



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

5.17.3

DECEMBER 26, 2019

## EFFECTIVE DATE

(12-26-2019)

## PURPOSE

- (1) This transmits revised IRM 5.17.3, *Legal Reference Guide for Revenue Officers, Levy and Sale*.

## MATERIAL CHANGES

- (1) IRM 5.17.3.7.2.1(8), updated the definition of perishable goods based on the Taxpayer First Act.
- (2) Editorial corrections throughout to update citations, references, etc.

## EFFECT ON OTHER DOCUMENTS

This supersedes IRM 5.17.3 dated August 24, 2018.

## AUDIENCE

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5.17.3

Levy and Sale

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5.17.3.1  
(08-29-2017)  
**Program Scope and Objectives**

- (1) **Purpose:** This section provides legal references for collection staff regarding levy, seizure, and sale.
- (2) **Audience:** This section is for Collection employees and offers legal references regarding levy, seizure and sale.
- (3) **Policy Owner:** Director, Collection Policy.
- (4) **Program Owner:** Small Business/Self Employed office of Headquarters Collection Policy.
- (5) **Primary Stakeholders:** The primary stakeholders are Revenue Officers, Advisors and Property Appraisal and Liquidation Specialists (PALS).
- (6) **Program Goals:** Provide legal references for collection staff regarding levy, seizure and sale.

5.17.3.1.1  
(08-29-2017)  
**Background**

- (1) Internal Revenue Manual 5.17.3, *Legal Reference Guide for Revenue Officers, Levy and Sale*, contains legal references in relation to levy, seizure and sale. The references contained in this section relate to conditions required prior to levy or seizure, scope of the levy, general procedures, redemption, release of levy, sale, and types of property.

5.17.3.1.2  
(08-29-2017)  
**Authority**

- (1) For detailed authority specific to levy and seizure, see IRM 5.17.3.3, *Authority*. For detailed authority specific to sale, see IRM 5.17.3.7, *Sale -- Authority*. The authority of this IRM is based on the following:
  - IRC 6331, *Levy and Distraint*
  - IRC 7505, *Sale of Personal Property Acquired by the United States*
  - IRC 7506, *Administration of Real Estate Acquired by the United States*

5.17.3.1.3  
(08-29-2017)  
**Responsibilities**

- (1) The Director of Collection Policy is responsible for overseeing the policy and procedures regarding seizure and sale of assets.
- (2) Revenue Officers are responsible for developing and conducting seizures as appropriate. Advisors are responsible for reviewing the file as outlined in IRM 5.10.2.2(10), *Securing Managerial Approval of Seizure Actions*, IRM 5.10.3.23(6), *Contacting Advisory for Seizure Numbers*, and IRM 5.10.6.11, *Advisory Review of Seizure Files*. The Property Appraisal and Liquidation Specialists (PALS) are responsible for conducting or coordinating all the auction sale activities.

5.17.3.1.4  
(08-29-2017)  
**Program Management and Review**

- (1) **Program Reports:** Per IRM 1.4.50, *Collection Group Manager, Territory Manager and Area Director Operational Aid*, and IRM 1.4.53, *Advisory and Property Appraisal and Liquidation Specialist Group Manager Operational Aid*, Group Managers are required to review ICS and Entity reports on a monthly basis to ensure cases are being effectively worked.
- (2) **Program Effectiveness:** Collection Policy completes an annual seizure and sale review to identify trends and opportunities for improvement.

5.17.3.1.5  
(08-29-2017)  
**Acronyms and  
Definitions**

- (1) The table below lists common acronyms used in this section.

Acronym	Definition
CDP	Collection Due Process
CAP	Collection Appeals Program
MEC	Minimal Essential Coverage
SRP	Shared Responsibility Payment
PALS	Property Appraisal and Liquidation Specialist
HSA	Health Savings Account

5.17.3.2  
(01-07-2011)  
**Overview**

- (1) IRM 5.17.2, *Federal Tax Liens*, deals with the federal tax lien in some detail. As that section discussed, the federal tax lien attaches to all of the taxpayer's property and rights to property, both real and personal. This section discusses how the IRS administratively enforces the tax lien using its power to levy on and sell property of the taxpayer or property encumbered with a federal tax lien.
- (2) A levy is an administrative means of collecting taxes by seizure and sale of property to satisfy delinquent taxes. It enables the government to collect outstanding taxes without first going to court. An exception is the seizure of a principal residence, which requires court approval. See IRM 5.17.3.5.5 below. A levy is a summary self-help extra-judicial remedy used to compel the payment of the tax. United States v. Nat'l Bank of Commerce, 472 U.S. 713 (1985).
- (3) Collecting taxes by levying upon the taxpayer's property or rights to property warrants serious consideration. This section does not describe the step-by-step actions to be taken by a revenue officer in levying upon and seizing property, because such material is in IRM 5.10, *Seizure and Sale*, and IRM 5.11, *Notice of Levy*. This section addresses legal complications that might arise through use of levy procedures.

5.17.3.3  
(01-07-2011)  
**Authority**

- (1) IRC § 6331(a) authorizes the Secretary to levy upon or seize property to collect delinquent taxes. In this context, Secretary means the Secretary of the Treasury, or any officer, employee, or agency of the Treasury Department authorized to perform the function. See IRC § 7701(a)(11) & (12).
- (2) The Secretary of the Treasury has delegated the authority to levy to the Area Director to whom the assessment is charged or, upon his request, to any other Area Director. Treas. Reg. § 301.6331-1(a)(1). Revenue officers, while acting in the course of their duties on behalf of the Area Director in levying upon property of the taxpayer, are delegates of the Secretary of the Treasury having power to levy. The revenue officer, however, must obtain the requisite supervisory approval when necessary. See, e.g., IRC § 6334(e).



**Note:** Pursuant to IRC § 6331(g), the Service may not levy on a person's property on the day that person (or that person's officer or employee) is required to appear in response to a summons issued by the Service for the purpose of collecting any tax.

- (3) IRC § 6331(b) describes levy as including the power of distraint and seizure by any means, thus authorizing the Secretary or his delegate to collect delinquent tax liabilities by distraint against and seizure of particular items of property or rights to property belonging to the person liable to pay the tax or on which there is a tax lien (as on property fraudulently transferred by the taxpayer after the date of an assessment).
- (4) The revenue officer must take special care to comply with the Internal Revenue Code's levy requirements.

5.17.3.4  
(01-07-2011)  
**Conditions Precedent**

- (1) The Code imposes a number of conditions that must be met before the IRS may levy. In addition, there are certain restrictions that limit the timing of a levy. These include:
  - a. the investigation of the status of the property;
  - b. notice and demand;
  - c. notice of intent to levy;
  - d. collection due process (CDP) rights; and
  - e. additional restrictions set forth in IRC § 6331.

5.17.3.4.1  
(01-07-2011)  
**Notice and Demand**

- (1) The Service must give the taxpayer a notice stating the amount of the tax liability and demanding payment of it as soon as practicable, but within 60 days after assessment of the tax. IRC § 6303(a).
- (2) Notice and demand of the assessed tax is necessary prior to levy under IRC § 6331(a), and is also a prerequisite to the creation of the federal tax lien under IRC § 6321. However, pursuant to Treas. Reg. § 301.6303-1(a), the failure to give notice within 60 days does not invalidate the notice. Therefore, a late notice and demand given more than 60 days after assessment is a valid notice and demand for purposes of levy under IRC § 6331(a) and the creation of the federal tax lien under IRC § 6321.
- (3) An immediate payment of the tax is normally not demanded unless delay would jeopardize collection. Bremson v. United States, 459 F. Supp. 128 (W.D. Mo. 1978). Notice and demand for immediate payment also should be made when the taxpayer's taxable period is terminated pursuant to IRC § 6851 before the expiration of the taxable period.
- (4) Notice and demand need not personally be served upon the taxpayer to validate such notice. The notice and demand must be left at the dwelling or usual place of business of the taxpayer or mailed to his/her last known address. If doubt exists as to the dwelling, place of business or last known address, the notice should be delivered or mailed to all of the available addresses.
- (5) Payment of only a portion of the tax after notice and demand represents neglect or refusal to pay. United States v. Wintner, 200 F. Supp. 157 (N.D. Ohio 1961), aff'd per curiam, 312 F.2d 749 (6th Cir. 1963), rev'd on other grounds, 375 U.S. 393 (1964). A levy made before the expiration of the 10-day period after notice and demand, as well as a levy made before notice and

demand, is invalid. L.O.C. Indus. Inc. v. United States, 423 F. Supp. 265 (M.D. Tenn. 1976). A levy for a tax liability for which notice and demand was not made is invalid. Notification of a proposed assessment does not eliminate the need for notice and demand for payment of the tax once the assessment is made.

5.17.3.4.2  
(01-07-2011)

#### Notice of Intent to Levy

- (1) The Service must provide a taxpayer with a 30-day notice of intent to levy. IRC § 6331(d)(2). The notice must be given in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail to the taxpayer's last known address. Only a single notice is required to be given with respect to a particular liability, regardless of the number of levies made to satisfy the liability. This notice, either L 1058 or LT 11, is usually combined in one notice with the Collection Due Process (CDP) notice required by IRC § 6330. Area Offices use L 1058, and the Automated Collection System (ACS) uses LT 11.
- (2) A levy made before the expiration of the 30-day period after notice of intent to levy is invalid absent a jeopardy determination or waiver by the taxpayer of the waiting period and right to a hearing. See IRM 5.11.1.3.3.11, *Waiver of Notice of Intent to Levy/Notice of a Right to a Hearing*.

5.17.3.4.3  
(01-07-2011)

#### Pre-levy Notice and Collection Due Process (CDP)

- (1) Prior to levy, the taxpayer is entitled to one (and only one) CDP hearing with respect to the tax and tax period. IRC § 6330; Treas. Reg. § 301.6330-1(b), Q & A-B4.

**Note:** The taxpayer may receive more than one CDP hearing with respect to a tax period where the type of tax is different (e.g., income tax and employment tax), or the amount of the unpaid tax has changed as a result of an additional assessment of tax. See Treas. Reg. § 301.6330-1(d)(2), Q & A-D1 for examples.

- (2) The pre-levy notice sets forth in simple and non-technical terms:
  - a. the amount of the unpaid tax;
  - b. notification of the right to request a hearing;
  - c. a statement that the IRS intends to levy; and
  - d. the taxpayer's rights with respect to the levy action, including a brief statement that describes:
    - (1) the statutory provisions relating to the levy and sale of property;
    - (2) the procedures applicable to the levy and sale of property;
    - (3) the administrative appeals available to the taxpayer with respect to the proposed levy and the procedures relating to those appeals;
    - (4) the alternatives available to taxpayers that could prevent levy on the property (including installment agreements);
    - (5) the statutory provisions relating to redemption of property and the release of liens on property; and
    - (6) the procedures applicable to the redemption of property and the release of liens on property.
- (3) The pre-levy notice must be given in person, left at the dwelling or usual place of business of the taxpayer, or sent by certified or registered mail, return receipt requested, to the taxpayer's last known address.

- (4) The notice under IRC § 6330 must be provided no less than 30 days prior to the date of the first levy with respect to the amount of the unpaid tax for the taxable period for which the levy may be made. Also, as noted in IRM 5.17.3.4.2(1), above, this notice is usually combined with the Notice of Intent to Levy required under IRC § 6331(d).

**Note:** In some situations, the taxpayer may have incentive to waive the waiting period, and the right to a hearing, so the levy can be issued promptly. For example, a taxpayer may want the Service to issue a levy quickly when the taxpayer is expecting another creditor to attach the assets. For more information regarding such waivers, see IRM 5.11.1.3.3.11, *Waiver of Notice of Intent to Levy/Notice of a Right to a Hearing*.

- (5) The Service need not send the taxpayer a CDP notice prior to levy in three circumstances: (1) if the Service has levied on a state tax refund; (2) in a jeopardy levy situation; and (3) if the Service has made a “disqualified employment tax levy.” A “disqualified employment tax levy” is a levy made with respect to an employment tax liability for a tax period beginning within 2 years after an employment tax period included in a previous request for a CDP hearing. However, the Service must provide the taxpayer with a notice containing substantially the same information as is contained in the pre-levy notice within a reasonable time after the levy (i.e., post-levy CDP notice). IRC § 6330(f); Treas. Reg. § 301.6330-1(a)(2). See IRM 5.1.9.3.14, *Disqualified Employment Tax Levy*, and IRM 5.11.1.5, *Post-Levy Actions - Disqualified Employment Tax Levy*, for more information regarding this exception.
- (6) A taxpayer may request a CDP hearing by filing a written request within 30 days following delivery or mailing of the CDP notice. Treas. Reg. § 301.6330-1(c).
- (7) A CDP hearing will be held by Appeals and, unless waived by the taxpayer, will be conducted by an employee or officer who has had no prior involvement with respect to the taxable period subject to the CDP hearing. IRC § 6330(d); Treas. Reg. § 301.6330-1(d).
- (8) A taxpayer who fails to timely request a CDP hearing is not entitled to a CDP hearing. Such taxpayer may nevertheless request an administrative hearing with the Appeals Office. Such a hearing is referred to as an “equivalent hearing.” The taxpayer must submit a written request for an equivalent hearing within the one-year period commencing the day after the date of the CDP notice issued under IRC § 6330. The equivalent hearing will be held by Appeals and will generally follow the procedures for a CDP hearing. See IRM 5.1.9.3.2.2, *Equivalent Hearing (EH) and Timeliness of EH Requests*.
- (9) When an equivalent hearing is held, Appeals will issue a Decision Letter rather than a Notice of Determination. In an equivalent hearing, Appeals will consider the same issues that it would have considered at a CDP hearing on the same matter. Because the equivalent hearing is not a CDP hearing, the taxpayer is not entitled to obtain judicial review.
- (10) The statute of limitations on collection is suspended for the period of the CDP hearing (but not the equivalent hearing) and any judicial appeal. In no event will the period expire before the 90th day after the day on which there is a final determination in a hearing.

- (11) Levies are generally prohibited during the administrative hearing and during any judicial review and appeals, except where the court has granted a motion to permit levy.

## 5.17.3.4.3.1

(01-07-2011)

**Collection Appeals Program**

- (1) A taxpayer or third party may appeal a levy or seizure action that has been or will be taken under the Collection Appeals Program (CAP). See IRM 5.1.9.4, *Collection Appeals Program (CAP)*. See also Publication 1660, *Collection Appeal Rights*. Except as it relates to installment agreements, CAP is not a program specifically required by statute, and there is no right to judicial review of the decision of Appeals in a CAP case.
- (2) CAP also may be available to taxpayers or third parties where the CDP or Equivalent Hearing right is not available (due to lapse of time for exercising of the right).
- (3) Once a seizure action is taken, the taxpayer has 10 business days to appeal under CAP from the date the Notice of Seizure is provided to the taxpayer, or left at his or her usual abode or place of business. Publication 1660, *Collection Appeal Rights*, must be included with the Notice of Seizure. See IRM 5.1.9.2(5).
- (4) By policy, collection action is suspended while the case is in Appeals for levy and seizure CAP appeals. The Collection function may continue enforcement action, however, if it believes withholding the action would put collection of the tax liability at risk or collection of the tax is in jeopardy. Refer to IRM 5.11.3. A taxpayer may have CAP appeal rights of a jeopardy levy under certain circumstances. See IRM 5.11.3.7, *Appealing the Jeopardy Levy*.

## 5.17.3.4.4

(01-07-2011)

**Investigation of Property**

- (1) IRC § 6331(j) requires the Service to investigate the status of property before the levy or seizure of any property that will be sold under IRC § 6335.
- (2) In the investigation of the status of the property, the Service must:
- verify the taxpayer's liability;
  - analyze whether the amount of estimated sales-related expenses exceeds the fair market value of the property at the time of levy;
  - determine that the equity in the property is sufficient to yield net proceeds from the sale of the property to apply to the taxpayer's liability; and
  - thoroughly consider alternative collection methods.

## 5.17.3.4.5

(01-07-2011)

**Additional Requirements**

- (1) IRC § 6331(k) provides that no levy may be made during the time an offer in compromise is pending. If an offer is rejected, no levy may be made during the 30 days after rejection (and, if an appeal of the rejection is filed within the 30 days, while the appeal is pending).
- (2) IRC § 6331(k) provides that no levy may be made during the time an installment agreement is pending. If the installment agreement is rejected by the Service, no levy may be made during the 30 days after rejection (and, if an appeal is filed within the 30 days, during the time the appeal is pending). In addition, no levy may be made during the time an installment agreement is in effect and, if an agreement is terminated by the Service, during the 30 days after termination (and, if an appeal is filed within the 30 days, during the time the appeal is pending). For criteria identifying "pending" installment agreements, see IRM 5.14.1.3, *Identifying Pending, Approved and Rejected Installment Agreement Proposals on IDRS*.

- (3) The Code prohibits levy on property if the amount of estimated sale-related expenses exceeds the fair market value of the property at the time of levy. IRC § 6331(f). This is referred to as an “uneconomical levy.”
- (4) Except where there has been a determination that collection is in jeopardy, IRC § 6331(g) prohibits levying on any day on which the taxpayer is required to appear in response to a summons issued by the IRS to collect any underpayment of tax.
- (5) IRC § 6331(i) prohibits a levy (but not an offset under IRC § 6402) if the taxpayer has filed a refund proceeding to recover a divisible tax, unless jeopardy exists or the taxpayer waives his rights under this subsection.
- (6) IRC § 6015(e)(1)(B) prohibits levy or proceeding in court with respect to a spouse who has requested innocent spouse relief under IRC § 6015(b) or (c) or who has requested equitable relief under IRC § 6015(f) (if the liability is unpaid as of December 20, 2006, or does not arise until after December 20, 2006),
  - a. until the taxpayer signs a waiver of the restrictions (Form 870-IS, *Waiver of Collection Restrictions in Innocent Spouse Cases*),
  - b. the 90 day period for petitioning the Tax Court expires, or
  - c. if a Tax Court petition is filed, until the Tax Court decision becomes final.

**Note:** Levy against the non-requesting spouse during this period is not prohibited.

5.17.3.4.5.1  
(01-01-2015)  
**Affordable Care Act  
Provisions**

- (1) Starting in 2014, the individual shared responsibility payment provision of IRC § 5000A requires individuals to have qualifying health care coverage (known as minimum essential coverage or MEC) for each month of the year, qualify for a coverage exemption, or make a shared responsibility payment (SRP) when filing their Federal income tax returns.
- (2) Per IRC § 5000A(g)(2)(B)(ii) and Treas. Reg 1.5000A-5, if a taxpayer fails to pay the shared responsibility payment (SRP) imposed by this section and §§1.5000A-1 through 1.5000A-4, the Secretary will **not** levy on any property of the taxpayer for the failure.

5.17.3.4.6  
(01-07-2011)  
**Jeopardy and  
Termination Cases**

- (1) If the Area Director determines that collection of the tax is in jeopardy, the Service is not required to wait 10 days after giving the taxpayer notice and demand, 30 days after giving notice of intent to levy, or 30 days after the IRC § 6330 pre-levy notice. See IRM 5.17.15.4, *Jeopardy Collection*, and IRM 5.11.3, *Jeopardy Levy without a Jeopardy Assessment*, for further discussion of jeopardy levies.

5.17.3.5  
(01-07-2011)  
**Scope of Levy**

- (1) The following discussion presumes that all required notices have been provided to the taxpayer and that all conditions for a levy have been met. It addresses the reach of a levy.

5.17.3.5.1  
(01-07-2011)  
**Property and Rights to  
Property**

- (1) All property and rights to property (except that which is exempt under IRC § 6334) belonging to the person liable to pay the tax, or on which there is a tax lien, may be levied upon for payment of such tax.



**Note:** Only the taxpayer's interest in property is subject to levy. The interest of a third party is not subject to levy. See, e.g., United States v. Rodgers, 461 U.S. 677 (1983) (in dictum).

