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DEPARTMENT OF THE TREASURY
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MEMORANDUM FOR Associate Area Counsel (SB/SE) Los Angeles
CC:SB:8:LA:2

FROM: Mitchel S. Hyman
Senior Technician Reviewer, Branch 1
Collection, Bankruptcy, and Summonses CC:PA:CBS:BR1

SUBJECT: Refund of Levied Pension Plan Distributions

This responds to your request for advice dated May 17, 2002, concerning whether to return monies received through levies on a pension plan after the taxpayer had died. Our analysis and recommendations follow. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

## ISSUE

Whether a third party alleging that it was wrongfully levied upon can maintain a refund suit under United States v.Williams, 514 U.S. 527 (1995), after the statute of limitations for filing a wrongful levy has expired?

## CONCLUSION

No. I.R.C. § 7426 is the exclusive remedy for wrongful levy actions. Wrongful levy suits must be filed within the statute of limitations provided for in I.R.C. § 6532(c).

## BACKGROUND

The Internal Revenue Service levied on payments due a taxpayer from a pension plan. The taxpayer subsequently died. Pursuant to the terms of the plan, payments were to cease at death. In this case, the pension plan honored the Service's levy after the taxpayer's death and remitted to the Service funds that were not due. The pension plan failed to file an administrative claim or complaint for wrongful levy in the nine-month period proscribed by I.R.C. §§ 6343(b) and 6532(c).

This case arises in the Ninth Circuit. Counsel for the pension plan cites WWSM Investors v. United States, 64 F.3d 456 (9th Cir. 1995), as support for the proposition that section 7426 is not the exclusive means of relief for a wrongful levy. You have

asked for our opinion regarding whether the pension plan can maintain a 28 U.S.C. 1346(a)(1) suit for recovery of the funds in the Ninth Circuit.

**DISCUSSION**

The Ninth Circuit in Williams v. United States, 24 F.3d 1143 (9th Cir. 1995), determined that a taxpayer had standing to bring a tax refund action under section 1346(a)(1) for money that she had paid to release a lien for a liability that had been assessed against her former husband. In this case, Lori Williams and her then-husband Jerrold Rabin jointly owned their home. As part owner of a restaurant, Rabin personally incurred tax liabilities which he failed to satisfy. The Government assessed these liabilities against Rabin and a lien was created in the assessed amount on all of Rabin's property, including his interest in the residence. See I.R.C. § 6321.

Subsequently, in anticipation of divorce, Rabin and Williams divided their marital property. There was no lien filed when Rabin deeded his interest in the residence. The Government filed its tax lien two weeks after the transfer. No levy was ever served on the residence. Subsequent to the transfer, Williams entered into a contract to sell the house. A week before the closing, the Government gave actual notice to Williams and the purchaser of the residence of the existence of the liens. The purchaser threatened to sue Williams if the sale did not go through. Under protest, Williams authorized a disbursement from the sale proceeds to go directly to the Internal Revenue Service to pay the amount of the liens so that she could convey clear title.

After the Government denied William's claim for an administrative refund, Williams brought suit under section 1346(a)(1) in an effort to collect a refund in the amount she had paid to satisfy the lien. The District Court dismissed the action holding that section 1346 authorizes actions only by the assessed party (Rabin), and as such, Williams lacked standing to bring suit. The United States Court of Appeals for the Ninth Circuit reversed and that decision was affirmed by the Supreme Court. United States v. Williams, 514 U.S. 527 (1995).

The Supreme Court determined that Williams had standing to bring a refund suit under section 1346(a)(1) because this provision authorizes a refund suit by a party who, though not assessed a tax, paid the tax under protest to remove a federal tax lien from her property. Williams, 514 U.S. at 536. The Court rejected the Service's argument that Williams had other remedies that could have been pursued to gain a return of her money. The Court noted that the Government's position would leave people in Williams' position without a meaningful remedy, since she could not bring a wrongful levy action in the absence of a levy, a quiet title action would not permit her to sell the property quickly, and the Government was not obligated to enter into a lien substitution agreement under I.R.C. § 6325(b)(3).

The rationale in the Williams decision was subsequently applied by the Ninth Circuit in the levy context in WWSM Investors v. United States, 64. F.3d 456 (9th Cir. 1995). Prior

to this decision, the Ninth Circuit had concluded that the exclusive remedy for a wrongful levy was a claim under section 7426. Winebrenner v. United States, 924 F.2d 851 (9th Cir. 1991). However, in light of the Williams decision, the court determined that a third party could challenge a levy through a refund suit under section 1346.

