Department of the Treasury

Internal Revenue Service Office of Chief Counsel

Notice

CC-2011-005

November 22, 2010

Considering Economic Hardship in

Determining the Appropriateness of Upon incorporation

Subject: a Levy **Cancel Date**: into the CCDM

Purpose

In <u>Vinatieri v. Commissioner</u>, 133 T.C. No. 16 (2009), the Tax Court found that Appeals abused its discretion by upholding a proposed levy after the settlement officer concluded that the levy would create an economic hardship for the taxpayer. In light of the holding in <u>Vinatieri</u>, this Notice provides instructions regarding Tax Court Collection Due Process levy cases in which economic hardship is raised.

Background

Section 6330 requires the Service (except in the situations described in section 6330(f)) to provide written notification of its intent to levy on any property or right to property of a taxpayer at least 30 days prior to the levy and to inform the taxpayer of the right to a CDP hearing with the Office of Appeals (the section 6330 notice). In a CDP hearing, the settlement or appeals officer conducting the hearing verifies that the requirements of applicable law and administrative procedure have been met, considers issues raised by the taxpayer, including challenges to the appropriateness of collection and offers of collection alternatives, and determines whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. Section 6330(c)(3). If the taxpayer disagrees with the final notice of determination issued by Appeals, the taxpayer has, in accordance with section 6330(d)(1), 30 days to appeal the determination to the Tax Court.

In <u>Vinatieri</u>, the Service sent a section 6330 notice to the taxpayer, and the taxpayer timely requested a CDP hearing. During the CDP hearing, the taxpayer provided financial information showing that her income did not exceed her allowable monthly expenses and her only asset was a 1996 Toyota Corolla. The settlement officer determined that any levy action would prevent the taxpayer from meeting necessary living expenses. The settlement officer also determined that the taxpayer met the criteria to have her account placed in Currently Not Collectible status but that she had not filed her 2005 and 2007 income tax returns. See IRM 5.16.1.2.9(8). Appeals issued a notice of determination upholding the levy and stating, "since unfiled returns exist, the

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only alternative at present is to take enforced action by levying your assets."

The taxpayer appealed and the Tax Court ruled that upholding the levy was an abuse of discretion, observing that, pursuant to section 6343(a)(1)(D), a levy that creates an economic hardship for a taxpayer must be released. Neither section 6343(a)(1)(D) nor the underlying regulations specify that the taxpayer must be in compliance with return filing requirements to qualify for the release of the levy. Because the settlement officer determined that the taxpayer met the hardship requirements with respect to Currently Not Collectible status, the taxpayer must have similarly met the economic hardship requirements of section 6343(a)(1)(D). Treas. Reg. § 301.6343-1(b)(4)(ii). The court concluded that proceeding with the levy was unreasonable because section 6343(a)(1)(D) would have required its immediate release.

Discussion

In the <u>Vinatieri case</u>, the Tax Court correctly held that Appeals abused its discretion in determining that the Service could proceed with the levy. In a CDP hearing concerning a proposed levy, the settlement or appeals officer must determine whether the levy would be appropriate. As part of that inquiry, if the taxpayer provides adequate financial information from which it can be determined that a levy will create an economic hardship, it is not appropriate to proceed with the levy, even if the taxpayer is not compliant with return filing requirements.

The taxpayer in <u>Vinatieri</u> cooperated in providing all requested financial information, and the uncontroverted facts established that the levy would have created an economic hardship by preventing the taxpayer from meeting her necessary living expenses. Based on these facts, Appeals should have determined that it was not appropriate to collect by levy at the time of the CDP hearing.

The following steps should be taken when a taxpayer is alleging, in an appeal to the Tax Court from a notice of determination sustaining a levy action, that the levy should not proceed because it would cause economic hardship: 1) the administrative record should be reviewed to determine whether the taxpayer raised economic hardship and whether the facts support the assertion that the levy would prevent the taxpayer from meeting necessary living expenses; and 2) if a credible argument of economic hardship was raised, but the settlement or appeals officer did not address the issue, a motion should be filed requesting that the case be remanded to Appeals so that the settlement or appeals officer can consider properly whether the levy action is inappropriate because the taxpayer would suffer an economic hardship if a levy is served.

Please contact Branch 3 or 4 of Procedure and Administration at (202) 622-3600 or (202) 622-3630, respectively, if you have questions concerning these procedures.

_____/s/
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