- (2) The property subject to levy may be real property or personal property. In addition, personal property susceptible to levy may be either tangible or intangible. The taxpayer need not have property in his/her possession before it may be levied upon. If it is discovered that property or rights to property are those of the taxpayer, such property is subject to levy no matter who is in possession.
- (3) In determining a taxpayer's property and rights to property, the Supreme Court has held that one must look initially to state law to determine what rights the taxpayer has in the property the government seeks to reach, then to federal law to determine whether the taxpayer's state delineated rights qualify as property or rights to property within the meaning of the federal tax lien statutes. Drye v. United States, 528 U.S. 49 (1999); Craft v. United States, 535 U.S. 274 (2002).
- (4) At times an issue will arise regarding whether the taxpayer has a cognizable interest in the property. For example, when a taxpayer has obtained money through the commission of a crime, state law may provide that the taxpayer has no interest in or rights to such money. See, e.g., United States v. Ortiz, 140 F. Supp. 355 (S.D.N.Y. 1956) (illegally obtained money is not the taxpayer's property, therefore the money need not be surrendered by a police property custodian in response to a notice of levy).
- (5) The *tax lien* attaches to after-acquired property. Glass City Bank v. United States, 326 U.S. 265 (1945). Therefore, use of a levy to collect taxes is not limited to property or rights to property of the taxpayer that exist when the assessment is made. If a federal tax lien has attached to the taxpayer's property and the property is later transferred to a third party in a way that the lien would not be divested, the property remains subject to levy.

**Note:** Although property acquired post-assessment is subject to the *tax lien*, a *levy* reaches only property and rights to property existing at the time of the levy, or property encumbered with the federal tax lien *as of the time of the levy*. The exception is for continuous levies, discussed in IRM 5.17.3.5.2, below.

Example: If the tax lien arises on Date A, at which time taxpayer's bank account contains \$100, and subsequently on Date B the taxpayer deposits an additional \$100, the tax lien then attaches to the full \$200 in the account. If the levy is served after Date A but before Date B, the levy only reaches the original \$100 because the levy does not reach after-acquired property. A new levy must be served on or after Date B to reach the full \$200 in the account.

- (6) During the time custody of seized property is in the United States, certain benefits may arise that are attributable to the seized property, e.g., rent from a seized building. Although it may be argued that a seizure of the property results in a seizure of the benefits, particularly if the benefit represents a fixed right at the time of the levy and seizure, a notice of levy should be served to remove any doubt as to whether the United States seized the right to benefits. For example, if stocks have been levied upon and before their sale a dividend is declared, a notice of levy should be served on the corporation after the

record date but before the dividend is paid out. If real property is seized that is producing rental income, a notice of levy should be immediately served upon the lessee.

5.17.3.5.2  
(03-12-2018)  
**Effect of Levy**

- (1) IRC § 6331 provides that except for the continuing levy on salary or wages provided for in IRC § 6331(e) and a levy on certain government payments provided for in IRC § 6331(h), a levy shall extend only to property possessed or obligations existing at the time of the levy. Thus, service of a levy or notice of levy upon the taxpayer or a third person, respectively, results in a seizure of property or rights to property in possession of either party at the time of service of the levy. Should property come into possession of the taxpayer or third party later, another levy must be made to seize the property, regardless of the fact that the federal tax lien attaches automatically to after-acquired property. Rev. Rul. 55-210, 1955-1 C.B. 544. If, for example, a levy is made upon the bank account of a delinquent taxpayer and the bank surrenders the balance in the account at the time the levy is made, this levy has no effect upon subsequent deposits made in the bank by the taxpayer. Subsequent deposits may be reached only by subsequent levies. IRC § 6331(c) provides for successive levies upon property of the taxpayer until the amount due, together with all expenses, is fully paid.
- (2) Similarly, a levy only reaches obligations that exist when the levy is made. Obligations are in existence when the liability of the obligor is fixed and determinable, even though the right to receive payment is deferred to a later date. Treas. Reg. § 301.6331-1(a)(1). This would include, for example, a right to receive future payments under a trust or contract, provided the right to receive such payments was not contingent upon the performance of future services. Rev. Rul. 55-210, *supra*. In other words, the right to future income, if it is a fixed or present right to property, is subject to levy, even though the taxpayer cannot receive the property until some future date. *In re Orr*, 180 F.3d 656 (5th Cir. 1999).
- (3) IRC § 6331(e) provides, however, that the effect of a levy on salary or wages payable to or received by a taxpayer is continuous from the date the levy is first made until the levy is released under IRC § 6343.

**Note:** Treas. Reg. § 301.6343-1(b)(1)(ii) provides that a continuing levy on salary or wages made under IRC § 6331(e) must be released at the end of the period of limitations in IRC § 6502.

- (4) IRC § 6331(h) provides for a continuous levy on certain federal payments, including Social Security benefits. The levy attaches up to 15% of the payment (and up to 100% in the case of vendors of goods or services sold or leased to the federal government). The power to make an IRC § 6331(h) levy has not been delegated to field personnel. The IRS makes an IRC § 6331(h) levy by sending an electronic transmission to Financial Management Service, another agency within Treasury. These provisions are exceptions to the rule that the levy only reaches obligations that are in existence at the time the levy is made.
- (5) For purposes of determining the two year period under IRC § 6343(b) for the return of property, the “date of such levy” for continuous wage and salary levies under IRC § 6331(e) is the date the notice of levy is served. For federal payment levies under section 6331(h) that are transmitted electronically, The IRS should return only levy payments received during the two year period preceding the request for return of funds. See IRM 5.11.7.2.7, *Returning FPLP*

*Levy Proceeds*, IRM 5.17.3.6.6 , *Release of Levy and Return of Property*, and IRM 5.17.3.6.6.3, *Wrongful Levy*, below, for additional information regarding IRC § 6343.

5.17.3.5.3  
(01-07-2011)

**Statute of Limitations on Levy**

- (1) In general, any tax may be collected by levy if such levy is made within 10 years after the assessment of the tax, or any extensions of the 10-year period. IRC § 6502(a). If the levy is served within the period of limitations, a suit to enforce the levy may be instituted after the 10-year period. This is true regardless of any state statutes of limitation. See United States v. Summerlin, 310 U.S. 414 (1940). IRC § 6502(a) permits levy after a judgment is secured for the life of the judgment. Therefore, a judgment based on a tax claim can be administratively collected by levy after the 10-year period would have otherwise expired. A judgment does not curtail the use of a levy to collect a liability. See IRM 5.17.4.6.2, *Effect of Judgment on Collection Statute of Limitations*.
- (2) For personal property that will be sold, IRC § 6502(b) provides that a levy occurs on the date on which the notice of seizure provided in IRC § 6335(a) is given to the owner of the property and not the date the levy is made. In contrast, when the IRS levies on a bank account that will not be administratively sold, the levy occurs when the bank receives the notice of levy. United States v. Donahue Industries, 905 F.2d 1325 (9th Cir. 1990). Thus, it is important that if property is to be seized and sold, the notice of seizure must be given without delay if the statute of limitations on collection is imminent.
- (3) Prior to the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98"), the collection period could be extended by the execution of a written waiver. This authority was curtailed by RRA 98. Currently, the taxpayer and the Service can only enter into an agreement to extend the collection statute in two situations:
  - a. if the extension is secured in connection with an installment agreement, or
  - b. if a levy was served prior to the expiration of the collection statute and the levy is subsequently released.
- (4) Additionally, pursuant to a special transitional rule, extensions that were executed on or before December 31, 1999, may expire earlier than their original terms. An extension requested on or before December 31, 1999, expires on the latest of -
  - a. the last day of the original 10-year period,
  - b. December 31, 2002, or
  - c. in the case of an extension in connection with an installment agreement, the 90th day after the extension. RRA 98 § 3461(c)(2).
- (5) IRC § 6502(a)(2)(A) provides that the statutory period for collection may be extended in connection with granting installment agreements. However, it is the Service's policy that CSED extensions are permitted only in conjunction with Partial Payment Installment Agreements and only in certain situations. See IRM 5.14.2, *Partial Payment Installment Agreements and the Collection Statute Expiration Date (CSED)*.
- (6) Although an agreement extending the period for collection must normally be executed before the statute of limitations expires, an agreement may be entered into after the 10-year statutory period if the consideration extended by



the government is the issuance of a certificate of release of levy. However, the levy itself, for which the certificate of release is issued, must have been made within the statute of limitations and the waiver must have been executed prior to the release. IRC § 6502(a)(2)(B); Treas. Reg. § 301.6502-1(a)(2)(ii).

5.17.3.5.3.1  
(01-07-2011)

**Suspension of Statute of  
Limitations on Levy**

- (1) A number of conditions/events will suspend the collection statute of limitations. See IRM 5.1.19.3, *Case Actions That Can Suspend And/Or Extend A CSED*.
- (2) Under the general rule, the statute of limitations on collection after assessment is suspended during the period in which collection by levy is prohibited. See IRC § 6503(a)(1). For example, collection by levy is prohibited during the period in which an offer in compromise is pending, for 30 days immediately following the rejection of the offer, and for any period in which a timely filed appeal from the rejection is being considered by Appeals. See IRC § 6331(k)(1); Treas. Reg. § 301.7122-1(g)(1). See also IRM 5.8.10.7, *Effect of Previous Offers on Collection Statute*.
- (3) Other examples of when collection by levy is prohibited include the following:
  - While a CDP hearing, and any appeals thereof, are pending. IRC § 6330(e)(1). See also IRM 5.1.9.3.6, *Suspension of Collection Statute of Limitations*.
  - When a taxpayer seeks innocent spouse relief. IRC § 6015(e)(1)(B). See also IRM 25.15.1.8, *Statute of Limitations on Collection*.
  - With respect to penalties under IRC § 6700 or IRC § 6701, when a taxpayer pays not less than 15 percent of the penalty and files a claim for refund. IRC § 6703(c). See also IRM 5.20.8.8, *Appealing IRC 6700 and IRC 6701 Penalty Assessments*.
- (4) IRC § 6503 also suspends the collection period of limitations in a number of different situations, including the following:
  - While all or substantially all of the taxpayer's assets are in control or custody of any court in any proceeding and for six months thereafter. IRC § 6503(b). See also Treas. Reg. § 301.6503(b)-1. The rationale of the suspension is that during this time the assets are not subject to administrative collection procedures. The suspension applies to the outstanding amount due on the assessment. Treas. Reg. § 301.6503(b)-1. For more information regarding property in the control of the court, see IRM 5.17.3.5.4, *Custodia Legis*, below.
  - While the taxpayer is outside the United States if the absence is for a continuous period of at least six months. IRC § 6503(c). To make certain that the government has an opportunity to collect the tax after the taxpayer returns, the period does not expire (if the taxpayer has been out of the country for six months or more) until six months after the taxpayer's return to the country. For more information, see IRM 5.1.19.3.7, *Taxpayer Living Outside the U.S.*
  - When there is a wrongful levy. IRC § 6503(f)(1). The collection statute is suspended from the date that the property (including money) of a third person was wrongfully seized or received, to the date that the property is administratively returned pursuant to IRC § 6343(b), or to the date on which a wrongful levy judgment with respect to such property becomes final, and for 30 days thereafter. If the period of limitations is suspended under this provision, it is suspended only for the amount of money or

value of specific property that initially has been wrongfully taken from a third party and subsequently has been returned. This amount or value is determined as of the date the property was returned.

- When there is a wrongful lien. IRC § 6503(f)(2). The collection statute is suspended from the date any person becomes entitled to a certificate of discharge of lien under IRC § 6325(b)(4) until the earlier of the earliest date on which the Service no longer holds any amount as a deposit or bond under IRC § 6325(b)(4) or the date on which a judgment under IRC § 7426(b)(5), concerning the amount deposited or used as bond, becomes final. If the period of limitations is suspended under this provision, it is suspended only for the value of the interest of the United States in the property plus interest, penalties, additions to tax, and additional amounts attributable thereto.
- When a taxpayer files for protection under the Bankruptcy Code. IRC § 6503(h). The collection statute is suspended for the period during which the automatic stay (11 USC § 362) prohibits the IRS from taking any collection action and for six months thereafter. For more information, see IRM 5.9.4.3(3), *Collection Statute Expiration Date (CSED) Suspension Time Frames*.

5.17.3.5.4  
(01-07-2011)  
**Custodia Legis**

- (1) Generally, a levy should not be used to enforce collection of taxes if assets of the taxpayer are in custodia legis (control of the court). However, assets may be seized if a levy would not interfere with the work of the court or the court grants permission to levy. Treas. Reg. 301.6331-1(a)(3). Therefore, upon the filing of a petition in bankruptcy, the death of a taxpayer and the probating of the estate, an assignment for the benefit of creditors, an adjudication of incompetency and appointment of a committee of one's property, and many other types of proceedings or situations if the court has control or custody of the property (actual or constructive) subject to such proceedings, a levy to enforce collection should not be made without prior consideration by Area Counsel.
- (2) Property is not in custodia legis between the date of the filing of a petition in a state court for the appointment of a receiver and the date of the appointment; therefore, a levy made between those dates is valid. United States v. Allen, 328 F.2d 377 (5th Cir. 1964); Youngstown Sheet & Tube Co. v. Patterson-Emerson-Comstock of Ind., 227 F. Supp. 208 (N.D. Ind. 1963).
- (3) For a more extended discussion of the effect of bankruptcy, receivership, other insolvencies and decedent estates on levy action, see IRM 5.17.3.6.2.2, *Effect of Insolvency*, and IRM 5.17.3.6.2.3, *Effect of Bankruptcy*, below. See also IRM 5.17.8, *General Provisions of Bankruptcy*; IRM 5.17.9, *Chapter 7 Bankruptcy (Liquidation)*; IRM 5.17.10, *Chapter 11 Bankruptcy (Reorganization)*; IRM 5.17.11, *Chapter 13 Bankruptcy (Individuals with Regular Income) and Chapter 12 Bankruptcy (Family Farmers or Fisherman with Regular Income)*, and IRM 5.17.13, *Insolvencies and Decedents' Estates*.
- (4) Merely because an officer of a court has possession of a taxpayer's property, the property is not necessarily in custodia legis. If a United States Marshal is holding money of a taxpayer for safekeeping as a result of an arrest, to be returned upon posting a bond or acquittal, service of a notice of levy upon the United States Marshal is valid and must be honored, because the property is not in custody of the court. Simpson v. Thomas, 271 F.2d 450 (4th Cir. 1959); United States v. Bourbonnais, 602 F. Supp. 664 (E.D. Va 1985). If the property

in possession of the United States Marshal is attached as a result of court process, it is generally in custodia legis and not subject to levy. Averill v. Smith, 84 U.S. (17 Wall) 82, 21 L.Ed. 613 (1872). Property seized in violation of the Fourth Amendment of the Constitution (unlawful search and seizure), although suppressed as evidence in a criminal proceeding, may be levied upon. Field v. United States, 263 F.2d 758 (5th Cir. 1959), cert. denied, 360 U.S. 918 (1959). Although property may be in custodia legis, the federal tax lien attaches to such property, even though the property may not be levied upon. Welsh v. United States, 220 F.2d 200 (D.C. Cir. 1955).

- (5) Alimony payments made through a clerk of the court under a court order are not in custodia legis and may be levied upon. Property in the hands of an assignee for the benefit of creditors not under court supervision is subject to levy to the extent federal tax liens attached to the property before the assignment date. Notice of levy served upon a bank is ineffective to reach funds of a taxpayer the day following appointment by a court of a receiver of the taxpayer's assets. United States v. Peoples Sav. Bk. & Trust Co. of Wilmington, N.C., 55-2 USTC 55,683 (E.D.N.C. 1955).
- (6) Where the taxpayer's debtor is in bankruptcy and the taxpayer has filed a claim in the proceeding, there is no prohibition upon serving the bankruptcy trustee to reach the distribution the taxpayer is entitled to in the proceeding. In re Quakertown Shopping Center, Inc., 366 F.2d 95 (3d Cir. 1966); United States v. Ruff, 99 F.3d 1559 (11th Cir. 1996); Laughlin v. United States, 912 F.2d 197 (8th Cir. 1990), cert. denied, 498 U.S. 1120 (1991). However, Area Counsel should be consulted before serving such a levy.

5.17.3.5.5  
(08-29-2017)  
**Seizure of a  
Residence/Principal  
Residence**

- (1) IRC § 6334(a)(13)(A) exempts from levy any real property of the taxpayer used as a residence by any individual (except for real property that is rented), if the levy amount does not exceed \$5,000.
- (2) In addition, IRC § 6334(e)(1) requires a court order before administrative seizure of certain principal residences owned by the taxpayer when seizure is otherwise permissible. These include the principal residence of:
  - the taxpayer
  - the taxpayer's spouse
  - the taxpayer's former spouse
  - the taxpayer's minor child
- (3) Written approval by the Area Director is required before seizure of any property used by the taxpayer, the taxpayer's spouse or former spouse, or the taxpayer's minor children, as a principal residence.
- (4) After the required approval is obtained, a suit recommendation package should be prepared for Area Counsel. The procedures for preparing a seizure recommendation package for Area Director approval and for preparing the suit recommendation package are set forth in IRM 5.10.2.3, *Judicial Approval for Principal Residence Seizures*.
- (5) IRC § 6334(e)(1) provides that there will be no levy on a principal residence unless approved by a judge or magistrate (in writing). At this hearing, the Service will be required to demonstrate that (1) the requirements of any applicable law or administrative procedures relevant to the levy have been met, (2) the liability is owed, and (3) no reasonable alternative for the collection of the taxpayer's debt exists.

5.17.3.5.6  
(01-07-2011)  
**Seizure of Business Assets**

- (1) IRC § 6334(a)(13)(B)(ii) and IRC § 6334(e)(2) require the written approval of the Area Director or Assistant Area Director before seizure of certain business assets. "Business assets" is defined as any tangible personal property or real property (except for rental property) used in the trade or business of an individual taxpayer.
- (2) This approval is not required if there has been a jeopardy determination.
- (3) Approval may only be given after determining that the taxpayer's other assets subject to collection are insufficient to pay the amount due, together with the expenses of the proceeding.
- (4) With respect to the seizure of state permits for the harvest of fish or wildlife in the trade or business of an individual taxpayer, the term "other assets" includes future income that may be derived by the taxpayer from the commercial sale of fish or wildlife under the permit.
- (5) This approval requirement is only for assets used in the trade or business of an individual taxpayer. Thus, this approval is not required before seizure of the business assets of a corporation or partnership.
- (6) This approval requirement is only for tangible business assets. Tangible property is, in general, property that is physically seized for the purpose of being sold, such as inventory and vehicles. In general, intangible property represents property rights with no separate physical existence that are reached by levy, such as certificates of stock or copyrights. Any questions as to whether a certain business asset is tangible property and therefore, whether Area Director approval is required prior to seizure, should be referred to Area Counsel.

5.17.3.5.7  
(01-07-2011)  
**Property Exempt from Levy**

- (1) IRC § 6334(a) exempts certain property from levy. In addition to residences/ principal residences and certain business assets which may be exempt as discussed above, the following property is exempt from levy:
  - wearing apparel and school books necessary for the taxpayer or members of his family
  - fuel, provisions, furniture, and personal effects in the taxpayer's household, up to a specified, inflation-adjusted amount
  - books and tools of the trade, necessary for the trade, business or profession of the taxpayer, up to a specified, inflation-adjusted amount
  - unemployment benefits

**Note:** The unemployment benefit exemption has been strictly construed and does not encompass retirement and survivors benefits or disability insurance payments under the Social Security Act. Kane v. Burlington Savings Bank, 320 F.2d 545 (2d Cir), cert. denied, 375 U.S. 912 (1963).

  - undelivered mail
  - certain annuity or pension payments: payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by Army, Navy, Air Force, and Coast Guard Medal of Honor recipients, and annuities based on retired or retainer pay under chapter 73 of Title 10 of the United States Code

**Note:** Although as a matter of policy, the Service has placed some administrative restrictions on levying on retirement income and

retirement assets, those listed in IRC § 6334(a) are the only ones exempt from levy as a matter of law.

