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CHIEF COUNSEL

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MEMORANDUM FOR [REDACTED]

FROM: W. E. Williams
CC:INTL:Br1

SUBJECT: Section 6330 Appeals Conference

This Technical Assistance responds to your memorandum [REDACTED] for our views concerning the application of I.R.C. sec. 6330 to levies made for treaty partners. Technical Assistance does not relate to a specific case and is not binding on Examination or Appeals. This document is not to be cited as precedent.

Issue

Do the pre-levy notice and appeal procedures in I.R.C. sec. 6330 apply to a levy made to collect a foreign tax liability for which a treaty partner has requested collection assistance?

Conclusion

The pre-levy notice and appeal procedures in sec. 6330 apply to a levy made to collect a treaty partner's tax liability. However, the taxpayer may only raise procedural issues at the conference, i.e., questions regarding actions taken by the United States to collect the foreign tax liability (e.g., challenges as to whether the procedural requirements have been met for the Service's use of summonses, liens, and/or levies). The taxpayer may not raise substantive issues at the appeals conference, i.e., questions relating to the existence or amount of the underlying tax liability.

Background

WTA-N-113249-99

The United States has five bilateral income tax treaties that contain collection assistance articles, as follows:

Canada

Article XXVI A of the Convention Between The United States of America and Canada With Respect to Taxes on Income and on Capital (signed September 26, 1980) states, in part, the following:

2. An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.

* * *

5. Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection. [emphasis added]

Denmark

Article XVIII of the Convention Between the United States of America and the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (signed May 6, 1948) (TIAS 1854) states, in part, the following:

(2) In the case of applications for enforcement of taxes, revenue claims of each of the contracting States which have been finally determined may be accepted for enforcement by the other contracting State and may be collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes.

(3) Any application shall include a certification that under the laws of the State making the application the taxes have been finally determined. [emphasis added]

WTA-N-113249-99

France

Article 28 of the Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital (signed August 31, 1994) states, in part, the following:

1. The Contracting States undertake to lend assistance and support to each other in the collection of the taxes to which this Convention applies (together with interest, costs, and additions to the taxes and fines not being of a penal character) in cases where the taxes are definitively due according to the laws of the State making the application.

* * *

3. The application will be accompanied by such documents as are required by the laws of the State making the application to establish that the taxes have been finally determined.

4. If the revenue claim has not been finally determined, the State to which application is made will take such measures of conservancy (including measures with respect to transfer of property of nonresident aliens) as are authorized by its laws for the enforcement of its own taxes. [emphasis added]

Netherlands

Article 31 of the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (signed December 18, 1992) states, in part, the following:

2. In the case of applications for enforcement of taxes, revenue claims of each of the States which have been finally determined may be accepted for enforcement by the other State and collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes. The State to which application is made shall not be required to enforce executory measures for which there is no provision in the law of the State making the application.

3. Any application shall be accompanied by documents establishing that under the laws of the State making the application the taxes have been finally determined. [emphasis added]

WTA-N-113249-99

Sweden

Article 27 of the Convention Between the Government of Sweden and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (signed September 1, 1994) states, in part, the following:

1. The Contracting States undertake to lend assistance and support to each other in the collection of the taxes to which this Convention applies, together with interest, costs, and additions to such taxes.
2. In the case of applications for enforcement of taxes, revenue claims of each of the Contracting States which have been finally determined may be accepted for enforcement by the other Contracting State and may be collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes.
3. Any application shall include a certification that under the laws of the State making the application the taxes have been finally determined.
[emphasis added]

Discussion

Code Section 6330 states, in relevant part, as follows:

SEC. 6330. NOTICE AND OPPORTUNITY FOR HEARING BEFORE LEVY.

Subsec. (a) Requirement of Notice Before Levy.--

(1) In general.--No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

* * *

(3) Information included with notice.--The notice required under paragraph (1) shall include in simple and nontechnical terms--

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

WTA-N-113249-99

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth--

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

* * *

Subsec. (c) Matters Considered at Hearing.--

In the case of any hearing conducted under this section--

(1) Requirement of investigation.--The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.--

(A) In general.--The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including--

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

WTA-N-113249-99

(iii) 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.

(B) Underlying liability.--The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination.--The determination by an appeals officer under this subsection shall take into consideration--

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary. . . .

Pursuant to sec. 6330, the IRS is required to notify a taxpayer in writing at least 30 days prior to a proposed levy, and the taxpayer may request a hearing before the IRS Office of Appeals to challenge the levy, provided the issue has not already been raised in an administrative or judicial hearing. If the taxpayer requests a hearing, the IRS may not levy on the taxpayer's property while the hearing is pending, unless the Secretary determines that collection would be jeopardized by the delay. If the underlying tax liability is at issue, collection activity is also suspended while a judicial appeal of the determination is pending (Code Sec. 6330(e)).

