or received by the taxpayer, upon agreement with the taxpayer that the tax is not collectible, the Secretary shall release such levy as soon as practicable.

(f) INDIVIDUALS HELD HARMLESS ON WRONGFUL LEVY, ETC.^[1] ON RETIREMENT PLAN

(1) IN GENERAL If the Secretary determines that an individual's account or benefit under an eligible retirement plan (as defined in section 402(c)(8)(B)) has been levied upon in a case to which subsection (b) or (d)(2)(A) applies and property or an amount of money is returned to the individual—

(A) the individual may contribute such property or an amount equal to the sum of—

(i) the amount of money so returned by the Secretary, and

(ii) interest paid under subsection (c) on such amount of money,

into such eligible retirement plan if such contribution is permitted by the plan, or into an individual retirement plan (other than an endowment contract) to which a rollover contribution of a distribution from such eligible retirement plan is permitted, but only if such contribution is made not later than the due date (not including extensions) for filing the return of tax for the taxable year in which such property or amount of money is returned, and

(B) the Secretary shall, at the time such property or amount of money is returned, notify such individual that a contribution described in subparagraph (A) may be made.

(2) TREATMENT AS ROLLOVER The distribution on account of the levy and any contribution under paragraph (1) with respect to the return of such distribution shall be treated for purposes of this title as if such distribution and contribution were described in section 402(c), 402A(c)(3), 403(a)(4), 403(b)(8), 408(d)(3), 408A(d)(3), or 457(e)(16), whichever is applicable; except that—

(A) the contribution shall be treated as having been made for the taxable year in which the distribution on account of the levy occurred, and the interest paid under subsection (c) shall be treated as earnings within the plan after the contribution and shall not be included in gross income, and

(B) such contribution shall not be taken into account under section 408(d)(3)(B).

(3) REFUND, ETC., OF INCOME TAX ON LEVY

(A) In general

If any amount is includible in gross income for a taxable year by reason of a distribution on account of a levy referred to in paragraph (1) and any portion of such amount is treated as a rollover contribution under paragraph (2), any tax imposed by chapter 1 on such portion shall not be assessed, and if assessed shall be abated, and if collected shall be credited or refunded as an overpayment made on the due date for filing the return of tax for such taxable year.

(B) Exception

Subparagraph (A) shall not apply to a rollover contribution under this subsection which is made from an eligible retirement plan which is not a Roth IRA or a designated Roth account (within the meaning of section 402A) to a Roth IRA or a designated Roth account under an eligible retirement plan.

(4) INTEREST

Notwithstanding subsection (d), interest shall be allowed under subsection (c) in a case in which the Secretary makes a determination described in subsection (d)(2)(A) with respect to a levy upon an individual retirement plan.

(5) TREATMENT OF INHERITED ACCOUNTS

For purposes of paragraph (1)(A), section 408(d)(3)(C) shall be disregarded in determining whether an individual retirement plan is a plan to which a rollover contribution of a distribution from the plan levied upon is permitted.


(Aug. 16, 1954, ch. 736, 68A Stat. 789; Pub. L. 89-719, title I, § 104(i), Nov. 2, 1966, 80 Stat. 1138; Pub. L. 94-455, title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 96-167, § 4(a), Dec. 29, 1979, 93 Stat. 1275; Pub. L. 99-514, title XV, § 1511(c)(10), Oct. 22, 1986, 100 Stat. 2745; Pub. L. 100-647, title VI, § 6236(f), Nov. 10, 1988, 102 Stat. 3740; Pub. L. 104-168, title V, § 501(b), July 30, 1996, 110 Stat. 1460; Pub. L. 105-206, title I, § 1102(d)(1)(B), title III, § 3432(a), July 22, 1998, 112 Stat. 704, 759; Pub. L. 115-97, title I, § 11071(a), Dec. 22, 2017, 131 Stat. 2091; Pub. L. 115-123, div. D, title II, § 41104(a), Feb. 9, 2018, 132 Stat. 155.)

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