- workmen's compensation (including amounts payable with respect to dependents)
- so much of the salary, wages, or other income as is necessary to comply with a judgment of a court requiring the taxpayer to contribute to the support of his/her minor children, but only if the judgment was entered before the date of the levy
- an amount determined under IRC § 6334(d) as a minimum exempt amount of wages, salary, or other income
- certain service-connected disability payments
- certain public assistance payments
- any amount payable under the Job Training Partnership Act

**Note:** With the exception of undelivered mail, unemployment benefits, workmen's compensation, public assistance payments, Job Training Partnership Act payments, specified annuity and pension payments, exempted categories are limited in terms of value, necessity or both.

5.17.3.5.7.1  
(01-07-2011)  
**Effect of State Law on  
Levy Exemptions**

- (1) Just as state law (including state-defined exemptions) cannot prevent the attachment of the federal tax lien, no state law provision can exempt property or rights to property from levy for the collection of any federal tax. Treas. Reg. 301.6334-1(c).

5.17.3.6  
(01-07-2011)  
**General Procedures --  
Levy and Seizure**

- (1) For step-by-step actions to be taken by a revenue officer in levying upon and seizing property, see IRM 5.10, *Seizure and Sale*, and IRM 5.11, *Notice of Levy*. This section addresses legal complications that might arise through use of levy procedures.

5.17.3.6.1  
(01-07-2011)  
**Constitutional  
Considerations**

- (1) If a levy is not honored or if the taxpayer or a third party interferes with the levy or seizure, it is imperative that constitutional guarantees and individual rights not be violated. Property should not be forcibly removed from the person of a taxpayer. Such conduct may expose a revenue officer to an action in trespass, assault and battery, conversion, etc. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, rehearing denied, 337 U.S. 682 (1949); Maule Industries v. Tomlinson, 244 F.2d 897, (5th Cir. 1957). If there is reason to suspect an interference with a levy, the matter should be referred for proper legal action against the offending party. See IRM 5.17.3.6.4, *Interference With Levy*, below.
- (2) The Supreme Court in G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) held that an entry without a warrant by the Service onto private property of a person in which that person has a reasonable expectation of privacy for the purpose of seizing property to satisfy a tax liability is a violation of that person's rights under the Fourth Amendment to the Constitution. Before levies or seizures of property located on such property may be made, permission of the occupant of the premises on which the seizure is to take place must be obtained. If the occupant refuses to permit entry, the matter should be referred to Area Counsel to obtain a court order authorizing entry.
- (3) The Fourth Amendment to the Constitution, forbidding unreasonable searches and seizures, does not guarantee that illegally seized property, although suppressed as evidence in a criminal proceeding, must be returned to the owner.



Accordingly, such property may be levied upon. A similar result occurs if property is illegally seized by state or local authorities for purposes of criminal prosecution and is suppressed as evidence.

5.17.3.6.2  
(01-07-2011)  
**Effecting a Levy or  
Seizure**

- (1) A levy requires that the property levied upon be brought into legal custody through seizure. There must be actual or constructive physical appropriation of the property levied upon. Mere intent to reduce to possession and control is insufficient. Freeman v. Mayer, 152 F. Supp. 383 (D.N.J. 1957), aff'd, 253 F.2d 295 (3d Cir. 1958). If actual physical appropriation is not possible, i.e., as with a taxpayer's storefront, constructive seizure is effected through posting, tagging, and inventorying the property and by dispossessing the taxpayer of the property (e.g., by padlocking the doors). Physical dispossession might not be necessary depending on the type of property (e.g., a taxpayer's personal residence). Refer the case to Area Counsel if physical dispossession becomes an issue.

5.17.3.6.2.1  
(01-07-2011)  
**Administrative  
Discretion**

- (1) Whether to levy or take another course of action is within the discretion of the Area Director and his/her collection personnel, subject to the limitations on levy and satisfaction of the requirements for levy. See IRM 5.17.3.4, et seq.

5.17.3.6.2.2  
(01-07-2011)  
**Effect of Insolvency**

- (1) The statute of limitations on collection is suspended during the period in which substantially all of the taxpayer's assets are in control or custody of any court in any proceeding and for six months thereafter. IRC § 6503(b).
- (2) Although substantially all of the taxpayer's assets may be in custodia legis, property not in custodia legis, because exempt by law, may be levied upon or a suit may be instituted to foreclose a federal tax lien. The suspension provisions of IRC § 6503(b) are applicable with respect to the entire assessment and the taxes can be collected from all the taxpayer's property or rights to property which is not at the time of collection within the jurisdiction of the court.
- (3) The period of suspension is terminated six months after the date on which the assets are no longer in custodia legis. Generally, in a judicial proceeding, when the court by some act of its own relinquishes its jurisdiction over the property, the property may no longer be considered in custodia legis, notwithstanding the necessity of others to perform certain functions with respect to the property in question.
- (4) See IRM 5.17.13, *Insolvencies and Decedents' Estates*, for more information regarding insolvencies.

5.17.3.6.2.3  
(01-07-2011)  
**Effect of Bankruptcy**

- (1) Under the Bankruptcy Code, the statute of limitations on collection is suspended for the period during which the Secretary is prohibited by reason of the bankruptcy case from collecting the liability, plus six months thereafter. IRC § 6503(h). The Service may be prevented from collecting the liability for any one of several reasons, including the automatic stay imposed by section 362 of the Bankruptcy Code (11 USC), because it is bound by the terms of a repayment plan pursuant to Chapter 11, 12 or 13 of the Bankruptcy Code or because the court has issued an order prohibiting the Service from exercising its collection powers. Area Counsel's opinion should be obtained in the event of a defaulted Chapter 11 plan to determine what remedies are available to the Service.

- (2) The Service is automatically stayed from taking any act to perfect or enforce a lien against property of the estate or to collect a claim against the debtor upon the filing of a bankruptcy petition. 11 USC § 362(a).
- (3) If levied-upon property has not been sold or credited to the taxpayer's account before the taxpayer files for bankruptcy, the trustee can obtain an order directing the Service to turn over property to the trustee if it provides adequate protection for the Service's interest in the seized property. Whiting Pools v. United States, 462 U.S. 198 (1983). The revenue officer should work with Area Counsel to determine whether the government will seek relief from the automatic stay or negotiate for an adequate protection agreement before returning the property. In these cases, time is of the essence because inaction might subject the government to monetary sanctions for violating the automatic stay.
- (4) For a more complete discussion of the effect of bankruptcy, see IRM 5.17.8, *General Provisions of Bankruptcy*; IRM 5.17.9, *Chapter 7 Bankruptcy (Liquidation)*; IRM 5.17.10, *Chapter 11 Bankruptcy (Reorganization)*; and IRM 5.17.11, *Chapter 13 Bankruptcy (Individuals with Regular Income) and Chapter 12 Bankruptcy (Family Farmers or Fisherman with Regular Income)*.

5.17.3.6.3  
(01-07-2011)  
**Notice of Levy**

- (1) The Code does not set forth the manner in which levy is to be made. IRC § 6331(b) merely defines the term "levy" as including the power of distraint and seizure by any means. Treas. Reg. § 301.6331-1(a)(1) states that levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy.
- (2) The notices of levy used by the Service when levying on cash or cash-like property are the Notice of Levy (Form 668-A(c)(DO)) and the Notice of Levy on Wages, Salary, and Other Income (Form 668-W(c)(DO)). In addition, when a notice of levy is served upon a third party and there is no response or a refusal to comply, it is followed by, though not required by statute or regulation, a Final Demand (Form 668-C).

5.17.3.6.3.1  
(01-07-2011)  
**Seizure**

- (1) The Service must seize tangible property to effect a levy upon the property. That is, the taxpayer's property must be reduced to possession and control (actual or constructive). Freeman v. Mayer, 152 F. Supp. 383 (D.N.J. 1957), aff'd, 253 F.2d 295 (3d Cir. 1958). The Service must take sufficient steps to evidence constructive possession of seized property whose size, bulk or quantity reasonably prevent its removal upon seizure. Property capable of removal, such as an automobile should be removed.
- (2) Force should never be used in seizing property of a taxpayer. Local or other law enforcement authorities may be contacted to assist the revenue officer in performing his/her duties. Also, the Service may seek a court order to restrain the taxpayer or third party from interfering with such removal or sale.
- (3) In seizing property to be sold, the Service uses the Levy (Form 668-B) and, post-seizure, the Notice of Seizure (Form 2433).

5.17.3.6.3.2  
(01-07-2011)

**Tangibles-Intangibles**

- (1) The IRS may levy upon and seize tangible personal property. Such property is generally capable of being viewed and physically seized and, if necessary, removed for safe keeping pending sale. (Real property is, of course, not susceptible of removal. Thus, posting of a notice of levy along with notification to the owner, tenant or occupant amounts to control.)
- (2) When the IRS levies upon intangible property, such as accounts receivable, contract rights, promissory notes, stock, and debts, problems may arise. The best approach to a levy and seizure of intangibles is to do everything possible to constructively reduce the intangible to possession. Thus, for example, seizure of everything in taxpayer's place of business—padlocking the premises and posting notices of distraint for taxes—did not constitute a levy upon certain accounts receivable of the taxpayer, since no steps were taken to establish possessory dominion over any sums owed the taxpayer. *Freeman v. Mayer*, supra, (service of notice of levy upon the taxpayer's debtors would have been sufficient in this case).
- (3) If intangible property is represented by a negotiable document, actual seizure of the document must be made. Service of notice of levy upon the maker of the note, the corporation or the bank is ineffective to reduce the property right to possession. Money on deposit in a bank represented by a nonnegotiable certificate of deposit in the hands of a delinquent taxpayer is subject to the levy. Rev. Rul. 73-12, 1973-1 C.B. 601. The holding in Rev. Rul. 73-12 is not applicable to negotiable certificates. Rev. Rul. 75-355, 1975-2 C.B. 478. A levy by the government on funds represented by a negotiable certificate of deposit must be made by presentation of the negotiable certificate and surrender of such certificate to the maker.
- (4) There are three essentials to bear in mind when contemplating levying upon intangibles. First, the revenue officer must investigate and determine the taxpayer's property or rights to property. Second, the revenue officer must determine the steps necessary to seize the intangible and reduce it to constructive possession. Third, the revenue officer must resolve whether one levy is adequate, or whether successive levies must be made.

5.17.3.6.3.3  
(01-07-2011)

**Suits Against Third Party**

- (1) Where a taxpayer has instituted suit against a third party for damages in tort or contract, the right of the taxpayer to satisfaction of any judgment obtained may be levied upon. Service of notice of levy upon the defendant in most cases will amount to constructive seizure of the taxpayer's property rights. However, it is advisable to serve a notice of levy at both the commencement and conclusion of the litigation upon the defendant's attorney and the taxpayer-plaintiff's attorney and upon any insurance company, whether named a party defendant or not, or other party who may be contractually obligated to satisfy, in whole or in part, any judgment obtained in the court proceedings.

5.17.3.6.3.4  
(01-07-2011)

**Offset**

- (1) A problem frequently encountered when serving a Notice of Levy upon a third party debtor of the taxpayer is the third party's claim that he has a right of setoff against the taxpayer. The claim of setoff is most frequently asserted by banks and, to a lesser degree, by the taxpayer's employer. Generally, if the tax lien arises before a third party acquires the right of setoff, or a levy is made before a setoff is made, a notice of levy reaches all the taxpayer's property in the hands of the third party undiminished by any setoff. *Bank of Nevada v. United States*, 251 F.2d 820 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958); *United States v. Sterling National Bank & Trust Co. of New York*, 494 F.2d 919



(2d Cir. 1974); and United States v. First National Bank of Arizona, 348 F. Supp. 388 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972).

- (2) If the federal tax lien attaches to a taxpayer's property prior to setoff, then a bank takes funds encumbered with a federal tax lien. The government may levy on the bank to obtain the encumbered funds. United States v. Donahue Industries, Inc., 905 F.2d 1325 (9th Cir. 1990); Rev. Rul. 2006-42. See also IRM 5.17.3.10.4, *Bank Accounts*, below.
- (3) If the taxpayer assigns future wages to his employer to secure a debt owed to the employer, a notice of levy will reach only accrued wages due the taxpayer in excess of the amount to be setoff at the time of service of the levy. See Rev. Rul. 73-365, 1973-2 C.B. 407.

5.17.3.6.3.5  
(01-07-2011)  
**Defenses**

- (1) IRC § 6332(a) states that except as otherwise provided in subsection (b), (which contains a special rule for life insurance and endowment contracts) and subsection (c) (which contains a special rule for banks requiring a 21-day delay before payment for the levy is sent, with interest), a person in possession of property or rights to property upon which levy has been made must, upon demand, surrender such property.
- (2) The Supreme Court held in United States v. National Bank of Commerce, 472 U.S. 713 (1985), that there were only two defenses to a levy: (1) the levied-upon person is not in possession of nor obligated with respect to property or rights to property of the taxpayer, or (2) the property or rights to property are subject to prior judicial attachment or execution.
- (3) It is important to ensure that the party having actual possession of the taxpayer's property is served with a notice of levy, particularly when dealing with entities rather than individuals. For example, a notice of levy addressed to the Chairman, Board of Supervisors, of a particular county was held to not be a levy on the county because, under state law, only the county treasurer had possession and control of county money. United States v. Brechtel, 90 F.2d 516 (8th Cir. 1937).
- (4) Courts have rebuffed a number of defenses to levy offered by levy sources. For example, there is no statute of limitations on bringing a suit to enforce a levy. United States v. Weintraub, 613 F.2d 612 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980).
- (5) Lien foreclosure may be an appropriate alternative to administrative collection where potential defenses would present litigation hazards for the government.

5.17.3.6.3.6  
(01-07-2011)  
**Saved Harmless**

- (1) A person levied upon who honors a levy (or who pays after being held personally liable under IRC § 6332(d)(1) for failure to honor a levy) is discharged from any obligation or liability to the taxpayer and any other person with respect to the property surrendered (or amount paid). IRC § 6332(e). However, any person who mistakenly surrenders property or rights to property in which the delinquent taxpayer has no apparent interest is not relieved of liability to a third party who has an interest in the property. Treas. Reg. § 301.6332-1(c)(2).

- (2) In addition to any claims against the levy source, the owners of mistakenly surrendered property may also obtain administrative relief for wrongful levy under IRC § 6343(b) or may bring suit to recover their property under IRC § 7426.

5.17.3.6.4  
(01-07-2011)  
**Interference with Levy**

- (1) A revenue officer attempting to levy on property of the taxpayer may experience interference by the taxpayer or a third party. Such interference may take the form of acts committed directly against the revenue officer, attempts to place property beyond the reach of levy through removal or secreting of the property, the institution of judicial proceedings to restrain the collection of a tax, or attempts to rescue or recover the property after its seizure.

5.17.3.6.4.1  
(01-07-2011)  
**Criminal Acts**

- (1) It is a criminal offense to forcibly assault, resist, oppose, impede, intimidate or interfere with any employee or officer of the United States in the performance of his/her official duties. 18 USC § 111. Commission of the act itself is a crime even though the doer of the act had no knowledge that the person assaulted, resisted, etc. was an officer of the Service. Bennett v. United States, 285 F.2d 567 (5th Cir. 1960), cert. denied, 366 U.S. 911 (1961), see also United States v. Alvarez, 755 F.2d 830 (11th Cir.), cert. denied, 474 U.S. 905 (1985) (federal officers generally).
- (2) Specifically, the Internal Revenue Code provides that it is a criminal offense to endeavor to intimidate or impede, by force or threats of force, any officer or employee of the United States acting in an official capacity under the Code. IRC § 7212.
- (3) Any person who removes, deposits, or conceals any property subject to levy or who abets in the removal, deposit, or concealment of such property, with intent to defeat the collection of any tax, is guilty of a felony. IRC § 7206(4). For example, the government may consider prosecution where an employer purposely pays a taxpayer in advance to preclude the government from levying upon the accrued salary of the employee. However, under IRC § 7206(4), the burden is upon the government to prove intent, a necessary element of the offense, and a very difficult burden to sustain.
- (4) Once property has been levied upon and seized, the owner or a third-party may attempt to regain possession improperly. Any person convicted of forcibly rescuing, or causing such rescue of seized property, or attempting or endeavoring to do so, shall be fined not more than \$500.00, or not more than double the value of the property rescued, whichever is greater, or be imprisoned not more than two years. IRC § 7212(b). Also, a person may be subject to a fine or imprisonment or both if convicted of forcibly rescuing, dispossessing, or attempting to rescue or dispossess any property taken, detained or seized under the authority of any federal revenue law. 18 USC § 2233. The offense of rescuing property consists of the forcible retaking of the property out of the hands of an officer who has it in legal custody. It is not necessary that violence be committed against the person of the officer (conduct and language may be sufficient). Leaving property in possession of an individual after levy does not justify him/her in taking and disposing of it.

5.17.3.6.4.2  
(01-07-2011)  
**Injunction**

- (1) Taxpayers may also attempt to interfere with levy and seizure of property or rights to property by commencing a court action to enjoin or restrain the collection of a tax. IRC § 7421 prohibits a suit to restrain the collection of any tax except where levy is sought to be made:

- a. during the period a taxpayer may petition the Tax Court; and before the Tax Court's decision becomes final, if a Tax Court petition is filed;
  - b. during the pendency of a CDP hearing and any judicial review/appeals unless the court has granted a motion to permit levy;
  - c. before the final resolution of a suit for: refund of a divisible tax (but only if a bond is filed); tax return preparer penalties; abusive tax shelter promoter penalties; aiding and abetting understatement penalties and frivolous return penalties;
  - d. if a party has brought a wrongful levy action or a suit to review a jeopardy assessment;
  - e. during the pendency of notice pursuant to IRC § 6672(b) of proposed liability for the trust fund recovery penalty, and during the pendency of an administrative protest to the asserted liability;
  - f. when a deficiency attributable to a partnership item is prematurely assessed, and during the pendency of the Tax Court proceeding (IRC § 6225(b)), after a notice of partnership adjustment is sent and during the pendency of the judicial proceeding resolving the dispute over the proposed partnership adjustment; or
  - g. during the pendency of a proceeding for determination of employment status.
- (2) The courts have further narrowed the parameters of the prohibition against enjoining the collection of the federal tax. For example, the prohibition has been construed not to apply if suit is brought against a purchaser in possession to set aside the government's sale of seized property if conditions precedent to a levy sale have not been substantially complied with. Margiotta v. District Director of Internal Revenue, 214 F.2d 518 (2d Cir. 1954), National Bank & Trust Co. v. United States, 78-1 USTC 9196 (N.D. Ind. 1977), *aff'd*, 589 F.2d 1298 (7th Cir 1978). Further, where there are special and extraordinary circumstances combined with the illegality of the tax (failure to give notice of the tax and demand for payment), the collection of which is sought to be restrained, the courts, in the exercise of their equitable powers, will restrain collection of such tax by levy, notwithstanding IRC § 7421. L.O.C. Indus. Inc. v. United States, 423 F. Supp. 265 (M.D.Tenn, 1976). The illegality, however, must be clearly apparent and convincingly established. Bob Jones University v. Simon, 416 U.S. 725 (1974); Commissioner v. Americans United, Inc., 416 U.S. 752 (1974); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, *reh'g denied*, 370 U.S. 965 (1962).

5.17.3.6.5  
(01-07-2011)  
**Redemption**

- (1) The person whose property has been seized may redeem both real and personal property at any time before its sale by paying the taxes due and any expense incurred in connection with the seizure and contemplated sale. IRC § 6337(a). The amount of the tax due must be paid and not merely an amount equal to the value of the property seized or the value of the government's interest in the property.
- (2) Once personal property is sold, the taxpayer no longer has any right to redeem the property. Real property, however, may be redeemed within 180 days from the date of sale by the taxpayer, his/her heirs, executors, or administrators, or any person having an interest in or a lien on the property, or any person on their behalf. IRC § 6337(b).
- (3) When a certificate of sale is tendered after the expiration of the redemption period, the deed should be issued even if there is a contention that a qualified

party has offered to redeem and been refused, since that party's remedy is to seek judicial enforcement of the right to redeem.