The issue is whether the treaty requirement that a liability be "finally determined" may be reconciled to the pre-levy notice and hearing rights of taxpayers under sec. 6330. It is our view that the treaty and Code requirements may be interpreted to give effect to both, a basic principle of statutory construction. See 2A N. Singer, Sutherland Stat Const, sec. 46.06.

In our view, the legislative histories of the collection assistance articles provide a basis for harmonizing the treaties and sec. 6330. That is, we think that sec. 6330 applies to treaty levies but that only issues concerning the Service's administrative collection procedures (e.g., challenges as to whether the procedural requirements have been met for the Service's use of summonses, liens, and/or levies) and not issues concerning the liability itself, may be raised at a hearing.

WTA-N-113249-99

The Senate Foreign Relations Committee Explanation of the Proposed Income Tax Treaty between the United States and Canada includes the following:

Nothing in the assistance in collection article shall be construed as creating or providing any rights of administrative or judicial review of the applicant country's finally determined revenue claim by the requested country, based on any such rights that may be available under the laws of either country. [emphasis added]

Further, Treasury's Technical Explanation of the 1997 Protocol Amending the Convention Between the United States and Canada (Original Convention Signed September 26, 1980, as amended by Protocols signed on June 14, 1983 and March 28, 1984) states, in relevant part, as follows:

Paragraph 5 of the Article provides that nothing in Article XXVI A shall be construed as creating in the requested State any rights of administrative or judicial review of the applicant State's finally determined revenue claim. Thus, when an application for collection assistance has been accepted, the substantive validity of the applicant State's revenue claim cannot be challenged in an action in the requested State. [emphasis added]

Similarly, the Memorandum of Understanding (dated December 18, 1992) between the United States and the Kingdom of the Netherlands states, in part, the following:

WTA-N-113249-99

XXX. IN REFERENCE TO ARTICLE 31 (ASSISTANCE AND SUPPORT IN COLLECTION)

It is understood that in applying Article 31 (Assistance and Support in Collection) the following shall be taken into account:

* * *

2. The request for administrative assistance in the recovery of a tax claim shall be accompanied by:

(a) an official copy of the instrument permitting enforcement in the applicant State;

(b) where appropriate, certified copies of any other document required for recovery;

(c) a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined.

For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.

3. A revenue claim of the applicant State that has been finally determined may be accepted for collection by the competent authority of the requested State and, * * *, if accepted shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes.

* * *

5. Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection. [emphasis added]

WTA-N-113249-99

The Senate Foreign Relations Committee Explanation of the Proposed Income Tax Treaty between the United States and the Netherlands states, in relevant part, as follows:

The Understanding provides that nothing in this article shall be construed as creating or providing any rights of administrative or judicial review of the applicant country's finally determined revenue claim by the country whose assistance is requested, based on any such rights that may be available under the laws of either country.

Further, Treasury's Technical Explanation of the United States - Netherlands Income Tax Convention incorporates, verbatim, Paragraph XXX of the Memorandum of Understanding (dated December 18, 1992) between the United States and the Kingdom of the Netherlands, supra.

The background materials for the treaties with Canada and the Netherlands support the view that it would be contrary to the treaties to interpret section 6330 as requiring the IRS to offer a foreign taxpayer a hearing on the substance of the foreign tax liability.

We note that in another context, the courts declined to require an interpretation of foreign law as a prerequisite to the IRS issuance of a summons to obtain information for a treaty partner. See United States v. Stuart, 489 U.S. 353 (1989).

Accordingly, it is our view that sec. 6330 and the treaty collection assistance articles may be interpreted harmoniously. While sec. 6330 grants the taxpayer a right to notice and an appeals conference before the IRS issues a notice of levy, in the context of a levy to be issued to collect a treaty partner's liability, only issues concerning the IRS's collection procedures may be raised by the taxpayer. If the taxpayer wishes to raise issues concerning the underlying liability, it must do so in the requesting State.

Our conclusion is consistent with sec. 6330(c)(2)(B). The last clause of Section 6330(c)(2)(B) states that the taxpayer may only raise the issue of the existence of the underlying liability where the taxpayer "did not otherwise have an opportunity to dispute such tax liability." As discussed above, the United States will only be collecting "finally determined" tax liabilities where the taxpayer has exhausted "all administrative and judicial rights . . . to restrain collection in the applicant State". Accordingly, in the case of a finally determined tax liability, the taxpayer has had the opportunity to dispute such tax liability, and as such, the taxpayer is outside the purview of Section 6330(c)(2)(B). As a result, a literal reading of Section 6330(c)(2)(B) prohibits the taxpayer from raising an issue at the appeals conference that questions the existence of the underlying tax liability.

WTA-N-113249-99

If you have any further questions concerning this matter, please call [REDACTED]
[REDACTED] or Ed Williams at 622-3880.