



7/17/2018 RIA Fed. Tax Update

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Articles

District court okays IRS levy on taxpayers' principal residence

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Background levies on principal residences. If a person liable to pay any tax fails to pay said tax after receiving a demand to do so, a lien arises in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (Code Sec. 6321) IRS is authorized to collect such tax by levy upon all property and rights to property ... belonging to such person or on which there is a lien ... for the payment of such tax. (Code Sec. 6331(a))

Prior to the levy, IRS must provide to the taxpayer written notice of its intent to levy and notice of the taxpayer's right to a pre-levy Collection Due Process (CDP) hearing. (Code Sec. 6330(a)(1), Code Sec. 6331(d)(1)) At the CDP hearing, the taxpayer may raise any issue relevant to the tax liability or the proposed levy, including challenges to the appropriateness of the collection actions and to the amount of the underlying tax liability. (Code Sec. 6330(c)(2))

The taxpayer's principal residence is exempt from levy unless a judge or magistrate [judge] of a district court of the United States approves (in writing) the levy of such residence. (Code Sec. 6334(e)(1)(A)) The Government initiates the proceeding for judicial approval of levy on a principal residence by filing a petition showing that: 1) the underlying liability has not been satisfied; 2) the requirements of any applicable law or administrative procedure relevant to the levy have been met; and 3) no reasonable alternative for collection of the taxpayer's debt exists. (Reg. 301.6334-1(d)(1))

The taxpayer is then granted a hearing to rebut the Government's prima facie case regarding the levy on his principal residence if the taxpayer files an objection within the time period specified by the court raising a genuine issue of material fact demonstrating one or more elements of the Government's petition. (Reg. 301.6334-1(d)(2))

Background offers in compromise. An offer in compromise (OIC) is an offer made by the taxpayer to IRS to enter into a contract in which IRS agrees to accept an amount different from what the taxpayer owes in taxes. (Reg. 601.203) There are three grounds for such a compromise: 1) doubt as to liability; 2) doubt as to collectibility; and 3) promotion

of effective tax administration. Reg. 301.7122-1(b). Offers that are considered on the ground of promoting effective tax administration are also referred to as ETA Offers. (Internal Revenue Manual (IRM) 5.8.11.1(1))

IRS may accept an ETA Offer if the Secretary determines that, although collection in full could be achieved, collection of the full liability would cause the taxpayer economic hardship within the meaning of Reg. 301.6343-1. (Reg. 301.7122-1(b)(3)(i))

If doubt as to liability, doubt as to collectibility, and economic hardship do not constitute grounds for compromise, IRS may accept an ETA Offer where compelling public policy or equity considerations identified by the taxpayer provide a sufficient basis for compromising the liability. This ground for compromise requires that the taxpayer show exceptional circumstances. (Reg. 301.7122-1(b)(3)(ii)) Further, [n]o compromise to promote effective tax administration may be entered into if compromise of the liability would undermine compliance by taxpayers with the tax laws. (Reg. 301.7122-1(b)(3)(iii))

Background installment agreements. IRS is authorized to enter into written agreements with any taxpayer under which such taxpayer is allowed to make payment on any tax in installment payments if the [IRS] determines that such agreement will facilitate full or partial collection of such liability. (Code Sec. 6159(a))

No levy may be made to collect a tax liability that is the subject of an installment agreement during the period that a proposed installment agreement is pending with IRS, for [thirty] days immediately following the rejection of a proposed installment agreement, during the period that an installment agreement is in effect, and for [thirty] days immediately following the termination of an installment agreement. (Reg. 301.6159-1(f)(1))

A levy is not prohibited during these time periods, however, if IRS determines that the proposed installment agreement was submitted solely to delay collection. (Reg. 301.6159-1(f)(2)) According to the IRM, [t]he determination that the offer of an installment agreement is merely to delay collection must be apparent to any impartial observer, i.e., there is clearly no reality to the offer. The IRM provides the following as an example: The taxpayer offers to make a periodic, token payment such as \$1 a month. (IRM 5.11.1.4.8(4))

Facts. The taxpayers, Mr. and Mrs. Gower, purchased their current residence (the Property) in May 2013 for \$242,290, using all the proceeds from the sale of their former residence in Tampa, Florida (\$223,152). At the time of the purchase, the Gowers had outstanding tax liabilities for tax years 2008-2011.

At issue in this case were the Gowers' unpaid federal income tax liabilities for the 2008 through 2013 tax years, which totaled \$153,235.

Beginning in 2008, both taxpayers lost their primary source of work income, and from then through the date of trial, they did not have much income.