- (4) A tenant in common or a wife with an inchoate right of dower has sufficient interest to redeem. See, e.g., Babb v. Frank, 947 F. Supp. 405 (W.D. Wis. 1996); United States v. Lowe, 268 F. Supp. 190 (N.D. Ga. 1966), aff'd sub nom., Lowe v. Monk, 379 F.2d 555 (5th Cir. 1967), cert. denied, 389 U.S. 1039 (1968); Samet v. United States, 242 F. Supp. 214 (M.D.N.C. 1965). Similarly, the husband's right of curtesy entitles him to redeem.
- (5) The amount to be paid to the purchaser to redeem is the purchase price, together with interest at the rate of twenty percent (20%) per annum. IRC § 6337(b)(2).

**Note:** IRC § 6622 requires daily compounding interest. See Rosen v. Norton, 970 F.2d 1079 (2d Cir. 1992), cert. denied, 507 U.S. 918 (1993). See also IRM 5.10.6.8(3) - (6) regarding the calculation of interest.

- (6) If the purchaser cannot be found in the county in which the property to be redeemed is located, payment is to be made to the Secretary or his delegate for use of the purchaser, his/her heirs or assigns. IRC § 6337(b). Redemption cannot be made through a suit attacking the validity of the tax and the sale itself for which the property was seized to satisfy the purported invalid tax. If the terms of the redemption statute are not complied with, there can be no redemption. Babb v. Frank, 947 F. Supp. 405 (W.D. Wis. 1996). If there is an assignment by the purchaser of property purchased at a sale, one entitled to redeem may, as a means of protection, deposit the amount to redeem in court and tender said sum to either the defendant-purchaser or his/her assignee, whoever is entitled to such.
- (7) On occasion, real and personal property, or a number of tracts of real property may be purchased in the aggregate. Under such circumstances, the purchase price of the realty for purposes of redemption shall be the ratio, as of the time of sale, of the value of the realty to the total value of all property purchased. The minimum price or the highest bid price, whichever is higher, offered for the property separately or in groups shall be treated as the value. Treas. Reg. § 301.6337-1(b)(2).
- (8) Questions concerning who is entitled to rents, profits and possession of real property during the statutory period of redemption should be referred to Area Counsel.

5.17.3.6.6  
(01-07-2011)  
**Release of Levy and  
Return of Property**

- (1) The IRS is required to release a levy upon all or part of the property or rights to property levied upon under certain conditions. IRC § 6343(a).
- (2) The Area Director is authorized to return any property which has been wrongfully levied upon to its rightful owner. In addition to this administrative procedure in IRC § 6343(b) to return wrongfully levied property, a person other than the taxpayer may file suit against the government to recover the property or obtain a judgment. IRC § 7426.
- (3) In addition, IRC § 6343(d) authorizes the IRS to return levied upon property in certain situations other than wrongful levies:

- if the levy was premature or otherwise not in accordance with administrative procedures (e.g., the levy was made before the taxpayer was given CDP rights under IRC § 6630),
- the taxpayer has entered into an installment agreement under IRC § 6159 to satisfy the tax liability (unless the agreement provides otherwise),
- the return of the property will facilitate the collection of the tax liability, or,
- with the consent of the taxpayer or the National Taxpayer Advocate, the return of the property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

**Note:** The provisions of IRC § 6343(b) (as discussed below) apply to IRC § 6343(d) in the same manner as if the property had been wrongfully levied, except that the interest in wrongful levy cases provided under IRC § 6343(c) is not allowed.

5.17.3.6.6.1  
(01-07-2011)  
**Requirements for  
Release of Levy**

- (1) IRC § 6343(a) requires a release of levy for all or part of the seized property if:
  - a. the liability is satisfied or is unenforceable because the statutory period for collection had expired;
  - b. release will facilitate collection;
  - c. the taxpayer has entered into an installment agreement, unless the agreement provides otherwise;
  - d. the Secretary determines that the levy is creating an economic hardship within the meaning of IRC § 6343(a)(1)(B); or
  - e. the fair market value of the levied property is more than the amount owed and part of the levied property can be released without hindering collection.
- (2) In addition, the IRS must, as soon as practicable, release a wage levy upon agreement with the taxpayer that the tax is not collectible. IRC § 6343(e).

5.17.3.6.6.2  
(01-07-2011)  
**Effect of Release**

- (1) Even if a levy is released, IRC § 6343(a) specifically permits a subsequent levy upon the same property. However, the right to levy again is limited by the statute of limitations on collection or any extensions of it. To prevent possible future litigation over the claims of the exempted categories listed in IRC § 6323(a), a release of levy should not be issued unless or until a notice of tax lien is filed to establish the validity of the federal tax lien against such parties.

5.17.3.6.6.3  
(03-12-2018)  
**Wrongful Levy**

- (1) The wrongful levy procedures in IRC § 6343(b) provide for the return of property or sales proceeds to third parties. If the Secretary or his delegate determines that property has been wrongfully levied upon, the Secretary or his delegate pursuant to IRC § 6343(b) may return:
  - a. the specific property levied upon;
  - b. an amount of money equal to the amount of money levied upon (including interest); or
  - c. an amount of money equal to the amount received by the government from the sale of the property (including interest).

- (2) With respect to an amount levied upon or an amount of money equal to the amount received by the government from the sale of such property, interest is allowed and paid at the rate established under IRC § 6621 for the periods described in IRC § 6343(c).
- (3) If the sale of the property in question has occurred and the property has been declared purchased by the United States, the minimum bid price is to be treated as the amount received from the sale.
- (4) The United States may return the property at any time it still has possession of it.

**Note:** If the property is money specifically identifiable, such as a valuable coin collection worth more than its face value, this money is treated as specific property and, where possible, returned.

- (5) If money is levied upon or received at the sale of property, an amount of money equal to the amount levied upon or received at sale may be returned before expiration of two years after the date of the levy. When a request for return of property is filed before the expiration of the two year period, the funds may be returned after the two year period expires if necessary for the investigation and processing of the request.

**Note:** For purposes of determining the two year period under IRC § 6343(b), the “date of such levy” for continuous levies under IRC § 6331(e) and (h) is the date the notice of levy is served.

- (6) While filing a formal claim for return of property is not a prerequisite of a suit under IRC § 7426, any written request for the return of property under IRC § 6343 must comply with the conditions set forth in Treas. Reg. § 301.6343-2(b). Inadequacies in the request must be noted in writing by the Area Director and mailed within 30 days after receipt of the request or the request is deemed adequate. Treas. Reg. § 301.6343-2(c).

**Note:** The request must be sent to the office listed in Pub 4528, *Making an Administrative Wrongful Levy Claim Under Internal Revenue Code (IRC) Section 6343(b)*, to be effective. See Treas. Reg. § 301.6343-2(b).

- (7) A third party challenging a levy by the Service may only seek a remedy in a wrongful levy suit under IRC § 7426. The statute of limitations for bringing a wrongful levy suit is two years from the date of the levy. However, if an administrative claim has been made for the return of property, the two year period is extended by 12 months from the date of the request or 6 months from the date the Service denies the request, whichever is shorter. IRC § 6532(c).
- (8) The third party cannot bring a quiet title action under 28 USC § 2410 (which has a longer limitations period) because IRC § 7426 is the exclusive remedy for third persons claiming a senior interest in property seized by the Service. Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910 (8th Cir. 1998); Winebrenner v. United States, 924 F.2d 851 (9th Cir. 1991); and United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980). Similarly, the third party cannot seek redress through a refund claim filed under 28 USC § 1346(a)(1). EC Term of Years Trust v. United States, 550 U.S. 429 (2007).



5.17.3.7  
(01-07-2011)  
**Sale -- Authority**

- (1) Under IRC § 6331(b), the Area Director is authorized to sell the taxpayer's property or rights to property or property encumbered with a federal tax lien.
- (2) In addition to the authority under IRC § 6331(b) to sell seized property, the Service is authorized to sell personal property acquired by the United States in payment of or for security for federal tax liabilities. IRC § 7505(a). Property is sold under procedures set forth in Treas. Reg. § 301.7505-1(a).
- (3) The Service is also authorized to sell, at public sale after at least 20 days' notice, real property that has become property of the United States. There are various ways that real property can become property of the United States, including, but not limited to, a judgment of forfeiture under the tax laws, assignment to the United States, or redemption by the United States. IRC § 7506.
- (4) Sale procedures are set forth in Treas. Reg. § 301.7506-1(b).

5.17.3.7.1  
(08-29-2017)  
**Sale -- Role of Revenue Officer**

- (1) Sales of seized property are conducted by Property Appraisal and Liquidation Specialists (PALS). Under section 3443 of RRA '98, the revenue officer who seized the property may not participate in the actual sale of such property.  
  
**Note:** This prohibition only applies to tax sales under IRC 6335 and so does not bar revenue officers from conducting sales of perishable goods under IRC § 6336.
- (2) As a matter of Service policy, revenue officers who have taken any collection action **at any time** against the taxpayer whose assets have been seized have the same limitations as the seizing RO.
- (3) Prohibited acts by those revenue officers described in (1) and (2) above, include:
  - Grouping property prior to sale after the Form 2433 has been completed
  - Registering bidders
  - Tabulating bids
  - Assisting in collecting sales proceeds
  - Issuing certificates of sale
  - Answering sale-related questions
  - Any other sale-related activity involving interaction with anyone attending or conducting the sale
- (4) Revenue officers described in (1) and (2) above may perform limited ministerial acts without violating the prohibition on participation in sales.
- (5) Post-seizure the revenue officer continues to be responsible for the collection of the outstanding tax liability and remains in communication with the PALS as necessary. For example, the revenue officer would contact the PALS if the liability were satisfied before the sale or if the taxpayer filed bankruptcy before the sale. In addition, given the continued collection responsibility, the revenue officer may be present at the sale (or otherwise available) to address alternative methods of collection with the taxpayer.
- (6) As described in IRM 5.10, revenue officers do participate in post-sale procedures. For example, the revenue officer:
  - inputs the transaction code to remove a module from inventory;
  - works with the PALS to ensure that all expenses of seizure and sale are properly debited;

- maintains the ICS case file; and
- ensures that documents are forwarded to Advisory for inclusion in the seizure file and the permanent record.

5.17.3.7.1.1  
(01-07-2011)

#### Notice of Seizure

- (1) As soon as practicable after seizure, the revenue officer must give written notice to the owner of the property (or the possessor of personal property) which specifies the amount owed and contains an account of the personal property seized and a reasonably certain description of the real property seized.
- (2) The notice must be left at the usual place of abode or business of the person to be notified if within the area where the seizure is made, or mailed to his/her last known address if he/she has no abode or business in the area or cannot be readily located. IRC § 6335(a).
- (3) If the IRS does not comply with the notice requirements, the IRS can still argue that notice was effective because it “substantially complied” with the statute. Grable & Sons Metal Products, Inc. v. Darue, 377 F.3d 592 (6th Cir. 2004), aff’d on other grounds, 545 U.S. 308 (2005).

5.17.3.7.1.2  
(01-07-2011)

#### Notice of Sale

- (1) Preparation for the sale of seized property should be commenced as soon as practicable after seizure.
- (2) In the same manner as a notice of seizure, and as soon as practicable after the seizure, notice of sale must be given to the owner. A notice specifying the property to be sold and the time, place, manner and conditions of sale must be published in a newspaper published or generally circulated within the county in which the seizure was made. IRC § 6335(b). If a newspaper of general circulation in a county will reach more potential bidders for property to be sold than a newspaper published within the county, or if there is a newspaper of general circulation within the county but not published within the county, the government may publish notice of sale in the newspaper of general circulation. If no newspaper is published or generally circulated in the county, notice of sale shall be posted at the post office nearest the place of seizure and in not less than two other places.
- (3) The government, by regular mail, also sends a copy of the notice of sale to all interests of record (joint owners, senior and junior lien-holders, nominees, transferees, judgment creditors regardless of whether they have perfected a lien interest, etc.). See IRM 5.10.4.9, *Delivery of Notice of Sale*. See also Verba v. Ohio Cas. Ins., 851 F.2d 811 (6th Cir. 1988) (constructive notice provided by publication and posting pursuant to IRC § 6335(b) held to be constitutionally inadequate). Interests of record are pulled from Form 2434-B which lists all encumbrances/interests of record.
- (4) A description of real property in a notice of sale is sufficient if the land can be identified, provided that the portion of the description which is left out would add nothing to the certainty of the description. In describing personal property to be sold, it is not necessary that each item be listed and be completely detailed. A general description is sufficient.
- (5) If notice of sale is posted at public places, the premises of the taxpayer does not constitute a public place, even though the real property was seized for delinquent taxes and the sale was conducted on the premises.



5.17.3.7.1.3  
(01-07-2011)  
**Time of Sale and  
Adjournment**

- (1) The sale must be held not less than 10 days, nor more than 40 days from the date public notice of sale is given, unless it is adjourned for a period not to exceed one month. Pursuant to Anderson v. United States, 44 F.3d 795 (9th Cir. 1995), a sale may be adjourned but not postponed. (Postponed refers to an action taken to delay the sale prior to the commencement of sale; adjourned refers to an action taken to delay the completion of the sale after the bidding has started). The sale may not be delayed beyond the statutory periods provided in IRC § 6335(d).

**Note:** The Service is subject to another potential time constraint: Under IRC § 6335(f), the owner of any seized property may request that the property be sold within 60 days of the request. The Service must comply unless it determines (and notifies the owner within the 60-day period) that compliance would not be in the best interest of the United States. Failure to do so may have adverse consequences. For example, in Zapara v. Commissioner, 124 T.C. 223 (2005), reconsideration denied, 126 T.C. 215 (2006), aff'd, 652 F.3d 1042 (9th Cir. 2011), non-acquiescing, AOD 2012-6, 2013-12 I.R.B. 657, the Tax Court held that where the taxpayers requested that the Service sell the seized property and apply proceeds to their outstanding tax liabilities, but the Service did not sell the property or determine that the sale would not be in the best interests of United States, the taxpayers were entitled to credit for the value of the property as of the date by which it should have been sold under IRC § 6335(f).

- (2) After the commencement of the sale, it may be adjourned if the interests of either the United States or the taxpayer will best be served by the adjournment. Notice of the adjourned sale should be given to the taxpayer in the same manner as the original notice of sale. It is important that the sale of seized property take place within the time period designated in the Code and regulations because failure to do so will affect the validity of the sale. Powelson v. United States, 963 F.2d 1156 (9th Cir. 1992); Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975).
- (3) A sale may be adjourned at any time after the bidding has started but before the property is declared sold or the preestablished minimum bid price has been reached. Adjournments may not be made, however, for the express purpose of adjusting the minimum bid price downward to avoid purchase of the property by the United States. See IRM 5.10.5.6, *Adjournment Procedures*.

5.17.3.7.1.4  
(01-07-2011)  
**Jeopardy**

- (1) If the Area Director believes that collection of an unassessed liability is in jeopardy, he/she may make an immediate assessment and pursue collection without need to follow normal assessment and collection procedures. As soon as a jeopardy or termination assessment is made, the tax, penalties, and interest become due and payable, and the Area Director issues a notice and demand for payment in full. If payment is not made, the IRS may immediately proceed to collect by levy without waiting for the usual 10-day period after notice and demand to expire. Collection may be stayed by filing a surety bond.
- (2) Whenever levy is made without regard to the 10-day period required by IRC § 6331(a)(4), public notice of sale of the property seized will not be made within the 10-day period unless IRC § 6336 (relating to the sale of perishable goods) applies. See IRM 5.17.15, *Termination and Jeopardy Assessments and Jeopardy Collection*, for further discussion.

5.17.3.7.2  
(01-07-2011)  
**Manner of Sale**

- (1) Sales of seized property must strictly adhere to the sale mechanics provided to avoid a charge of impropriety.
- (2) Seized property may be sold either by public auction or by public sale under sealed bids. The PALS should select the method that will bring the highest price.
- (3) Prospective bidders should be allowed a reasonable time to inspect the property to be sold insofar as possible. The terms and conditions of the sale, the announcement of a minimum bid price if applicable (announcement of the minimum bid price may be made before the sale begins if advantageous or it may be deferred until after the receipt of the highest bid, and if that bid is greater than the minimum bid price, no announcement will be made), the type of auction sale to be held, the manner of bidding, the conditions under which property is to be offered for sale, etc., should be clearly announced, except as indicated, before entertaining bids.

5.17.3.7.2.1  
(12-26-2019)  
**Minimum Bid Price**

- (1) The IRS cannot sell seized property for less than the minimum bid price. IRC § 6335(e). Such a sale would be an unauthorized collection action, which may lead to an action for civil damages pursuant to IRC § 7433.
- (2) Before the sale the PALS must establish a minimum bid price below which the property may not be sold. Under the Service's procedures, the minimum bid price is generally computed at 80 percent or more of the forced sale value of the property, less encumbrances having priority over the federal tax lien. The taxpayer is given 10 days to contest the determination of the minimum bid price and may hire an outside appraiser or request a valuation by an IRS Valuation Engineer. The minimum bid price cannot exceed the government's lien interest in the property.
- (3) IRC § 6335 requires that before sale of seized property the Service must determine if purchase of the property at the minimum bid price is in the best interest of the government. If it is and the minimum bid is not offered at the sale, the IRS must buy the property. IRC § 6335(e)(1)(C). Otherwise, the property must be released back to the owner. IRC § 6335(e)(1)(D). After release, the property would still be subject to the lien and could be re-seized. Any expenses of levy and sale are added to the amount of taxes due. If the property is "bid in" by the government at the minimum bid price, it becomes "acquired property" and may subsequently be sold under IRC § 7506.
- (4) If the property is listed securities, the minimum bid is fixed at no less than 95 percent of the preceding day's closing market price. IRM 5.10.4.3.1.7(1) and Policy Statement P-5-35 at IRM 1.2.1.6.9.
- (5) The PALS may or may not announce the minimum bid at the sale.
- (6) If the minimum bid price is not offered during the course of a sale, the PALS may do whichever of the following best promotes the interest of the government and the taxpayer:
  - a. adjourn the sale for the purpose of re-evaluating the minimum bid price, IRM 5.10.5.6(7);
  - b. declare the property purchased by the United States for the minimum bid price; or
  - c. release property to the taxpayer pursuant to IRC § 6335(e).

- (7) The property must be declared sold to the highest bidder if the bids exceed the minimum bid price.
- (8) No minimum bid price is necessary in a sale of goods determined to be “perishable” under IRC § 6336. The term “perishable goods” means any tangible personal property which is determined to be liable to perish.

5.17.3.7.2.2  
(01-07-2011)  
**Grouping of Property**

- (1) The property will be sold under the method expected to produce the highest total proceeds. Seized property may be sold as separate items, in lots or as groups of items, or in the aggregate, or all three methods may be employed. If real and personal property are offered for sale, the real property must be offered first as separate items and the personal property as a group, groups, or separate items, before being offered in the aggregate. If several tracts of real estate are to be sold, the costs and expenses of levy and sale should be apportioned to each parcel for purposes of determining the amount to be paid for redemption of any one parcel. Failure to prorate costs and expenses incident to preparation of the sale, or failure to assign a value to each parcel of real property when sold in the aggregate may be held to prejudice the right of redemption before sale or after sale. McAndrews v. Belknap, 141 F.2d 111 (6th Cir. 1944), cert. denied, 323 U.S. 721 (1944).
- (2) It may be apparent that seized property, if sold, would return an amount far in excess of the tax and expenses of levy and sale. Under such circumstances, if the seized property is divisible and a sale of a part thereof would realize an amount sufficient to pay the entire tax and expenses, only so much of the divisible property should be sold as is necessary to satisfy the liability, including expenses. Johnson v. Gartlan, 470 F.2d 1104 (4th Cir. 1973), cert. denied, 414 U.S. 865 (1973).