The Ninth Circuit, however, did not overturn the basic holding of Winebrenner that the exclusive remedy for a wrongful levy was a section 7426 suit as evidenced by the decision in Fidelity and Deposit Company of Maryland v. United States, 87 F.3d 334 (9th Cir. 1996). In Fidelity, the plaintiff brought a quiet title action to challenge a levy under 28 U.S.C. § 2410(a)(1). Plaintiffs argued that in light of the decisions in Williams and WWSM, Winebrenner was no longer good law. In refuting this proposition, the court stated that to the extent that a refund action is available, section 7426 is not the exclusive remedy for a wrongful levy. Id. at 338. However, if a third party has a claim for wrongful levy under section 7426 and seeks a quiet title action under section 2410(a)(1), but not a refund under section 1346(a)(1), Winebrenner controls and section 7426 is the exclusive remedy. Id. at 338-339.

The Ninth Circuit's view on the applicability of section 1346 refund suits has not been adopted by any other circuit. Various circuits have held that a wrongful levy suit is the exclusive remedy for a third party seeking redress against the Service for levying on property to satisfy the tax liability of another. See, e.g., Williams v. United States, 947 F.2d 37,39 (2d. Cir. 1991); Trust Co. v. United States, 735 F.2d 447, 448 (11th Cir. 1984); United Sand & Gravel Contractors, 624 F.2d 733, 738-39 (5th Cir. 1980); Rosenblum v. United States, 549 F.2d 1140, 1144-45 (8th Cir. 1977). This rule effectuates Congress' intent that "a short nine-month limitations period is desirable for disputes involving tax levies because the government needs to know sooner rather than later whether it must look to the other assets of the taxpayer to satisfy the taxpayer's liability." Dahn v. United States, 127 F.3d 1249, 1253 (10th Cir. 1997), quoting Fidelity & Deposit Co., 87 F.3d at 337. See United Sand & Gravel, 624 F.2d at 738 (Congressional intent to set a short time limit for wrongful levy actions would be completely undermined if alternate remedies allowed).

The Tenth Circuit, in Dahn, concluded that the Supreme Court's decision in Williams does not require the abandonment of the section 7426 exclusivity rule. The court in Dahn focused on the fact that there were no tax levies involved in the Williams case and that the Court in Williams was primarily concerned with the unavailability of a wrongful levy or any other remedy to the plaintiff. Dahn, 127 F.3d at 1253. There is no indication in the Williams decision that the Court intended to reach beyond the facts of the case before it and overturn the established principle that section 7426 is the exclusive remedy in a wrongful levy case. Id. The internal inconsistency created by the holdings in WWSM and Fidelity & Deposit Co. has forced the Ninth Circuit into the untenable position that section 7426 exclusivity in levy cases is merely a matter of pleading in that a plaintiff who includes section 1346 as a possible remedy may challenge a levy after the statute of limitations has expired, while a plaintiff who does not is barred.

Central to the Supreme Court's holding in Williams was the fact that, absent a section 1346 refund suit, the plaintiff had no other meaningful remedy. Subsequent to that decision, Congress passed the Internal Revenue Restructuring Act of 1998, which added sections 6325(b)(4)(A) and 7426(a)(4) to provide a remedy to persons in the position of the plaintiff in Williams. Section 6325(b)(4)(A) provides that an owner of property who is not the taxpayer may request a certificate of discharge of the federal tax lien on the property, and the Service shall issue a discharge once the third party either deposits with the Service an amount equal to the Government's interest in the property or furnishes to the Service a bond in the like amount. Section 7426 provides that if a certificate of discharge is issued, that party may bring a civil action in federal district court for a determination of the value on the Government's interest in the property. Section 7426(a)(4) provides that "[N]o other action may be brought by such person for such a determination." We have consequently taken the position that third parties may no longer maintain a Williams suit for refund. The rationale for this position is that section 6325(b)(4) fixes the problem of lack of remedies that was the basis for the decision in Williams.

Based on the above discussion, we believe that the Service should continue to take the position in all circuits, including the Ninth Circuit, that section 7426 is the exclusive remedy for a wrongful levy. The Ninth Circuit decisions in this area are inconsistent and a Williams refund suit is no longer permitted in light of the amendments to sections 6325 and 7426. To allow Williams refund suits would render the limitation period for wrongful levies a nullity and would defeat Congressional intent of ensuring prompt resolution of wrongful levy claims. We therefore recommend that the Service reject any refund claim filed outside the statutory period applicable to wrongful levy claims, and our position is that we should continue to litigate this issue in the Ninth Circuit.

If you have any questions, please call the attorney assigned this case at 202-622-3610.