The Gowers never made an OIC, but they did request installment agreements when they filed some of the tax returns at issue. When they filed their 2008 tax return, they requested an installment agreement of \$1 per month, and with the 2009 through 2011 tax returns they requested \$20 per month. They did not request an installment agreement for tax years 2012 and 2013. At the hearing, when asked whether she believed IRS would accept these requests, Mrs. Gower testified that [a]t least [she] would get some type of response, where [IRS] could contact [her] and say, [t]his is what we need to do, this is how it works.

In August, 2014, IRS Revenue Officer Williams conducted a field visit. She provided to Mrs. Gower the IRS publications that cover OICs and explained the contents of those publications to Mrs. Gower.

Shortly thereafter, the taxpayers hired Aurora Capital Solutions as their representative and authorized it to act on their behalf in all transactions with IRS. Aurora provided IRS with certain documents that IRS requested, including a Collection Information Statement (CIS), but it did not provide all requested information.

In November, 2014, IRS asked the Gowers to take the following actions: 1) cash out \$2,055 from their 401(k) and provide IRS with the proceeds; 2) obtain a loan against the remaining cash value of their life insurance policies and provide IRS with the proceeds; 3) make an estimated payment toward their 2014 taxes; and 4) try to sell the Property and provide IRS with the proceeds. The Gowers never attempted to sell the Property, no payments were made toward their 2014 taxes, and IRS never received any proceeds from any cashout of the 401(k) or loan against the cash value of the life insurance policies.

Revenue Officer Williams conducted an investigation of the Property and determined that its sale would yield \$142,833 in net proceeds. On Jan. 12, 2015, IRS sent the Gowers and Aurora a notice informing the Gowers of its intent to levy and of the Gowers' right to a CDP hearing. The Gowers did not request a CDP hearing. On March 25 and Apr. 13, 2015, IRS sent notices to the Gowers and Aurora advising the Gowers that they must pay the amount they owed to IRS to prevent collection action.

In April 2015, Revenue Officer Williams submitted to several IRS officials a seizure memorandum recommending that IRS commence a civil action seeking approval of a principal residence seizure in the Gowers' case. In the seizure memorandum, she stated that an OIC and installment agreement were considered, but the fact that there was so much equity in their homestead precludes acceptance of an OIC or installment agreement. She indicated that the information she received showed the Gowers borrowed \$20,000 from Mrs. Gower's mother. Revenue Officer Williams found that [n]o hardship will occur as a result of the principal residence seizure as it will not cause a change in [the Gowers'] income and the mother will be able to continue to assist with living expenses.

Shortly thereafter, IRS petitioned the court, pursuant to Code Sec. 6334(e)(1)(A).

At trial, Mrs. Gower's brother, Mr. Dubberly, testified that he was willing to enter into a compromise with IRS to settle the Gowers' debt. He stated that [i]f IRS wants a check, [he] can have them a cashier's check within [sixty] days for about \$40,000, and [i]f they want to go to a monthly installment, [he will] guarantee it up to \$75,000. Mr. Dubberly never contacted IRS regarding this proposed settlement and did not provide IRS with any financial information regarding the Gowers' case.

Court allows levy. The court allowed the levy. It said that IRS made a prima facie showing that the levy was appropriate under the rules of Reg. 301.6334-1(d)(1), by demonstrating that the underlying tax liabilities had not been satisfied, all legal requirements and administrative procedures pertaining to the levy were met, and there were no reasonable alternatives for collection of the Gowers' debt. And, it concluded, the Gowers failed to rebut IRS's prima facie case.

The court quickly and summarily established that the underlying tax liabilities had not been satisfied and that all legal requirements and administrative procedures pertaining to the levy were met.

...Taxpayers' arguments. The Gowers argued that reasonable alternatives for collection did exist. They pointed to Mr. Dubberly's offer to fund an OIC and the possibility of a private sale of the Property.

They also asserted that [p]rior to contacting tax counsel, [they] were unaware of the applicability of an ETA Offer to their situation, and that Aurora ... did not advise them that an [OIC] was ever an option. Therefore, the Gowers argued, their failure to secure competent representation (i.e., who would be aware of the applicability of an ETA Offer) while being investigated by the Revenue Officer should not be held against them.

The Gowers contended that Mr. Dubberly's testimony that he was willing to pay part of the Gowers' debt was a guarantee to fund an [ETA] Offer, which should be more convincing to the Court than an [ETA] Offer submission by itself. The Gowers asserted that they were eligible for an ETA Offer because the sale of [the Property] would cause them an economic hardship. They said that their home is their sole remaining asset for retirement and that they cannot afford rent. The

Gowers stated that [i]f the Court determines filing an [OIC] is necessary for a 'collection alternative' to exist, then they propose that the Court require ... [them] to file an [OIC] within thirty ... days of the Court's determination.