5.17.3.7.2.3  
(01-07-2011)  
**Acceptance of  
Bid--Payment**

- (1) If a purchaser at a cash sale defaults, the IRS must resell the property pursuant to IRC § 6335(e). However, in a deferred payment sale the Service may either sue for the balance or void the sale and resell the property, retaining, as forfeited, any payments made. Treas. Reg. § 301.6335(e)(9). Because the forfeiture provisions of IRC § 6335(e)(3) apply only to deferred payment sales, the PALS should consult Area Counsel regarding whether under state law the United States may sue for damages and retain the deposit. The government must observe all Code provisions governing the sale of seized property even though no time limitations per se are imposed on the resale of property where a purchaser has defaulted.
- (2) The partial payment of the bid price by the purchaser at a deferred payment sale is forfeited when the Area Director elects to declare the sale null and void. The amount forfeited is not applied to the liability of the taxpayer, but is paid into the Treasury as in the case of other forfeitures. IRC § 7406. The new purchaser will receive the property free of all claims of the defaulting purchaser.

5.17.3.7.2.4  
(01-07-2011)  
**Invalid Sale**

- (1) The Code provisions relating to the sale of seized property are meant to protect the taxpayer. A sale is not void because of noncompliance with the provisions of IRC § 6335, but it is voidable by the owner of the property. Aqua Bar & Lounge, Inc. v. United States, 438 F. Supp. 655 (E.D. Pa. 1977), remanded from 539 F.2d 935 (3rd Cir. 1976). The government cannot of its own accord resell property because it failed to comply with the sale provisions of the Code. Koby v. United States, 47 Fed. Cl. 99 (2000); United States v. Conry, 74-1

## 5.17 Legal Reference Guide for Revenue Officers

USTC 9187 (N.D. Cal. 1973). The government has no statutory authority under section 6335 or under any other section of the Internal Revenue Code to administratively rescind a procedurally defective sale.

- (2) A taxpayer may institute suit against a purchaser to set aside a sale because the government failed to comply with the pre-sale requirements of the Code. The taxpayer may be able to restrain a sale if she can show the IRS failed to comply with the statutory sale requirements, coupled with a showing of special and extraordinary circumstances (irreparable harm and injury). Transport Mfr. & Equip. Co. of Delaware v. Trainor, 382 F.2d 793 (8th Cir. 1967); Aqua Bar & Lounge, Inc. v. United States, *supra*; Whalen v. Department of Treasury, 80-2 USTC 13375 (N.D. Ohio 1980). Such a suit does not contravene IRC § 7421, which prohibits suits to restrain the collection of a tax. Powelson v. United States, 963 F.2d 1156 (9th Cir. 1992); Kulawy v. United States, 917 F.2d 729 (2d Cir. 1990); Margiotta v. District Director of Internal Revenue, 214 F.2d 518 (2nd Cir. 1954); Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975).
- (3) However, the court may deny the taxpayer equitable relief if the taxpayer waits too long to attack a sale. McAndrews v. Belknap, 141 F.2d 111 (6th Cir. 1944), *cert. denied*, 323 U.S. 721 (1944); Howard v. Adle, 538 F. Supp. 504 (D. Mich. 1982); Van Skiver v. United States, 751 F. Supp. 1522 (D. Kan.1990), *aff'd*, 952 F.2d 1241 (10th Cir.), *cert. denied*, 506 U.S. 828 (1992).
- (4) Even if the sale is not deemed void, it is imperative to remember that failure to comply with the Code requirements may be deemed unauthorized collection actions subject to damages, if any, pursuant to IRC § 7433.

### 5.17.3.7.3 (01-07-2011) Warranties

- (1) It is important that the PALS emphasize that no warranties are made as to the validity of the title to the property to be sold. The property should be offered for sale “as is” and “where is” and without recourse against the United States.
- (2) The taxpayer’s property and rights to property are sold subject to any prior mortgages, encumbrances or liens in favor of third parties senior to the federal tax lien. Treas. Reg. § 301.6335-1(c)(5)(iii). It is the responsibility of the prospective bidders to investigate title to and encumbrances on the seized property. However, on request the government will provide prospective bidders information it has learned about encumbrances which have priority over the federal tax lien listed on Form 2434-B, *Notice of Encumbrances Against Property Offered for Sale*.

**Note:** The number of liens and the uncertainty of their respective priority may depress the sale price. In such cases, rather than administratively seizing and selling the property, the revenue officer (or the PALS if the property has already been seized) should consider recommending suit to foreclose the federal tax lien, provided sufficient money is involved to justify suit.

### 5.17.3.7.4 (01-07-2011) Certificate of Sale -- Deed of Property

- (1) A certificate of sale is given to the purchaser of either personal or real property upon payment of the purchase price. A deed to real property is given to the purchaser or his/her assignees upon surrender of the certificate of sale after the redemption period expires. (If the purchaser cannot produce the certificate of sale, the purchaser must execute an affidavit of lost certificate, drafted by Area Counsel). The certificate of sale of personal property transfers to the purchaser all the delinquent taxpayer’s right, title and interest in the property

sold, and the certificate is prima facie evidence of the right of the Service to make the sale and is conclusive evidence of the regularity of the sale proceedings. IRC § 6339.

- (2) The certificate of sale constitutes authority for the transfer of corporate stock and title to motor vehicles. It also constitutes a receipt if the property sold is securities or other evidence of debt. Treas. Reg. § 301.6339-1.
- (3) A deed to real property is prima facie evidence of the facts stated therein and operates as a conveyance of all the taxpayer's right, title and interest in the premises sold at the time the tax lien attached to the realty, provided the sale has been substantially in compliance with the provisions of the Code and regulations.
- (4) Some purchasers record the certificate of sale to preclude transfer by the taxpayer to a bona fide purchaser for value.

5.17.3.7.4.1  
(03-12-2018)  
**Delivery of Possession**

- (1) A certificate of sale is issued upon payment of the purchase price and, at that time, possession of personal property must be delivered to the successful bidder. Delivery should not be made if any deferred payments have not been made.

**Note:** Possession of personal property may remain in the government as security for the purchase price, but the cost of caring for the property and the risk of loss are borne by the purchaser. Treas. Reg. § 301.6335-1(c)(8).

- (2) The PALS should not attempt to interfere if other parties assert a right to the property and attempt to gain possession from the buyer. However, if a third party alleges a wrongful seizure, the third party should be advised that under IRC § 6343 that party has two years from the date of the levy to file an administrative request for return of wrongfully levied property and under IRC § 7426 has two years to bring a wrongful levy action (unless an administrative claim has been made, in which case the period is extended the shorter of 12 months from the date the request was filed or six months from the date the Service disallowed the request.)
- (3) Whether a purchaser of real property is entitled to possession following the sale or at the time he/she obtains a deed from the Area Director after the redemption period depends on state law applicable to a purchaser at a levy of execution sale.

**Note:** In addition, whether the purchaser is entitled to any rents from the property before the expiration of the redemption period is also a question of state law. Area Counsel should be consulted regarding who has a right of possession of real property from the date of sale to the expiration of the statutory period of redemption.

5.17.3.7.4.2  
(01-07-2011)  
**United States as Purchaser**

- (1) If no one offers the minimum bid price at the sale and the Service has determined that the purchase of the property would be in the best interest of the United States, the property will be declared sold to the United States at the minimum bid price. IRC § 6335(e)(1)(C).
- (2) A certificate of sale or deed of conveyance is given to the United States in the same manner as if another party had been the successful bidder, and the cer-



tificate, or deed, has the same force and effect as to the validity of the sale and the property interest transferred or conveyed. IRC § 6338(b).

- (3) The deed to real property declared purchased by the United States at such sale is to be executed by the Secretary or his delegate and duly recorded in the proper registry of deeds.

5.17.3.7.4.3  
(01-07-2011)

#### Junior and Senior Lienors

- (1) IRC § 6339(c) provides that a Certificate of Sale of personalty or a deed to real property discharges the property from all liens over which the tax lien had priority. Liens senior to the federal tax lien, however, are not extinguished by a sale even when the United States is declared purchaser of the property. Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), although not a federal tax case, sets the constitutional due process standards for notice by publication. In Mennonite, the U.S. Supreme Court held that notice by publication of a county tax sale was inadequate notice to a senior lienor of record where Indiana state law provided that the tax sale extinguished all liens on the property. In Verba v. Ohio Casualty Ins. Co., 851 F.2d 811 (6th Cir. 1988), the court applied Mennonite to the Service's notice by publication of its administrative tax sale and held that such notice violated the due process rights of a lienor whose junior lien was extinguished under sale. The Service has procedures in place to provide notice to all junior lienholders and interests of record. See IRM 5.10.4.9, *Delivery of Notice of Sale*.
- (2) A junior lien attaching to personal property is extinguished as of the date such personalty is sold, not necessarily the date a certificate of sale is actually given to the buyer. A junior lien on real property is extinguished after the expiration of the 180-day statutory period of redemption.
- (3) The successful bidder takes the property or rights to property subject to all senior liens and encumbrances. Senior liens and encumbrances are not extinguished by a sale even where the United States is declared the purchaser of the property.

5.17.3.7.5  
(01-07-2011)

#### Application of Proceeds

- (1) Any money realized by levy or sale of seized property, or sale of redeemed property, is applied first against the expenses of levy and sale; second, against any unpaid tax specifically imposed against the seized property by an internal revenue law (e.g., alcohol or tobacco tax); and third, against the tax liability for which the levy was made or the sale was conducted. IRC § 6342(a).

**Note:** The taxpayer does not have the right to direct the application of the sale proceeds as the payment was made involuntarily. O'Dell v. United States, 326 F.2d 451 (10th Cir. 1964).

- (2) Any remaining, or surplus, proceeds are credited or refunded to the person or persons legally entitled to the surplus proceeds. IRC § 6342(b). If the United States cannot resolve conflicting claims to the surplus proceeds, the United States may bring an interpleader action in federal district court. See United States v. Sage, 566 F.2d 1114 (9th Cir. 1977) (the court held that surplus proceeds never go to satisfy senior lienors because the federal tax sale did not affect their interests).

5.17.3.7.5.1  
(01-07-2011)  
**Expenses of Sale**

- (1) The expenses of levy and sale include expenses or liabilities incurred to protect and preserve property during the period following service of a levy (insurance, police or private guards, custodial or maintenance help, rent or storage, utilities, trucking, etc.) as well as actual expenses incurred in connection with the sale (advertising, etc.). Treas. Reg. § 301.6341-1. If both real and personal property or several tracts of real property are sold in the aggregate, the IRS must properly allocate the expenses to the real property or to each tract.
- (2) Often, a landlord may demand that the government pay rent for the use and occupancy of a building, leased by the taxpayer, which had been padlocked by the IRS until the sale of the seized taxpayer-tenant's property located within the building. In one case, the United States was found liable for the rental value of the premises that had been padlocked following seizure of the taxpayer's personal property located on the premises when it prevented the landlord from exercising his state-given right to reenter and take possession, or to commence an action for recovery of possession of the premises without formal demand or reentry, after the lessee became 5 days in arrears in his rent. Smith v. United States, 458 F.2d 1231 (9th Cir. 1972). This decision should not be construed as affecting the basic position that where the taxpayer's assets are seized on leased premises lawfully in the taxpayer's possession, the government has no obligation to the lessor until the lessor legally becomes entitled to possession, absent any contractual arrangement between the IRS and the lessor. Area Counsel should be consulted if questions arise concerning the payment of rent.
- (3) Payments for use and occupancy are proper expenses of levy and sale. Therefore, should a surplus result from a levy sale and it can be anticipated that the United States will be sued for the value of use and occupancy which the government denies it owes, the surplus proceeds should be retained until the matter in dispute is resolved.

5.17.3.7.5.2  
(01-07-2011)  
**Tax Liabilities**

- (1) The amount remaining after payment of expenses and special taxes relating to the property sold is then applied against the tax liability in respect of which the levy was made or the sale of redeemed property was conducted. IRC § 6342(a)(3).
- (2) If the government seizes and sells property to enforce several outstanding tax liens, the proceeds must be applied toward satisfaction of the tax liens in the order of their priority
- (3) If the United States is declared the purchaser of property, the amount of the minimum bid must be applied toward the tax indebtedness after payment of expenses of sale, notwithstanding the fact that the United States may realize nothing from the property through the subsequent foreclosure of a lien prior to that of the tax lien. Therefore, the minimum bid price should take into consideration this possibility where the property to be seized is subject to liens or encumbrances superior to the tax lien.

5.17.3.7.5.3  
(01-07-2011)  
**Surplus**

- (1) The person or persons legally entitled to the surplus sale proceeds (including those from the sale of redeemed property) may be the taxpayer, his/her assignee, mortgagee, creditor or other lienor. However any party other than the taxpayer claiming a right to the surplus proceeds must establish a superior claim over that of the taxpayer. Treas. Reg. § 301.6342-1(b).

**Note:** Any interest of a lien holder that is superior to the federal tax lien remains on the property after the sale and accordingly, would not prime a claim to surplus proceeds.

- (2) If a party's claim to surplus proceeds is denied, the claimant may institute an action against the United States for such proceeds. IRC § 7426(a)(2). The taxpayer, of course, can bring a refund action against the government for the surplus.
- (3) When the government cannot resolve conflicting claims to the surplus proceeds, the matter should be referred to Area Counsel for an opinion on the relative priorities of the competing claims. If the government remains uncertain as to which claimant is entitled to the surplus proceeds, it may institute an interpleader action making all claimants parties. The court would then determine which claimants are entitled to the surplus proceeds.

5.17.3.7.6  
(01-07-2011)  
**Record of Sale**

- (1) Pursuant to IRC § 6340, the IRS must keep a record of sales of personal and real property and of redemptions of real property. In addition, the IRS must provide an accounting to the taxpayer that includes a copy of the record of sale (other than the name of the purchaser), the amount of sale proceeds applied to the taxpayer's liability, and a statement including the amount of any remaining balance. See IRM 5.10.6.10, *Record 21, Record of Seizure and Sale*.
- (2) In the case of real property sales, the IRS is not precluded from disclosing the names of purchasers to the taxpayers to enable the taxpayers to exercise their redemption rights.

5.17.3.8  
(01-07-2011)  
**Property**

- (1) The following sections define and describe different types of property and forms of property ownership. The discussion is limited to general principles and definitions. Bear in mind that in addressing property issues, it is always important to refer to the applicable state law. For more information regarding property laws in specific states, see the State Law Guides on the My SB/SE Counsel website at <http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/sbse/Pages/LawGuides.aspx>.

5.17.3.9  
(01-07-2011)  
**Real Property**

- (1) Real property consists of those things that in law are permanent, fixed, and generally immovable except as otherwise modified by state law. Real property consists of land, tenements and hereditaments.

**Note:** What may be real property in one state may not be such under another state's law. Questions that arise should be referred to Area Counsel. The characterization of property as real or personal property may determine (1) whether property belongs to the taxpayer or to a third party; (2) whether the IRS may levy against it; and (3) redemption rights. This characterization will also determine where the Notice of Federal Tax Lien is filed.

- (2) Land includes the earth in its natural condition (surface, soil, minerals, trees, water, etc.) as well as those things annexed thereto in the form of permanent improvements, such as buildings, fences, and other types of fixtures. Air space above the land, at least so much as can reasonably be used, is also considered part of land. Air space is very important in large cities where, due to congestion, buildings are erected on air rights. When the government estab-



lishes a minimum bid on real property to be sold at a sale, it should consider the value of air rights if particular circumstances indicate potential development of the air rights.

- (3) The term “tenements” refers to land held by freehold (an interest in real property that is or can become possessory), an estate or holding of land.
- (4) The term “hereditaments” refers to that which may be inherited, whether corporeal (such as land and fixtures) or incorporeal (such as rents and easements). The term embraces real property or personal property such as a right to a product or benefit of the land, or a right over the land.
- (5) An improvement is an addition to real estate through the expenditure of money or labor to render real property useful for another purpose or more useful for the same purpose. If the owner makes the improvements, e.g., erection of a building or an addition thereto, etc., there is little doubt that they become part of the real property to which they become affixed and as such, are property of the owner of the land.
- (6) The owner of the land acquires ownership of improvements erected on the land by another, absent a contract to the contrary. A building erected by a lessee for trade purposes may be a trade fixture removable by the lessee as his/her property unless the leasehold agreement provides otherwise. Whether improvements made by a lessee become property of the owner upon expiration of the lease or remain property of the lessee is a question of intent to be derived from the terms of the lease-contract. However, it is imperative to know the law of the state controlling ownership of an improvement to real property.
- (7) A fixture is a chattel so annexed to realty that it may be regarded as legally a part of it. Some authorities regard articles that, though annexed to the land, are removable by the tenant as personalty, but the majority view is that they are fixtures and constitute a part of the land until the tenant actually removes them. The tests generally applied in determining whether a chattel has become a part of the realty are:
  - a. whether there was an annexation (real or constructive) of the chattel to the realty,
  - b. whether the chattel was so attached that its removal would leave an unfinished gap in the realty,
  - c. whether the chattel was specifically fitted or adaptable to the use or purposes of the realty to which it is connected, and
  - d. most importantly, whether the party making the annexation intended the chattel to become a permanent part of the realty.
- (8) The fact that a chattel has become a part of the realty does not preclude its subsequent severance from the realty, thus again becoming personal property (e.g., removing a boiler to install a new one). The same is true if trees are cut down or a house is severed from the realty to be moved to another location. Though an article is not actually detached or removed, it may resume or continue its chattel character through constructive severance by an express or implied agreement of the landowner, as when the landowner sells it as a chattel apart from the land, or mortgages, or conveys the land with a reservation of the article. To be valid, however, the landowner’s agreement must be by a writing that complies with the statute of frauds since it involves a transfer of real property.

- (9) Trade fixtures, articles annexed by the tenant for trade purposes, are usually removable by the tenant even if the landlord contests the removal. It is of public utility that a tenant be able to improve the property for the purpose of his/her trade, without forfeiting his/her improvements.
- (10) "Chattel Real" is used to denote interests in or arising out of real property, of a fixed and determinate duration, such as a lease for 10 years or 1,000 years. A lease for one's lifetime, however, is not a chattel real as the duration of the lessee's life cannot be determined.

5.17.3.9.1  
(01-07-2011)

**Forms of Ownership**

- (1) The effect of a levy depends upon the nature of the taxpayer's interest in real property. While, depending on state law, personal property may be held in the forms of ownership described below, issues related to forms of ownership arise most frequently with respect to real property.

5.17.3.9.1.1  
(01-07-2011)

**Joint Tenancy**

- (1) A joint tenancy may be created by devise or conveyance through a sale or by a gift. The interests of the tenants are identical, must be created by the same instrument, commence at the same time, and be held by the same undivided possession.
- (2) The joint tenants also enjoy a right of survivorship in the property (relating back to the date of the original conveyance): One tenant's interest cannot be inherited, but terminates upon his death.
- (3) Unlike a tenancy by the entirety (discussed below), the tenants may, but need not, be spouses. Also, the tenancy may be composed of any number of persons. Historically, the most important difference between the two estates has been that a joint tenant's interest in the jointly held real and personal property is severable and subject to sale during the tenant's lifetime.
- (4) State laws on joint tenancy vary. Many states require definite language to be employed in the instrument of conveyance to establish a joint tenancy, absent which a tenancy in common is created. A few states have virtually abolished an estate in joint tenancy, but most states recognize a joint tenancy in both real and personal property.
- (5) Only the taxpayer's property right in the joint estate can be sold at a sale made pursuant to levy. Although the joint tenants may be considered to constitute one person among themselves, each is entitled to share equally in the rents, income and profits from the estate. A joint tenant does not have a distinct interest in the whole estate unless the interest becomes separate by some act, in which case, the joint tenancy ceases. The tenants would then hold interests as tenants in common.
- (6) A conveyance of one tenant's interest, partition, or a sale under a levy of execution may sever a joint tenancy. The severance must occur during the lifetime of the tenants, and when it does, the party who succeeds to such interest holds as a tenant in common with the other tenant or tenants, notwithstanding a continued unity of possession. Another distinction between a tenancy by the entirety and a joint tenancy is that in the latter, the right of survivorship is destroyed by an act of severance, voluntary or involuntary, of one of the tenants during his or her lifetime.
- (7) Therefore, a levy may be made upon a tenant's interest in a joint tenancy, and upon sale of the tenant's interest, the estate ceases to exist and the right of

survivorship in the tenants is terminated. If there are three joint tenants, a sale of one tenant's interest does not destroy the right of survivorship to two-thirds of the property between the other two tenants, who together hold the estate as tenants in common with the purchaser at the sale. It is this termination of the right of survivorship which results in higher sale proceeds than in the case of the sale of a tenant's interest in an estate by the entirety where the buyer must assume the risk of one tenant surviving the taxpayer-spouse.

- (8) As in the case of entirety property, if the tax liability is outstanding against all the joint tenants, the whole property may be levied upon, seized and sold to enforce collection. If one of two tenants dies and tax assessments are outstanding against the surviving tenant, the entire property may be levied upon. In most cases, should the taxpayer-tenant predecease the surviving tenant, the tax lien is extinguished and does not attach to the estate in the survivor. However, in some states (e.g., Ohio, Wisconsin and Connecticut) the federal tax lien will survive the death of the taxpayer-joint tenant.

5.17.3.9.1.2  
(01-07-2011)  
**Tenancy by Entirety**

- (1) A tenancy by the entirety is very similar to a joint tenancy except it can exist only between spouses. In the majority of the jurisdictions recognizing tenancy by the entirety (often called full bar states), creditors cannot attach entireties property to satisfy the debts of only one spouse. The other entireties jurisdictions (referred to as partial bar states) permit creditors to attach one spouse's interest in entireties property for the debts of only that spouse, subject to the rights of the non-liable spouse. However, state law on attachment of liens against entireties property is not effective against the federal tax lien.
- (2) In United States v. Craft, 535 U.S. 274 (2002), the Supreme Court held that a federal tax lien attached to a taxpayer's right to property in a tenancy by the entirety for the tax liability of only one spouse, even though local law (Michigan's) insulates such property from the claims of the creditors of only one spouse. The Court reasoned that, under Michigan law, a tenant by the entirety has numerous rights, including the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the other tenant's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the other tenant's consent, and the right to block the other tenant from selling or encumbering the property unilaterally. These state law-defined rights, the Court found, are sufficient to constitute a property or rights to property for federal tax purposes. Thus, a taxpayer's tenancy by entirety interest is subject to levy and sale.
- (3) To create a tenancy by the entirety, the spouses must receive the property in a single instrument at the same time during the marriage. A number of states among those recognizing a tenancy by the entirety, permit the estate to exist as to personal as well as real property. At one time an estate by the entirety could only be created by the conveyance of real property to spouses. In some states, divorce severs the tenancy by the entirety, and the spouses become tenants in common.
- (4) On certain occasions entirety property may be converted into cash through condemnation proceedings, destruction by fire or a mortgage foreclosure. Generally, even in those states not recognizing an entirety estate in personal property, the proceeds are constructively real property held in the entirety by both spouses, and the general principles set forth above equally apply to the

funds in question. If the tenants voluntarily sold the entirety property, treatment of the sale proceeds as being held by the entirety or otherwise is often a question of the intent of the spouses.

- (5) It has always been the case in tenancy by the entirety jurisdictions that where there is a joint tax liability, the real or personal property is subject to levy to enforce collection. See, e.g., In re Butcher, 63 B.R. 30, 32 (Bankr. E.D.Tenn. 1986); United States v. Ragsdale, 206 F. Supp. 613 (W.D. Tenn. 1962); Augello v. United States, 93-2 USTC 50,391 (M.D. Pa. 1993). If a tax liability is outstanding against one tenant, upon the death of the liable tenant's spouse, the federal tax lien attaches to the entire property, United States v. American Nat'l Bank of Jacksonville, 255 F.2d 504 (5th Cir.), cert. denied, 358 U.S. 835 (1958); Theo H. Davies & Co. v. Long & Melone Escrow, 876 F. Supp. 230 (D. Haw. 1995); and the property may be levied on and sold.

5.17.3.9.1.3  
(01-07-2011)

#### Tenancy in Common

- (1) An estate in common may exist between two or more persons and may consist of the holding of an estate in land by persons under different titles, but there must be a unity of possession among the tenants. That is, each tenant must have the right to occupy the whole premises in common with the co-tenants. There is no unity of possession and thus, no tenancy in common if each tenant possesses a definite part of the real property to the exclusion of the other tenants. The unities of title, interest and time are not necessary as in a joint tenancy, although one or more of these unities may exist with the unity of possession.
- (2) A tenancy in common may generally exist as to both real and personal property. There is no right of survivorship. Upon the death of one tenant, his/her interest in the property passes by his/her will or by state law of descent and distribution. A tenant may seek to partition the property or convey or assign his/her interest to his/her co-tenant. The tenancy in common is terminated upon the occurrence of either event. The estate in common also ceases if all the tenants convey to a third party. But where a tenant conveys his/her interest to one of several co-tenants or to a stranger, the tenancy in common continues to exist. Each co-tenant need not own an undivided equal interest in the entire property to create or preserve a tenancy in common.
- (3) A levy may be made upon a co-tenant's property or right to property in common property. The purchaser at a levy sale holds the property as a tenant with the other tenant or tenants. Since a tenant's interest in an estate in common is not terminated or extinguished by death, the property may be levied upon and sold subsequent to the tenant-taxpayer's death to enforce collection of a tax assessed prior to the tenant's death or to enforce the estate tax lien arising at the date of death of the deceased tenant.

**Note:** Although only a tenant's interest in common property may be administratively levied upon to enforce collection of the tenant's delinquent taxes, the interest may be foreclosed upon as part of a judicial suit and the entire property sold. United States v. Rodgers, 461 U.S. 677 (1983).

**Note:** If the co-tenants are jointly liable, the entire premises may be administratively seized and sold.

5.17.3.9.1.4  
(01-07-2011)

**Community Property**

- (1) Community property systems, which have been adopted by nine states (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin), are created by state law as an incident of marriage. See, generally, IRM 25.18.1.2.2, *Community Property Law*, and IRM 25.18.4, *Collection of Taxes in Community Property States*. Because these systems are created by state law, there is a lack of uniformity in the laws of the various community property states. For more information regarding community property laws in specific states, see the State Law Guides on the My SB/SE Counsel website at <http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/sbse/Pages/LawGuides.aspx>.
- (2) Community property generally includes all property acquired by a married couple, except property acquired after marriage by gift or inheritance. It generally does not include property that was owned by either spouse before the marriage. Thus, the revenue officer attempting to collect by levy may first encounter the problem of determining what constitutes community property and what constitutes separate property. The time and source of funds the spouse uses to acquire the property are important to resolving this issue.
- (3) The revenue officer must also consider:
  - the nature of the rents, income, profits, etc. (i.e., are they derived from separate or community property);
  - the commingling of property (e.g., if the property is acquired with both community and separate property or where an account contains both community and separate funds);
  - the nature of income derived from separate property through the efforts of both spouses;
  - the execution of any agreements between the spouses changing the character of separate or community property;
  - the effect of one spouse taking sole title to community property;
  - the liability of community property for the individual debts of either spouse incurred both before and after marriage; and
  - the disposition of community property upon the death of either spouse or upon divorce.
- (4) Resolution of the issues above is necessary before levy. Because each of the various community property states has its own laws, the revenue officer, in deciding whether a levy should be made or a suit instituted to foreclose a federal tax lien, should consult Area Counsel whenever a legal opinion is needed.

5.17.3.9.1.5  
(01-07-2011)

**Dower**

- (1) Most states have abolished dower and curtesy in favor of statutory or elective shares equally available to surviving spouse of either sex as to both real and personal property. The revenue officer should carefully consider the law of wills and intestate descent and distribution of the particular state because these laws vary state to state. Area Counsel should be consulted when necessary.
- (2) Under common law, dower is generally a life estate given to a widow in one third of all inheritable real property which her deceased spouse owned during their marriage. The right of the widow/widower vests or becomes property upon the death of the spouse. Marriage does not vest an absolute right to dower, but is an incident thereof, dependent upon the widow/widower surviving his/her spouse. It is not necessary that the decedent acquire an inheritable interest in real property subsequent to his/her marriage to create a dower

estate in the spouse, nor need the decedent own such property at death. The decedent must merely own the property at some time during marriage. Because the estate arises out of a marital relationship, the marriage must be legally recognized. The decedent as owner of real property has the right to possession and the rents, income and profits to the exclusion of the spouse.

- (3) Although the spouse's dower estate is a mere expectancy, it generally cannot be destroyed by any other act of the decedent (e.g. a conveyance, or execution sale of lands by judgment-creditor). Nor may the spouse assign, convey or transfer the dower to another party. He/she may, however, release the dower, such as by joining in a conveyance of property with the decedent. The dower expectancy does attach to the decedent's interest in a tenancy in common, but there is no dower in estates by the entirety or joint tenancy. There is no dower in community property. Divorce may or may not terminate the dower interest depending on state law.
- (4) A right of dower cannot be levied upon to satisfy the survivor's individual tax liabilities, because the so-called right is a mere expectancy dependent upon surviving his/her spouse. There is no property or right to property in the spouse until the death of his/her spouse, at which time there is a non-transferable chose in action until the dower interest in the decedent's estate is determined and set aside. Likewise, a tax lien against the decedent arising subsequent to the marriage of the parties and after the acquisition of real property by the decedent cannot affect the dower interest in the property, because the dower right generally cannot be impaired or defeated by any act of the decedent. Rev. Rul. 79-399, 1979-2 C.B. 398.

5.17.3.9.1.6  
(01-07-2011)  
**Curtesy**

- (1) This is a common law estate somewhat similar to dower. It differs from dower in that the married couple must have a child during marriage. Upon the death of the spouse, the survivor has a life estate in all real property. The revenue officer must refer to state law, as in the case of dower, to ascertain the extent to which this estate is recognized today. Moreover, the discussion on levy, divorce, etc. in the dower section above, applies to a curtesy estate.

5.17.3.9.1.7  
(01-07-2011)  
**Homestead**

- (1) The term homestead refers to certain land and improvements exempt from the claims of particular creditors against the head of the family. This privilege does not extend to all debts incurred by the head of the family. Where the homestead is merely an exemption provision of state constitutions or legislative enactments, the right of the United States to levy on real property for taxes of the head of the family is unaffected. Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974).
- (2) Some states, while recognizing that a homestead is not an estate in land, view it as a special interest in land belonging to both spouses jointly and indivisibly. These states see it as an interest that is only lost by death or abandonment, and that may not be compromised by the other spouse. Other states treat a homestead as a mere expectancy similar to dower that cannot vest in either spouse until one survives the other. Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962), cert. denied, 372 U.S. 913. (1963); United States v. Benn, 73-1 USTC 9415 (S.D. Fla. 1973).
- (3) The revenue officer must refer to state law to determine whether a homestead is merely an exemption from the claims of creditors or a vested property interest. The revenue officer must also consider:



- the conditions precedent to the establishment of a homestead right,
- the real as well as personal property in which a homestead may be created,
- the person or persons in whose favor a right of homestead is created,
- events that may terminate a homestead claim, and
- other factors relating to the nature and incidents of a homestead.

5.17.3.9.1.8  
(01-07-2011)  
**Future Interests**

- (1) Future interests, interests in land in which possession will or may occur in the future, is one of the most complex areas of law. Briefly, if the future interest represents property or a right to property of the taxpayer, it may be levied upon and sold. If the interest is contingent or a mere expectancy, there is no property interest to which the levy can attach. The revenue officer should consult Area Counsel whenever a future interest arises.

5.17.3.10  
(01-07-2011)  
**Personal Property**

- (1) Personal property is any tangible or intangible thing that is subject to ownership and not real property. Tangible property is that which may be felt or touched and is either real or personal property. Intangible property is that which cannot be touched or perceived and usually applies only to personal property. For example, the paper on which a promissory note is written is tangible personal property, while the right to payment that such note evidences is intangible personal property. Of course, there are areas in which it is difficult to distinguish between real and personal property, and Area Counsel should be consulted if a determination as to the nature of property is needed.
- (2) Personal property can be owned by more than one person. Some states permit a married couple to hold personalty as tenants by the entirety with the same incidents of ownership as in the case of real property held by the entirety. Most states recognize either or both joint and common estates in personalty.
- (3) The following sections discuss, in general terms, some types of personal property. As with all property issues, always refer to specific applicable state law.

5.17.3.10.1  
(01-07-2011)  
**Accounts**

- (1) An account is any right to monetary payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. Art. 9-102(a)(2) of the Uniform Commercial Code. The party obligated is commonly referred to as the debtor. Levy is made on accounts by service of notice of levy on the debtor. After the levy on the debtor, the Service has the option of either administratively selling the account receivable or obtaining payment due the taxpayer. However, a levy does not accelerate the payment. See Cash v. United States, 961 F.2d 562 (5th Cir.), cert. denied, 506 U.S. 985 (1992).
- (2) When the Service levies on the debtor to obtain the payment for the accounts receivable, the taxpayer is not entitled to a credit for the fair market value of the accounts at the time of the levy. Cash, *supra*. The taxpayer's liability will be credited when the Service either administratively sells the accounts receivable or obtains payment from the debtor. If the Service, however, negotiates new payment terms with the debtor, then the taxpayer has an argument that his tax liability must be credited with the fair market value of the accounts at the time of the levy. In re Barlows Inc., 767 F.2d 1098 (4th Cir. 1985).

5.17.3.10.2  
(01-07-2011)  
**Alimony**

- (1) "Alimony" is an allowance paid by one spouse to the other for support and maintenance pursuant to a court order. If the spouse receiving alimony owes a tax, a levy served on the other spouse reaches the alimony payments.
- (2) If the court decree designates a specific amount to be paid for child support, the receiving spouse does not have a right to that for personal use. Therefore, a levy served upon the paying spouse for the receiving spouse's individual tax liabilities does not reach the amount attributable to child support. If the paying spouse is the delinquent taxpayer, amounts necessary for child support are likewise not subject to levy. IRC § 6334(a)(8).

5.17.3.10.3  
(01-07-2011)  
**Bail**

- (1) Used here, "bail" refers to the posting of security for a person's appearance in court at a designated time and place.
- (2) Property deposited with a court as security for bail is in custodia legis. Nevertheless the federal tax lien attaches to the deposit and the property can be levied upon. A notice of levy may be served upon the clerk of the court. In such a case the clerk should be advised that full compliance with the levy is not required until such time that the property would otherwise be turned over to the taxpayer or someone claiming through him/her. If a dispute arises as to who owns the property, the government must establish the nature and extent of the taxpayer's property interest. The levy would be ineffective if there were a forfeiture of the deposited property for failure to comply with the conditions of bail. If a third person deposits property for the taxpayer, there might be a question as to whether the taxpayer has a property interest in the deposit. Area Counsel should be consulted in such instances.
- (3) Property a defendant-taxpayer deposits with a surety or the court clerk to secure his/her liability on a bond is subject to levy, provided the security is not forfeited by the defendant. United States v. Parker, 55-2 USTC 9677 (N.D. Tex. 1955).

5.17.3.10.4  
(01-07-2011)  
**Bank Accounts**

- (1) The deposit of money in a bank generally creates a debtor-creditor relationship between the bank and depositor. Other relationships might exist, such as bailor and bailee, agent and principal, etc., depending upon the circumstances. A levy may be made upon the debt the bank owes to the taxpayer-depositor, as evidenced by the amount on deposit. To reduce a debt to the government's possession, the notice of levy must be served on the debtor-bank.
- (2) Bank accounts may be savings, checking, special interest, certificate of deposit, etc. However, the United States may levy upon that property interest in the bank account regardless of the designation of a bank deposit if the taxpayer has property or rights to property as a depositor. United States v. National Bank of Commerce, 472 U.S. 713 (1985).
- (3) A bank honoring a levy is not entitled to deduct a service charge from the amount of deposit to cover its costs in honoring the levy, regardless of the right the bank may have to offset service charges against the taxpayer's account in ordinary transactions. Also, the bank's exercise of its right of offset after the service of a notice of levy upon the bank is not a defense to a suit for failure to honor a notice of levy. E.g., State Bank of Fraser v. United States, 861 F.2d 954 (6th Cir. 1988).
- (4) In many situations the IRS will release a levy on a bank account if the bank proves that it has a superior lien interest in the account. Rev. Rul. 2006-42,

2006-35 IRB 337. Specifically, IRC § 6323(b)(10) provides a superpriority to a bank's security interest in a depositor's bank account, as long as the bank lacked actual notice and knowledge of the federal tax lien. A "security interest" is limited by IRC § 6323(h) to those interests that are protected under local law against subsequent judgment liens.

- a. Section 9-109 of Article 9 of the Uniform Commercial Code (UCC) allows a security interest to be created in personal property. Section 9-109(d)(13), however, excludes consumer deposit accounts from the scope of Article 9. Thus, a bank may obtain a security interest in a non-consumer deposit account, i.e., a business bank account.
  - b. Section 9-314 provides that a security interest in a business deposit account may be perfected only by control. The bank is not required to file a financing statement to perfect its security interest in the account. Under § 9-104(a)(1), a bank automatically has control when the bank maintains the business deposit account. Section 9-104(b) provides that a depositor's right to withdraw funds from the deposit account does not eliminate the bank's control.
- (5) In short, in many situations banks will qualify for a superpriority under IRC § 6323(b)(10). If the bank honors the levy, the bank may then file a wrongful levy suit to recover the amount of its superpriority.

**Note:** A superpriority is not a defense to levy, Virgin Islands Bureau of Internal Revenue v. Chase Manhattan Bank, 312 F.3d 131, 138 (3d Cir. 2002), and a superpriority does not extend the period for filing a timely wrongful levy action. Thus, if a bank has not resolved the levy before the expiration of the period for filing a wrongful levy suit, it may be in a predicament: the bank's IRC § 6323(b)(10) superpriority is not a defense to a levy and the bank has no wrongful levy claim that can be asserted in court.

- (6) If the deposit account is a consumer account or a bank had actual notice and knowledge of the federal tax lien, then no superpriority exists under IRC § 6323(b)(10). In this situation the bank must honor the levy without any further recourse against the Service. Moreover, if IRC § 6323(b)(10) does not apply and funds are deposited in the taxpayer's account after the levy and the bank makes a setoff, the IRS can still recover the funds under the argument that the bank has funds encumbered with the federal tax lien. United States v. Donahue Ind., 905 F.2d 1325 (9th Cir. 1990); United States v. Cache Valley Bank, 866 F.2d 1242 (10th Cir. 1989); United States v. Bank of Celina, 721 F.2d 163 (6th Cir. 1983).

5.17.3.10.4.1  
(01-07-2011)  
**Joint Account**

- (1) Generally, a bank account may be held jointly by two or more persons, although statutory or other particular language must be used (e.g., A and B, either or survivor) to effect this type of ownership. Moreover, the unities of interest, time, title and possession must be present. The property interest of a taxpayer in a joint account may be levied upon.
- (2) The Supreme Court has defined a delinquent taxpayer's interest in a joint bank account to include all of the funds in the joint account, if the taxpayer has an unqualified right to withdraw the funds under his contract with the bank and under state law. United States v. National Bank of Commerce, 472 U.S. 713 (1985). In National Bank of Commerce, the Court allowed the IRS to levy upon a joint bank account even though the IRS did not know whether the delinquent taxpayer, one of the joint depositors, actually had any money in the account at

all. The Court found that the taxpayer's unrestricted state-law "right to withdraw" constituted the "property" or "rights to property" "belonging to" the taxpayer. The taxpayer had an unrestricted "right to withdraw" under state law, subject to later claims by his co-depositors; the government therefore had the right to levy, subject to a later claim by a co-depositor.

- (3) If local law or the contract between the bank and the joint tenants does not grant an unqualified right of withdrawal, the joint account may still be levied upon. In those cases, the joint account is subject to levy only to the extent of the delinquent taxpayer's interest in it, which will be determined from the facts of each case.
- (4) Because minors in many situations cannot open bank accounts in their own names, the bank accounts list a parent's name, even when the children are the owners of the funds deposited. A levy on such an account to collect a parent's tax liability would be a wrongful levy, unless it can be shown that a federal tax lien encumbered the funds before they were deposited in the child's account.