Alternatively, the Gowers argued that [i]f the Court is not convinced that the availability of an ETA Offer is fatal to the case of IRS, then [the Gowers] should be permitted the ability to market and sell the property at its highest and best price. According to the Gowers, the forced sale of the Property would result in proceeds less than the current encumbrances against the Property. And they said that this request for a private sale of the Property is proposed as a last resort and is primarily due to the minimal funds that the [IRS] anticipates realizing from the forced sale.

The Gowers argued that IRS did not make an actual determination regarding hardship and alternatives to collection. They said that, in concluding that an OIC was not viable, Revenue Officer Williams determined that there would be no hardship, apparently because [the Gowers] could borrow unlimited sums of money from Mrs. Gower's mother. The Gowers contended that Revenue Officer Williams erred in doing so because the factors used in determining whether collection would cause economic hardship do not reference an ability to borrow from family members.

The Gowers finally contended that IRS was statutorily barred from levy or seizure of the Property because there was a pending installment agreement on all tax years at issue, excluding 2013. And, they said that their installment agreement requests were not frivolous.

...Court's rejection of those arguments. The court said that the Gowers did not show that there were other assets from which the tax liabilities could be satisfied. The Gowers' proposed alternatives an OIC funded by Mr. Dubberly and a private sale of the Property did not constitute reasonable alternatives for collection. Mr. Dubberly's offer to pay a lump sum of \$40,000 or up to \$75,000 in monthly installments, was inadequate as these amounts were insufficient to satisfy the Gowers' \$153,235 debt, and the expected net proceeds of the forced sale of the Property (\$142,833.45) far exceeded Mr. Dubberly's offer. In any event, an OIC was never submitted, and the offers made by Mr. Dubberly were merely hypothetical. Thus, Mr. Dubberly's offer to fund an OIC did not constitute a reasonable alternative for collection.

Likewise, a private sale of the Property was not a reasonable alternative for collection. The Gowers' argument that the Petition should be denied because the forced sale of the Property would likely yield less proceeds than a private sale of the Property was not persuasive. When the Gowers sold their former residence in Tampa, they did not use any of the proceeds to pay their outstanding tax liabilities for tax years 2008 through 2011. Instead, they used the entirety of the proceeds (\$223,152) to purchase the Property. Further, IRS suggested that the Gowers sell the Property and provide IRS with the proceeds; but the Gowers never did so. This conduct evidenced a lack of genuine willingness on the Gowers' part to sell the Property to satisfy their outstanding tax liabilities. The court said that it found no support for the proposition that the Petition should be denied based on the Gowers' mere suggestion that they were willing to sell the Property. If the Gowers wished to sell the Property, a grant of the Petition would not preclude the Gowers from attempting to reach an agreement with IRS to avoid a forced sale of the Property.

As to the Gowers' argument regarding Revenue Officer Williams's conclusion that they were ineligible for an OIC, this argument was meritless because the Gowers never submitted an OIC. Given that there was no OIC for IRS to consider, IRS was not required to take into account equitable considerations such as whether levy of the Property would cause economic hardship on the Gowers when considering alternatives for collection.

Further, the court noted that such equitable considerations play no role in its determination of whether to approve a levy upon the Property. The Gowers had the opportunity to challenge the appropriateness of the levy at a CDP hearing. Despite being notified of their right to request a CDP hearing, the Gowers never requested one, and the court wrote that it is not instructed to look at hardship as a specific cause to deny the Petition. As to the Gowers' request that the Court require them to file an OIC within thirty days of the court's order, the Gowers offered no legal authority, nor could the court find any, requiring or allowing the Court to do this.

To the extent the Gowers contended they were unaware of the applicability of an ETA Offer to their situation, Revenue Officer Williams provided them with documents containing information about OICs. Moreover, the Gowers' failure to secure competent representation (i.e., who would be aware of the applicability of an ETA Offer) ... is not a basis for denying the Petition.

Finally, the pending installment agreements did not prohibit IRS from levying upon the Property. The court found that the proposed installment agreements were submitted solely to delay collection because there was clearly no reality to the Gowers' requests to make periodic, token payments of \$1 and \$20 a month. Indeed, the court said, Mrs. Gower's testimony appeared to indicate that the installment agreement requests were not a genuine offer to settle the Gowers' tax liabilities; instead, they were an attempt to get some type of response from IRS.

References: For IRS levy on taxpayer's principal residence, see FTC 2d/FIN V-5244; United States Tax Reporter 63,314.05. For offers in compromise, see FTC 2d/FIN T-9601; United States Tax Reporter 71,224.01.

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