5.17.3.10.4.2  
(01-07-2011)  
**Trusts or Special  
Account**

- (1) A bank account of the taxpayer may be designated as a special account; but absent evidence that a trust was created, a bank must honor a levy served on the special account.
- (2) A savings account may be in the name of the taxpayer in trust for another party. This type of account is commonly referred to as a Totten trust. A trust is nothing more than another means of disposing of property by the party establishing the trust (called a settlor). Usually, the deposit in a Totten trust is held to be that of the settlor-trustee during the period he/she maintains control over the account with the freedom to make deposits and withdrawals at will. However, the Totten trust becomes a true trust when title of the beneficiary is no longer subject to revocation; for example, upon the death of the depositor without having revoked the trust. Thus, whether a levy will reach a Totten trust depends upon who the taxpayer is (depositor or beneficiary) and whether or not an irrevocable trust was established. It has been held that a levy served upon a bank to reach an amount in a Totten trust was ineffective where the taxpayer-beneficiary predeceased the party establishing the trust because the tentative trust was terminated by the taxpayer's failure to survive the depositor.
- (3) Trying to prove whether a bank deposit is a true trust or not will present difficulties that are not limited to Totten trusts. It is important to determine who owns the trust account before serving a notice of levy upon the bank.

5.17.3.10.4.3  
(01-07-2011)  
**Outstanding and  
Deposited Checks**

- (1) A bank, by custom or agreement, may allow the taxpayer-depositor to draw against checks before they clear. In such a situation, the bank is required to treat the amounts in clearance as funds in the taxpayer-depositor's account subject to levy. Rev. Rul. 79-38, 1979-1 C.B. 406.
- (2) A bank is required to pay over the funds actually on hand at the time the notice of levy is served, not the amount indicated by the bank in its acknowledgment of service. Rev. Rul. 73-310, 1973-2 C.B. 408.

5.17.3.10.4.4  
(01-07-2011)  
**Branch Banks**

- (1) If a levy is served on a branch of a bank and a bank employee states that the branch has no property of the taxpayer because the taxpayer banks at another branch, the revenue officer must determine whether the taxpayer has the right to withdraw funds from the levied upon branch. As with any other levy source, if a branch bank is in possession of property or rights to property of the taxpayer or is obligated with respect to the same, it has to honor the levy.
- (2) If, by law and pursuant to the terms of the contract with the bank, the levied upon branch is not in possession of or obligated with respect property or rights to property of the taxpayer, the revenue officer should immediately levy at the appropriate branch. It may be necessary to serve a summons to obtain that information.
- (3) There may be cases in which a branch served with a levy will refuse to honor the levy alleging that levies on the bank should be served on a central location. However, a bank's preference that levies be mailed to a central location does not render ineffective a levy served on a branch in possession of or obligated with respect to property or rights to property of the taxpayer.

5.17.3.10.4.5  
(01-07-2011)  
**Other Negotiable Paper**

- (1) A levy on a delinquent taxpayer's funds represented by other negotiable paper such as drafts, certificates of deposit and warehouse receipts can be made only by presenting and surrendering the negotiable paper to the maker. Rev. Rul. 75-355, 1975-2 C.B. 478. The service of a Notice of Levy (Form 668-A) is insufficient. The negotiable paper must also actually be seized and then presented and surrendered to the maker. The revenue officer should consider a suit to foreclose the federal tax lien if actual seizure is not practical.

5.17.3.10.5  
(01-07-2011)  
**Chose in Action**

- (1) A chose in action is an intangible personal right not reduced to possession, but recoverable by a suit at law. The right to sue for payment of a debt is a chose in action, not the overdue note which is merely evidence of the intangible debt. Since a chose in action is property and a right to property, a levy may be made upon the chose in action. See United States v. Citizens & Southern Nat'l Bank, 538 F.2d 1101 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977). However, in levying on a chose in action, the government can seize no more than the taxpayer owns by virtue of the contract, transaction or occurrence that gave rise to the taxpayer's property or right to property.
- (2) If a taxpayer-plaintiff has filed suit to recover on a chose in action, the Service may seize and sell the taxpayer's chose in action. A notice of levy can also be served on the taxpayer's attorney to seize any payment or settlement in the lawsuit. Notices of levy can also be served on the defendant and his/her attorney to seize the debt owed to the taxpayer.

**Note:** Levies served before a judgment or settlement seize obligations that are fixed and determinable as of the date of the levy. Treas. Reg. § 301.6331-1(a)(1).

- (3) Should the taxpayer-plaintiff obtain a judgment, notices of levy should again be served before payment is made by the defendant. If the defendant is the taxpayer and he/she files a counterclaim, a similar procedure should be followed. The revenue officer must remember that a right to sue for a debt is a chose in action which may be levied upon, but the debt, as distinguished from the chose in action, is not reduced to possession until a notice of levy is served upon the taxpayer's debtor.



5.17.3.10.6  
(01-07-2011)

**Condemnation Award**

- (1) To the extent that a taxpayer has property or a right to property in a condemnation award, the award is subject to levy. However, the revenue officer may encounter difficulties when levying if not all of the joint owners of the condemned property are delinquent taxpayers or there is a cloud on the title to the property. If state law provides that the condemnation award shares the same character as the condemned property, the amount awarded must be so treated by the government contemplating a levy and seizure of the award. In such cases, the decision to levy on a condemnation award should be approached in the same manner as would be the case of levying on the real property itself.
- (2) A notice of levy should be served on the appropriate official of the governmental unit charged by the court to pay the award.

5.17.3.10.7  
(01-07-2011)

**Credit/Debit Card  
Processing Contracts**

- (1) Under credit/debit card processing contracts, a processing company is generally obligated to pay the merchant/taxpayer for all credit card sales made. This obligation arises at the time of the sale, not later when the information is forwarded to the company or even later after daily settlement has occurred. While payments are not made to the merchant/taxpayer instantaneously, the obligation to pay is fixed and determinable, and the funds are owed to the merchant/taxpayer at least daily.
- (2) Whenever a processing company is served with a levy, it is required to surrender any amounts owed the taxpayer for credit card sales at the time the levy is served. The processing company generally holds funds up to 24 hours and then electronically transmits the aggregate amount of the transactions that occurred during the 24-hour period to the merchant.
- (3) Under credit/debit card processing contracts, processing companies also typically maintain funds in separate reserve or "charge back" accounts that are used to setoff any future "charge back" amounts against the merchant/taxpayer. Although the funds held in a reserve account belong to the merchant/taxpayer, under the typical contract, they are not available to the merchant/taxpayer until a specified amount of time after the contract is terminated. Where a processing company maintains amounts in a reserve or "charge back" account, the levy will attach to all funds held in that type of account. However, the processing company will not have to turn over those funds to the Service until the time period specified in the contract has expired.
- (4) The paragraphs above notwithstanding, the processing company may have priority over the Service with respect to the funds in the reserve account if
  - a. the processing company has executed a setoff before receiving notice of levy,
  - b. the processing company has a security interest earlier in time than the Service's notice of federal tax lien under IRC § 6323(a), or
  - c. the processor has a superpriority under IRC § 6323(b)(10). See IRM 5.17.3.10.4(4), above.

5.17.3.10.8  
(01-07-2011)

**Debts**

- (1) A debt owed a taxpayer is clearly subject to levy. The government reduces debts to its possession by serving a notice of levy upon the debtor. As stated previously, payment to the government is a complete defense to the debtor in any action brought against him/her on the debt. IRC § 6332(e). A debt may be levied on notwithstanding the fact that a state government is the taxpayer's debtor or that the security for the debt may not be levied upon.



- (2) If there is joint and several liability on a debt, a levy may be served on any of the debtors to reach the entire debt owed the taxpayer. There is no legal requirement to levy on all the debtors to reduce the debt to possession. In addition, the government is not required to consider the equities between the debtors.

5.17.3.10.9  
(01-07-2011)  
**Dividends**

- (1) A taxpayer's right to dividends declared on stock owned by the taxpayer is subject to levy. Rev. Rul. 75-554, 1975-2 C.B. 478. Dividends are distributions of earnings and profits to shareholders which have no effect on the shareholder's proportionate interests in the corporation. Although the rights of shareholders are determined by the law of the corporate domicile, it is generally accepted that whenever a lawful dividend on stock is declared shareholders become creditors of the corporation with a right to be paid a certain sum at a future time.
- (2) Thus, the revenue officer is levying upon a debt. A notice of levy should be served on the corporation and on the paying agent designated by the corporation to disburse the dividend payments, once the corporation becomes indebted to the taxpayer-shareholder. Because dividends are usually payable to shareholders of record as of a certain date, it is advisable to levy on the corporation after the date of declaration and on the paying agent before the date set for payment. The revenue officer need not seize the taxpayer's stock before he/she may levy to seize the debt. Problems may arise if the taxpayer has transferred his/her stock in the interim, but these should be referred to Area Counsel for an opinion on what property or right to property was, in fact, levied on.

5.17.3.10.10  
(01-07-2011)  
**Fixtures**

- (1) Fixtures were considered when defining real property previously in this section. Fixtures may be levied upon depending upon who the taxpayer is, the relationship between the owner of the premises and the party utilizing the fixtures, and the intent of the parties as to the disposition of the chattels upon termination of the use of the premises. The law of the state the real property is located in determines the property interest, if any, the owner of the premises has in fixtures.

5.17.3.10.11  
(01-07-2011)  
**Health Savings  
Accounts**

- (1) The Service may levy on a taxpayer's Health Saving Account (HSA) established under IRC § 223. An HSA is a trust created exclusively for the purpose of paying the qualifying medical expenses of the account beneficiary, the individual who establishes the HSA. IRC § 223(c)(3) and (d)(1). Banks, credit unions, insurance companies, and other financial institutions serve as trustees or custodians for HSAs. IRC § 223(d)(1)(B).
- (2) The account beneficiary (taxpayer) that establishes the HSA owns and controls the funds in his or her HSA. The taxpayer makes decisions regarding which qualified medical expenses are paid from the account and how the money in the account is invested. The taxpayer may receive a distribution at any time. Notice 2004-2, Q & A-24, 2004-1 C.B. 269.
- (3) The HSA trustee or account custodian is not required to determine whether the distributions are used for qualified expenses. The taxpayer's interest in the HSA is nonforfeitable under IRC § 223(d)(1)(E). In light of the foregoing, the taxpayer's interest in an HSA constitutes "property" or "rights to property" that is subject to levy under IRC § 6331.

- (4) A distribution from an HSA for any purpose other than qualified medical expenses is includible in the account beneficiary's gross income and subject to an additional ten percent tax under IRC § 223(f)(4). However, the ten percent additional tax does not apply if, at the time of the distribution, the account beneficiary was dead, had attained age 65, or was disabled. A levy on an HSA is not a distribution to pay qualified medical expenses. Therefore, unless one of the exceptions apply, a taxpayer would be liable for the additional ten percent tax on the amount of the levy.

5.17.3.10.12  
(01-07-2011)  
**Insurance**

- (1) IRC § 6332(b) permits the government to levy against the cash loan value of a life insurance or endowment contract without resort to a foreclosure suit. See IRM 5.11.6.4, *Notice of Levy in Special Cases, Insurance*, for administrative procedures. A levy on an insuring organization with respect to a policy issued by such organization constitutes:
- a demand by the Secretary or his delegate for payment of the cash loan value (with certain adjustments), and
  - the exercise of the right of the taxpayer to the advance of such amount.

**Note:** A lien foreclosure action may be used to collect the cash surrender value of an insurance policy. However, a suit to foreclose the tax lien on life insurance policy is disadvantageous to both the government and the taxpayer. Such a suit is a cumbersome method of collection. The consequences are more serious for the taxpayer as the suit, if successful, cancels the policy and completely eliminates the insurance coverage.

- (2) It is not necessary to surrender the contract document. However, the notice of levy must certify that a copy of the notice has been sent to the taxpayer. The insuring organization has 90 days from the date of service of notice of levy to pay over the required amount. This 90-day period provides time for the taxpayer to meet his/her tax liability by other means. In this event, the insurance company must be notified before the expiration of the 90-day period of the payment received from the taxpayer during the period.

5.17.3.10.12.1  
(01-07-2011)  
**Satisfaction of Levy**

- (1) The insurance company must pay over the amount the taxpayer could have had advanced to him/her 90 days after service of notice of levy increased by the amount of any policy loans made to the taxpayer on or after the date the insurance company had actual notice or knowledge of the existence of the lien and before the satisfaction of the levy. However, the insurer may, at any time, make automatic premium loans which keep the policy in force if such loans are made under an agreement entered into before the insurer had such notice or knowledge.
- (2) If the policy does not contain an automatic premium loan provision, but does provide that the policy is automatically converted to paid up term insurance with no cash value upon default in the premium payment, the amount generally required to be paid over is the cash loan value as of the date of the service of notice of levy. Treas. Reg. § 301.6332-2(c). However, the two circuits that have addressed the issue have held that if the automatic conversion provision is in effect due to a default in payment of premiums, there is no cash loan value as of 90 days after service of notice of levy and nothing is required to be paid over. See *United States v. Equitable Life Assurance Co. of the United States*, 78-2 USTC 9749 (2d Cir. 1978); *United States v. Prudential Insurance Co. of America*, 461 F.2d 208 (5th Cir. 1972).

- (3) The provisions governing the amount the insurance company must pay over recognize the superpriority status accorded certain insurance contracts by IRC § 6323(b)(9). That section further provides that once the levy is satisfied, the insurance company is to have priority for any subsequent policy loans until the Secretary or his delegate delivers to the insurer another notification executed after the date of satisfaction of the prior levy, that a tax lien exists against the property or rights to property of the taxpayer. Notification may be made by any means (e.g., a letter, etc.), but delivery will be deemed to be effective only from the time of actual receipt by the insurance company. A notice of levy form should generally not be used to put the insurance company on notice of the tax lien, because the use of this form will restrict the notice to 90 days.
- (4) If the insurance company honors the levy, it is discharged from any obligation or liability to any beneficiary under the policy or to the taxpayer-insured with respect to the payment made. IRC § 6332(e).

5.17.3.10.12.2  
(01-07-2011)

**Taxpayer is Beneficiary**

- (1) If the beneficiary is the delinquent taxpayer, a levy may be served upon the insurer to reach the proceeds payable to the beneficiary-taxpayer. State law determines whether a beneficiary-taxpayer has a vested property interest upon which a levy may be made. Payment of premiums by a beneficiary alone does not vest title to the policy in the beneficiary, particularly if the insured retains the right to change the beneficiary and to withdraw the cash surrender value. United States v. Fried, 309 F.2d 851 (2d Cir. 1962); United States v. McWilliams, 234 F. Supp. 117 (D. Conn. 1964).

5.17.3.10.12.3  
(01-07-2011)

**Other Benefits**

- (1) Numerous types of insurance policies exist to cover various types of losses, such as destruction, loss or theft of property, or injury to the person, or loss of income, as well as marine insurance, title insurance, and accident or health insurance, etc. A policy might be of the type where the insurer agrees to guarantee or indemnify the insured for loss upon the occurrence of a certain event (e.g., embezzlement of funds by employee, loss of building by fire, destruction of automobile following a collision, etc.). If the taxpayer has property or rights to property under any such insurance coverage, a levy may be utilized to collect outstanding taxes.

5.17.3.10.13  
(01-07-2011)

**Leasehold**

- (1) The right of a taxpayer to occupy premises for a fixed period of time pursuant to a lease agreement is property that may be levied upon and sold, with the purchaser of the leasehold interest entitled to possession, notwithstanding a clause in the lease prohibiting the assignment thereof without the consent of the lessor. Stagecrafter's Club v. District of Columbia Division, 110 F. Supp. 481 (D.D.C. 1953), aff'd, 211 F.2d 811 (D.C. Cir. 1954).

5.17.3.10.14  
(01-07-2011)

**Legacies--Devises**

- (1) A "legacy" or "bequest" is disposition of personal property by will. If one dies intestate (without making a will) property passes according to state intestacy law. Although the government should not levy upon a decedent's assets subject to the jurisdiction of a probate court, it should consider participating in the probate proceedings pursuant to state law to protect its interests as a creditor. Moreover, state law may permit the service of a notice of levy upon an executor or other representative once an order of distribution is made.
- (2) State law generally permits a beneficiary under a will or through intestate succession to file a disclaimer and renounce his/her right if there has been no acceptance of the testamentary gift. Under such circumstances, the renuncia-

tion usually relates back to the date of the bequest or devise, in which case the renouncer is not deemed to have accepted the property because he/she never had any rights to that property. However, for federal tax purposes, a taxpayer, who is a beneficiary or devisee, cannot disclaim his or her inheritance after the federal tax lien has arisen to prevent the federal tax lien from attaching to that property. The Supreme Court in Drye v. United States, 528 U.S. 49 (1999) held that the federal tax lien under IRC § 6321 attaches to the taxpayer's right to inherit if the taxpayer later disclaimed his inheritance under state law. The Court held that the term property was intended to reach every species of right or interest protected by law and having an exchangeable value. A right to inherit or to "channel the inheritance to a close family member (the next lineal descendant)" cannot simply be written off as a mere personal right to accept or reject a gift, the Court concluded. That right was "property" or a "right to property" subject to the federal tax lien.

5.17.3.10.15  
(01-07-2011)  
**Licenses--Franchises--  
Memberships**

- (1) A license is a certificate or document authorizing or permitting the holder to engage in a particular type of activity (e.g., selling liquor, operating a child care center, etc.). A franchise is a grant by a sovereign or public authority of the privilege to an individual or corporation to engage in a particular activity or enterprise serving a public interest (e.g., interstate trucking, supplying gas or electric power, railroading, operating a fleet of taxicabs or a bus line, etc.).
- (2) If the license or franchise is a property right of the taxpayer-holder, it may be levied on and sold to satisfy taxes due. For state-created licenses, check local law to determine the taxpayer's interest in the license. Even if local law does not treat the license as property, it may be property for purposes of the federal tax lien and levy. 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354, 357-358 (3d Cir. 1986) (although a liquor license did not constitute "property" and could not be reached by creditors under state law, it was nevertheless "property" subject to federal tax lien). See generally, Drye v. United States, 528 U.S. 49 (1999) (state law determines a taxpayer's interests; federal law determines whether such interests amount to property).
- (3) A state statute providing that a license shall not be regarded as property does not control if the license, in fact, is something of value and possesses the attributes of property. See, e.g., Sea Girt Restaurant v. Sea Girt, 625 F. Supp. 1482 (D.N.J.) aff'd, 802 F.2d 445 (3d Cir. 1986). Generally, if the license, franchise or membership may be transferred, assigned, conveyed or bequeathed, the taxpayer should be considered as having a property right subject to levy, notwithstanding the necessity of the approval of the transferee, assignee, etc. by the issuing authority. The revenue officer must exercise great caution in determining whether the interest constitutes property. Contact Area Counsel for guidance.
- (4) If a license or franchise constitutes property or a right to property of a taxpayer, the purchaser at a sale must ordinarily comply with the rules and regulations of the issuing agency to effectuate a transfer of the property of the taxpayer to the buyer, but the conditions imposed must be proper and reasonable.
- (5) The fact that a license is not property subject to transfer under the state law does not eliminate all collection potential of a license. For example, although New York regards a liquor license as a mere privilege, the licensee-taxpayer may voluntarily surrender the license during its term and receive an allocable refund provided a verified petition is filed with the surrender of the license.

Therefore, while the seizure of a liquor license is of no value, a levy served on the State Comptrollers Office when a refund has ripened into a property right reaches the refund.

- (6) Intangible, like tangible, property may be seized and reduced to possession after serving a levy. A levy served upon the taxpayer, taking physical possession of the liquor license certificate, and the mailing to the license owner and the government agency which issued the license, substantially identical notices of levy were held sufficient to be equivalent to possession of the intangible items of property. Division of Labor Law Enforcement v. United States, 301 F.2d 82 (9th Cir. 1962).

5.17.3.10.16  
(01-07-2011)  
**Money**

- (1) Money of a delinquent taxpayer constitutes property and may be levied on. Although money, due to its nature, is not sold to satisfy taxes, a levy must still be used to obtain possession. The same is true for other forms of property that need not be sold such as a dividend, debt, check, etc.

5.17.3.10.17  
(01-07-2011)  
**Notes**

- (1) A debt, evidenced by a note, payable in installments may be levied upon. The taxpayer's debtor would be obligated to comply with the levy by paying the installments to the United States. The government, having no greater rights than the taxpayer in property seized, cannot seek an acceleration of the installment payments outside of the terms and conditions imposed in the note itself. United States v. Ragsdale, 206 F. Supp. 613 (W.D. Tenn. 1962). If a promissory note is payable in installments, successive levies need not be served on the maker of the note because at the time of the execution of the note, the holder has a fixed right to payment which is merely deferred over a future period of time. Rev. Rul. 55-210, 1955-1 C.B. 544
- (2) To obtain possession of the debt owed on a note, service of notice of levy on the maker would ordinarily be sufficient. However, if the government wishes to sell an installment note, the revenue officer must take physical possession of the physical paper representative of the promise to pay to accomplish a seizure. Matter of Frank, 55-2 USTC 9772 (S.D. Calif. 1955).

5.17.3.10.18  
(01-07-2011)  
**Partnership Interest**

- (1) A partner's interest in a partnership is determined under state law and the partnership agreement. Generally, a partner's interest is a right to a proportionate share of the distribution of partnership profits or surplus after the payment of partnership debts. The Service may serve a notice of levy on the partnership to obtain a distribution of money that is owed to the taxpayer. If at the time of levy there is no distribution owed to the taxpayer, the levy would not seize any funds. As an alternative, the Service may seize the taxpayer's partnership interest which may be sold to satisfy a partner's individual tax liability.

**Note:** If a partner receives periodic payments as compensation for services rendered to the partnership, these payments constitute salary or wages and are subject to a continuous levy for the partner's individual tax liability. See IRM 5.17.3.10.20, *Salary*, below.

- (2) The government may not seize and sell partnership property to collect taxes of an individual partner. Rev. Rul. 73-24, 1973-1 C.B. 602. Similarly, a levy on property or rights to property of a joint venture to satisfy a tax liability of one of the joint venturers has been held to be void. Stuart v. Willis, 244 F.2d 925 (9th Cir. 1957).



- (3) If the tax liability is incurred by a partnership, the partnership property may be levied upon as well as the property of each partner, to the extent a partner is liable for partnership debts. Adler v. Nicholas, 166 F.2d 674 (10th Cir. 1948). The liability of a limited partner (one not participating in the management of the partnership) is dependent on state law and surrounding factual circumstances. Rev. Rul. 54-213, 1954-1 C.B. 285.
- (4) See IRM 5.17.3.10.21, *Shares of a Limited Liability Company*, below, for information regarding LLCs.

5.17.3.10.19  
(08-29-2017)

#### **Pension and Retirement Benefits**

- (1) The federal tax lien attaches to a participant's interest in a retirement plan, such as profit-sharing, stock bonus, pension, cash or deferred (401(k)) plans, annuity plans under IRC § 403(a) and the Federal Thrift Savings Plan, if the participant has any vested benefit under the plan. Vesting occurs when the plan participant acquires a nonforfeitable right to part or all of his accrued benefits. In other words, vesting is the plan participant's "ownership" of his accrued benefit, which results from the participant's satisfaction of service or other requirements specified under the terms of the plan. Similarly, the federal tax lien attaches to a taxpayer's individual retirement account.
- (2) The list of exemptions set forth in IRC § 6334 is exhaustive. Courts have held that a participant's interest in a retirement plan is not exempt from levy under IRC § 6334. See, e.g., Travelers Insurance Co. v. Ratterman, 96-1 USTC 50,143 (S.D. Ohio 1996); Ameritrust Co., N.A. v. Derakhshan, 830 F. Supp. 406 (N.D. Ohio 1993); In re Jacobs, 147 B.R. 106 (Bankr. W.D. Pa. 1992); Shanbaum v. United States, 32 F.3d 180 (5th Cir. 1994).
- (3) Funds in a retirement plan that are currently being paid out to the taxpayer are reachable by levy. In addition, even if the retirement plan is not in pay status, if a present right to future payment on an obligation exists, the levy reaches that present right. See Rev. Rul. 55-210, 1955-1 C.B. 544 (lien attaches to entire unqualified right to receive future benefits; only one notice of levy needs to be served to effectively reach benefits subsequently payable).

**Note:** The IRS can seize the entire balance in vested TSP accounts pursuant to 5 U.S.C. 8437(e)(3), which authorizes turnover of funds in TSP accounts to the IRS pursuant to IRS levies. The levy will attach to any TSP account that is vested, or will become vested within 30 days of the date the TSP receives the levy if the participant were to remain in Government service. The Federal Retirement Thrift Investment Board (FRTIB) has issued regulations governing TSP levies. 5 CFR §1653.32..

- (4) Thus, a levy can reach a participant's interest in a plan regardless of whether the participant's right to receive benefits under the plan requires payments to be made immediately or not until sometime in the future. See, e.g., In re Wesche, 193 B.R. 76 (Bankr. M.D. Fla. 1996); In re Anderson, 149 B.R. 591 (9th Cir. BAP 1992); In re Evans, 155 B.R. 234 (Bankr. N.D. Okla. 1993); In re Perkins, 134 B.R. 408 (Bankr. E.D. Cal. 1991). However, levying on the present right to future payment would not require immediate distribution by the plan administrator. Honoring the levy only would be required if the benefits will have become payable to the participant under the terms of the plan. In addition, if a present right to elect distribution exists, the levy reaches that present right. Therefore, if a participant has, for example, the unqualified right to receive distribution because he has reached the minimum age required or because he has been a participant in the plan for the length of time required



by a profit-sharing plan, that right is reachable by levy. With respect to minimum retirement age, this does not mean that the Service can compel a taxpayer to retire. Rather, if a taxpayer is retiring or has retired and therefore has the right to receive a distribution, the levy reaches that right, whether or not the taxpayer has elected distribution.

**Note:** As a matter of administrative policy, the IRS has put in place approval requirements and extensive procedures for levying on the corpus of (as opposed to the income from) retirement accounts. See IRM 5.11.6.2 and Delegation Order 5-3.

- (5) Under federal law, for some retirement plans, there are significant limitations as to the form of benefit that the Service is entitled to elect on behalf of a taxpayer. Careful consideration must be given where the Service seeks collection from a retirement plan that, absent waiver, requires benefits to be paid in the form of a joint and survivor annuity. In these cases, the Service may only levy upon that joint and survivor annuity, and may not elect another form of benefit for collection purposes without the consent of a spouse. This rule is the same regardless of whether the tax liability is a separate liability of the plan participant or a joint tax liability.
- (6) Careful consideration should also be given if the participant is deceased. If a participant dies without ever having an immediate right to distribution of benefits under the terms of the plan, the Service may not levy on those assets after his death, even if the taxpayer's interest was "vested." Moreover, even if a fully vested participant while living could have elected to receive distribution, the Service cannot levy on the plan after his death to assert that right. A levy after the participant's death attaches to the rights of the participant's estate.
- (7) Because of the complex issues which arise when levying on retirement plans, particularly where there is a spouse involved or the participant is deceased, you should contact Area Counsel for advice on how best to proceed.
- (8) In levying on Social Security payments, the Service has the option of serving either a levy under IRC § 6331(a) or a continuous levy under IRC § 6331(h). Under section 6331(h), the Service is authorized to continuously levy on certain federal payments to reach 15 percent of the payments. This includes Social Security payments. A levy under section 6331(a) is not continuous like a levy under section 6331(h) or (e), but is continuous to the extent that the levy is on rights that are fixed and determinable. Therefore, a single levy reaches a future stream of Social Security payments. If the section 6331(a) option is chosen, the Service is not subject to the 15% limitation.

**Note:** The paragraphs above discuss applicable law with respect to levying on pension and retirement benefits. Because levying upon these types of benefits, including Social Security payments, is a sensitive area, ensure that current, applicable IRM provisions specifically addressing the particular type of benefit to be levied upon are followed. For example, see IRM 5.11.6.2, *Retirement Income*, IRM 5.11.6.2.1, *Social Security*, and IRM 5.11.6.3, *Funds in Pension or Retirement Plans*.

5.17.3.10.20  
(01-07-2011)  
**Salary**

- (1) The accrued salary, wages, fees, bonuses or commissions of an employee-taxpayer are subject to levy. "Salary and wages" used herein includes compensation for services paid in the form of fees, bonuses, commissions, or similar items. Treas. Reg. § 301.6331-1(b). A levy on salary or wages attaches to:
  - a. salary or wages earned but not yet paid at the time of the levy,
  - b. advances on salary or wages made after the date of the levy, and
  - c. salary or wages earned and becoming payable after the date of the levy.
- (2) A levy on salary or wages is continuous from the date of the levy until the tax liability for which the levy was made is satisfied or becomes unenforceable. IRC § 6331(e).
- (3) Periodic payments made on a recurring basis to a partner as compensation for services rendered to the partnership will constitute "salary or wages" subject to a continuous levy. See United States v. Moskowitz, Passman & Edelman, 603 F.3d 162 (2d Cir. 2010) (court rejects taxpayer's argument that payments were not salary or wages because a partner only realizes income on the last day of the partnership's taxable year).
- (4) State laws limiting the amount of wages which may be garnished by judgment creditors must yield to the provisions of the Internal Revenue Code permitting the Secretary or his delegate to levy. In addition, the Consumer Credit Protection Act relating to restrictions on garnishment specifically exempts federal tax claims from its provisions. 15 USC § 1673(b)(1)(C); IRC § 6334 determines the exemptions allowed when collecting by levy.

5.17.3.10.21  
(01-07-2011)  
**Shares of a Limited Liability Company (LLC)**

- (1) Limited liability companies (LLCs) combine elements of a corporation and a partnership. The main difference from a partnership is that the owners of the LLC (known as members) do not have any personal liability for debts of the LLC. See IRM 5.1.21, *Collecting from Limited Liability Companies*, for more information regarding LLCs; and IRM 5.1.21.6.3, *Notice of Levy*, and the provisions that follow for more information regarding levies involving LLCs.
- (2) Collection issues arise when the LLC does not pay its employment tax liability and does not have sufficient assets to pay the liability in full. Member-managers cannot be held directly liable for the employment taxes of the LLC because state law generally provides that members and managers are not liable for the debts of the LLC. This is true even in the case of an LLC that is treated as a partnership for income tax purposes. Rev. Rul. 2004-41, 2004-1 C.B. 845. However, member-managers of an LLC can be held liable for the trust fund portion of the employment taxes if they are responsible persons under IRC § 6672. In some cases it may be possible to assert an alternate basis of liability, such as a transferee liability, if property of the LLC was transferred to a member.
- (3) Final regulations were issued on August 16, 2007, which provide that single-owner eligible entities that are disregarded as entities separate from their owners for Federal tax purposes are treated as separate entities for employment tax purposes. See Treas. Reg. § 301.7701-2(c)(2)(iv) and (v). These entities continue to be treated as disregarded entities for income tax purposes. The regulations apply to single-owner LLCs that have not elected to be treated as an association taxed as a corporation, and apply to wages paid on or after January 1, 2009, for employment taxes, and to liabilities imposed and actions

first required or permitted in periods beginning on or after January 1, 2008, for excise taxes. See Treas. Reg. § 301.7701-2(e)(5) and (6).

- (4) If a member of an LLC has a tax liability, the Service may levy and sell the taxpayer's interest in the LLC. In some situations, the LLC shares may have little or no market value. In such cases, the Service must be careful that it does not make an uneconomical levy. IRC § 6331(f).
- (5) Another alternative collection method for LLCs is to charge the member's interest. See IRM 5.1.21.9.1, *Charging the Member's Interest*, for more information.

5.17.3.10.22  
(08-29-2017)  
**Shares in Corporations  
and Mutual Funds**

- (1) The taxpayer's ownership interest in publicly-traded corporate securities that are held in accounts managed by a brokerage firm or bank is subject to levy, whether the interest is certificated or not certificated. The firm or bank, upon levy, is required to liquidate the interest and turn over the funds to the Service.

**Note:** In the unusual case where the ownership interest is represented by stock certificates, such certificates may be seized and sold at an administrative sale.

**Note:** Securities that are not publicly-traded must be seized and administratively sold. Alternatively, the Service may refer the case to Counsel for a lien foreclosure suit. For procedures, see IRM 5.10.3.18, *United States Marketable Securities*, and IRM 5.11.6.9, *Securities - Stocks, Bonds, Mutual Funds, etc.*

- (2) Interests in mutual funds are also subject to levy. Most mutual fund shares are not represented by certificates. Record of ownership of these shares is maintained by electronic or book-entry systems. The taxpayer has the right to redeem the shares for cash. The IRS requires the levy source to redeem the taxpayer's interest and remit the funds to the IRS. Kane v. Capital Guardian Trust Co., 145 F.3d 1218 (10th Cir. 1998).
- (3) IRC § 6331(f) prohibits uneconomical levies. For shares of publicly traded securities, the Service will be able to ascertain the fair market value of the shares easily. For securities that are not publicly traded, it will be more difficult to determine the fair market value, and the possibility of an uneconomical levy increases.

5.17.3.10.23  
(01-07-2011)  
**Stock Options**

- (1) Sometimes persons affiliated with a company, typically key employees, are granted stock options. In the case of non-qualified stock option plans, the terms of the plan are dictated by the particular contractual terms of the plan. The statutory requirements of federal law apply in cases of ERISA-qualified incentive stock option plans. Where the taxpayer has a vested right to the stock option, the taxpayer's interest in the stock option is subject to levy.
- (2) Typically, non-qualified stock options contain restrictions on transferability. ERISA-qualified incentive stock option plans are subject to the restrictions on transferability contained in IRC § 422. Any restrictions on transfer of stock options applicable to the taxpayer would not apply to the Service: IRC § 6334(a) enumerates certain types of property that are exempt from levy under IRC § 6331, and neither non-qualified options or ERISA-qualified options are listed. Therefore, the Service can enforce a levy by selling such options to a third party.

5.17.3.10.24  
(01-07-2011)  
**Trusts**

- (1) A bona fide trust arises if a settlor transfers title and possession of property to a trustee for the benefit of one or more beneficiaries. The trust may be established during the lifetime of the settlor (inter vivos) or by will (testamentary trust). The property to which the trustee has legal title is referred to as either the trust res or corpus.
- (2) The extent, if any, to which a levy may be made on the corpus of the trust or on trust income to satisfy the tax liability of the trustee depends on the nature of the trust instrument and the relationship between the trust and the taxpayer. Because a trustee holds bare legal title for the benefit of others, neither the corpus nor income therefrom may generally be levied upon to satisfy the trustee's individual tax liabilities. The exception is if the trustee-taxpayer is a beneficiary, which would permit a levy and seizure to be made of his/her property or rights to property in the trust, as would be the case if any other beneficiary was indebted to the United States for delinquent taxes.
- (3) If the settlor establishes a trust after the assessment of taxes against him/her, the tax liens, having attached to the property before the conveyance of legal title to the trustee, are not diminished or destroyed. United States v. Bess, 357 U.S. 51 (1958). A levy may be made upon the corpus of the trust.
- (4) A levy may be served upon the trustee to seize the taxpayer's right to distribution if the taxpayer has a right to a distribution of trust corpus and this right is not subject to the discretion of the trustee. The same is true for distribution of income from trust property. A levy served upon a trustee for taxes owing by a beneficiary reaches not only payments then due but all subsequent payments that will become due, when the payments become due, if the taxpayer-beneficiary has an unqualified fixed right to receive the periodic payments at the time of service of levy. IRC § 6331(b); Rev. Rul. 55-210, 1955-1 C.B. 544.
- (5) Spendthrift trusts limit or restrain the alienation of trust distributions. Those limitations or restrictions do not affect the government's right to levy on the taxpayer's property interest in such trust, regardless of whether the prohibition on alienation is embodied in the trust instrument or created by state exemption statutes. United States v. Rye, 550 F.2d 682 (1st Cir. 1977).
- (6) Family trusts are particularly susceptible to abuse, and the government should scrutinize them carefully and consider using nominee liens and levies to reach the trust assets. See, e.g., Joan Whitesel Family Estate v. United States, 84-2 USTC 9890 (S.D. Ohio 1984).

5.17.3.10.25  
(01-07-2011)  
**United States  
Obligations**

- (1) Certain obligations of the United States, such as Treasury bills, notes, bonds, and savings bonds, as well as obligations of state and local governmental bodies, are property or rights to property to which federal tax liens attach, United States v. Ridley, 127 F. Supp. 3 (N.D. Ga. 1954), and may be levied on to collect the holder's delinquent taxes. Treasury bills, notes, and bonds are held electronically; they are not paper securities like some savings bonds. After serving a notice of levy, the Service may choose to either sell the taxpayer's interest or wait until the bill, note, or bond matures and obtain the money.
- (2) Federal law, rather than state law, controls the rights and duties of the United States on commercial paper issued by it, as well as all other obligations of the government. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

Therefore, determining the nature and extent of the taxpayer's interest in a United States security will require examination of the law and regulations governing the specific security.

5.17.3.10.26  
(01-07-2011)

**Withheld  
Amounts--Construction  
Contracts**

- (1) This is a complex field of law because it involves retained percentages on construction contracts, a defaulting contractor or subcontractor, substantial performance, setoff, public and private improvements, performance bonds, laborers and materialsmen bonds, competing sureties, sureties subrogated to the rights of laborers and materials men, mechanics liens, the doctrine of relation back, the no debt or no property theory, state property laws, and relative priorities under federal law. The variable elements make even a very general discussion here unproductive.
- (2) The revenue officer should remain mindful of several matters, however.
  - First, a notice of levy served upon the taxpayer's debtor will reduce the taxpayer's property interest to the government's constructive possession if the taxpayer-contractor or subcontractor under state law has property or rights to property in amounts withheld under a construction contract.
  - Second, because there may be numerous claimants to withheld funds, a suit to foreclose the federal tax lien may be more advantageous than a suit for failure to honor levy. However, the revenue officer should levy to protect the government's interest.
  - Finally, the complexity of the problems involved requires the revenue officer to carefully investigate all the factual information and circumstances surrounding the contract, if the government is to succeed in collecting either by levy or by enforcing its tax lien in a court proceeding.
- (3) See IRM 5.11.6.6, *Federal Contractors*, for information on levying payments owed to federal contractors. See IRM 5.1.14.1 and IRM 5.17.7.3 for information relating to performance bonds and holding sureties liable for unpaid employment taxes.

5.17.3.10.27  
(01-07-2011)  
**Other**

- (1) There are many other forms of intangible personal property (e.g., postal savings accounts, money orders, mortgage indebtedness, patents, royalties, copyrights, rental income) that may be levied upon to collect delinquent taxes. There are three essentials to bear in mind when contemplating levying upon intangibles:
  - First, the revenue officer must investigate and determine the taxpayer's property or rights to property.
  - Second, the revenue officer must determine the steps necessary to seize the intangible and reduce it to constructive possession.
  - Third, the revenue officer must resolve whether one levy is adequate, or whether successive levies must be made.
- (2) Tangible personal property has been discussed only briefly in this section because by its nature it is easily identifiable and should present the revenue officer few difficulties.
- (3) The revenue officer must also be mindful of the government's right to levy upon a taxpayer's property or rights to property, subject to a real property mortgage, chattel mortgage, pledge, conditional sales contract, bailment, etc. Further, although property subject to a lien prior to the federal tax lien may be

seized and sold, practical considerations may dictate against the administrative collection method of levying and in favor of a suit to foreclose the tax lien. See IRM 5.10.1, *Pre-Seizure Considerations*.