

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **200815001**

Release Date: 4/11/2008

CC:PA:B04

GL-144298-07

UILC: 6331.18-00

date: December 28, 2007

to: CC:SB:2:PIT
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from: Joseph W. Clark
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(Procedure & Administration)

subject: Whether a revenue officer should reissue a levy and notice of seizure to a revocable trust holding real property where those notices list the taxpayer in the "name and address" and "due from" fields, but the notice of seizure describes the property as being held by the revocable trust as nominee or alter ego of the taxpayer?

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

X =

Y =

revocable
trust =

revocable
trust A =

City A =

County A =

State A =

Number A =

Street A =

Zip Code A =
Country A =
Bank A =

Utility
Company A =
YR1 =
YR5 =
YR15 =
YR17 =

ISSUES

Whether the revenue officer should reissue a Levy (Form 668-B (ICS)) and Notice of Seizure (Form 2433) to the revocable trust holding real property where those notices list X in the "Name and Address" and "Due from" fields, but the Notice of Seizure (Form 2433) describes the property as being held by the revocable trust as nominee or alter ego of X?

CONCLUSIONS

In describing the party against whom the levy was issued, the Levy (Form 668-B (ICS)) does not list X in his capacity as the trustee of the revocable trust, or as the nominee or alter ego of X. The levy should be reissued with "X as trustee of the revocable trust and as the nominee or alter ego of X", and with the address of the trustee in the "Due from" field. This information should be placed on the levy form where the taxpayer's name and address would normally be inserted if the Service were seizing property titled directly in the name of X, the delinquent taxpayer.

The Notice of Seizure (Form 2433) should also be reissued and the "Name and Address" field should include "X as trustee of the revocable trust and as nominee or alter ego of X" along with the trustee's address. This form should also include X's name and address (not in his capacity as trustee) in the "Due from" field, and the legal description of the City A property, including the street address, should be retained in the "Description of Property" field. See I.R.M.section 5.10.3.18 and Exhibit 5.10.3-5.

FACTS

X owes delinquent YR1 income taxes, which were assessed on October 13, YR5.¹

¹ Although the taxes in this matter were assessed October 13, YR5 and the collection statute of limitations would normally expire 10 years later on October 13, YR15, the Service maintains that X's continuous absences from the United States during this time period suspended the collection statute's running until October 13, YR17. I.R.C. §§ 6502(a) and 6503(c). This memorandum therefore assumes that the collection statute of limitations will not bar a levy or foreclosure suit.

X's mother transferred certain real property located in City A, State A to revocable trust A. She thereafter obtained a mortgage on the property. Upon the mother's death two years later, X became the trustee of revocable trust A. Subsequently, X transferred the property out of revocable trust A to himself for no consideration by a grantor deed. X then transferred the parcel for no consideration to "X as trustee of the revocable trust". The Service did not file a Notice of Federal tax lien against X in County A until after X transferred the real property to the revocable trust.

The revenue officer handling this matter has verified the following facts in regard to X's control over the real property located in City A: (i) X pays the mortgage for the property by wiring funds from a Country A bank account in the name of "Y" to a Bank A account in the joint names of X and his mother; (ii) telephone and water bills for the property are paid from the Bank A account; (iii) X enrolled in an automatic payment plan with Utility Company A to have the bills paid automatically; and (iv) the real estate taxes are paid by credit card, although it is not clear whose card it is.

During February, YR15 the Service filed a nominee lien against "X as the Trustee of the revocable trust as nominee or alter ego of X" in County A, State A. The property appears to be worth substantially more than the outstanding balance on the mortgage.

On September 10, YR15, the revenue officer handling this matter issued a Notice of Seizure (Form 2433) and on this form he inserted X's name and address in the "Name and Address" field and X's name in the "Due from" field.² This notice of seizure also included the following in the "Description of Property" field:

Description of the property . . .

" . . . X as Trustee of the . . . revocable trust as nominee or alter ego of . . . X, in the real property situated in State A, City and County of City A, legally described as follows: . . .

This real property is a Single Residence more commonly known as:
Number A Street A
City A, State A, Zip Code A

A levy (Form 668-B (ICS)), also issued September 10, YR15, listed X's name, address and Country A in the "Due from" field.

² This memorandum assumes that that this notice of seizure and the Levy (Form 668-B (ICS)) were served upon X as the Trustee of the revocable trust.

LAW AND ANALYSIS

A third party holds property as a nominee for a taxpayer where the taxpayer's property is titled in the name of the third party, but the taxpayer in fact retains beneficial ownership of the property. Long v. United States, 958 F.2d 367 (4th Cir. 1992); United States v. Barton, 2001-1 U.S. Tax Cas. (CCH) P 50,292 (9th Cir. 2000); Towe Antique Ford Found. v. Internal Revenue Service, 791 F.Supp. 1450, 1454 (D. Mont. 1992)(listing factors considered in determining nominee status), *aff'd. on other grounds*, 999 F.2d 1387 (9th Cir. 1993); Oxford Capital Corp. v. United States, 211 F.3d 280, 284 n.1 (5th Cir. 2000)(noting that concepts of "nominee", "transferee", and "alter ego" are independent bases for attaching property of a third-party to satisfy a delinquent taxpayer's liability); Sharp Management LLC v. United States, 2007-1 USTC P 50,511 (W.D. Wash. 2007)(Government proved nexus between taxpayer and funds in bank account held by limited liability company by virtue of a nominee relationship); I.R.M. section 5.12.2.6.6 (determining when nominee lien should be filed).

Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. United States v. Jon-T Chemicals, Inc., 768 F.2d 686 (5th Cir. 1985). There is an exception to this rule, commonly known as the alter ego doctrine. This can be established when the owner of a corporation dominates and controls it to the point that the separate corporate identity becomes merely a sham, i.e. it does not exist independent of its controlling shareholder and it was established for no reasonable business purpose or for fraudulent purposes. Oxford Capital, *supra*; Jon-T Chemicals, *supra*. In that situation, all of the assets of the corporation may be levied upon to satisfy the tax liabilities of a delinquent taxpayer-shareholder. Jon-T Chemicals, 768 F.2d at 694-96; *see also* Loving Savior Church v. United States, 728 F.2d 1085 (8th Cir. 1984)(church, an unincorporated association, was the alter ego of delinquent taxpayers)

When the Service seeks to collect delinquent taxes by either seizing the property held by a third-party under a nominee or alter ego theory or by filing a lien against such third party, the notice of levy or notice of Federal tax lien should expressly list such third party as the taxpayer's nominee or alter ego. Macklin v. United States, 300 F.3d 814 (7th Cir. 2002)(lien notice identified the taxpayer as "Orvill Macklin, nominee of Gerald Macklin"); Oxford Capital, *supra* (levy imposed on funds of Oxford as "nominee . . . alter ego . . . of taxpayer RX Staffing Corporation"); Valley Finance, Inc. v. United States, 629 F.2d 162 (D.C. Cir. 1980)(IRS filed notices of tax liens against "Pacific [Development, Inc.] as the 'alter ego and nominee' of Park").

The I.R.M. sets forth the Service's internal operating procedures, including guidance in regard to the correct forms to use in connection with property seizures. Upon determining that it is necessary to seize property in which a taxpayer has an interest to


collect delinquent taxes, the Service uses the Levy (Form 668-B). Following the seizure, the Notice of Seizure (Form 2433) is issued. I.R.M. section 5.17.3.5.3.1(3).³

In this case, the Levy (Form 668-B (ICS)) includes only X's name and address in the "Due from" field and makes no mention of the revocable trust. Because the Service seeks to seize the real property located in City A, which is titled in the name of the revocable trust, the levy should name X as Trustee of the revocable trust and as the nominee or alter ego of X.

I.R.M. section 5.10.3 (*Conducting the Seizure*), and Exhibit 5.10.3-5 include instructions and a table showing how to complete the Notice of Seizure (Form 2433). It states that if the seizure involves real property and the taxpayer is not the owner of record, the notice should be addressed to such owner of record. The taxpayer's name and address goes into the "Due from" box and the legal description of the real property (including the address and street location, if available) should be inserted into the "Description of property" field.

The revenue officer should reissue the notice of seizure and include X as Trustee of the revocable trust and as nominee or alter ego of X (plus the revocable trust's address) in the "Name and Address" field. X's name and address should be placed in the "Due From" field and the legal description and street address of the City A property should be retained in the "Description of Property" field.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

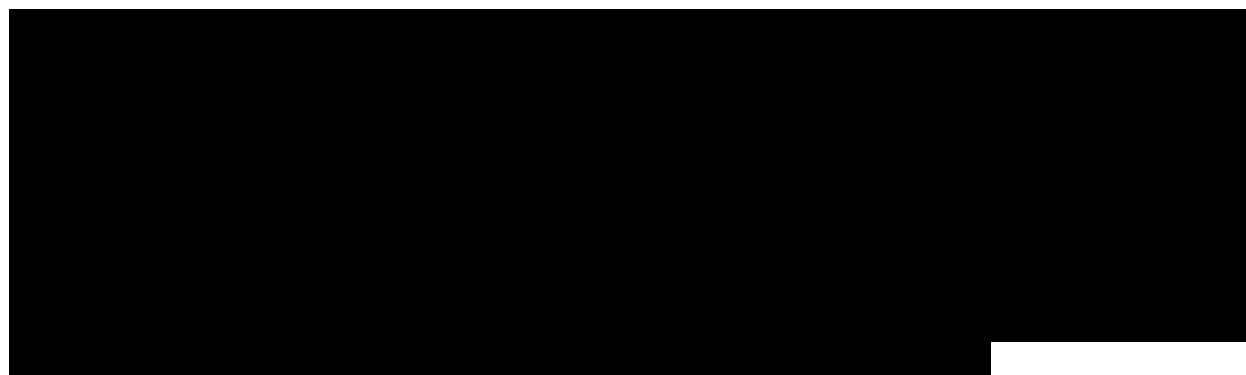
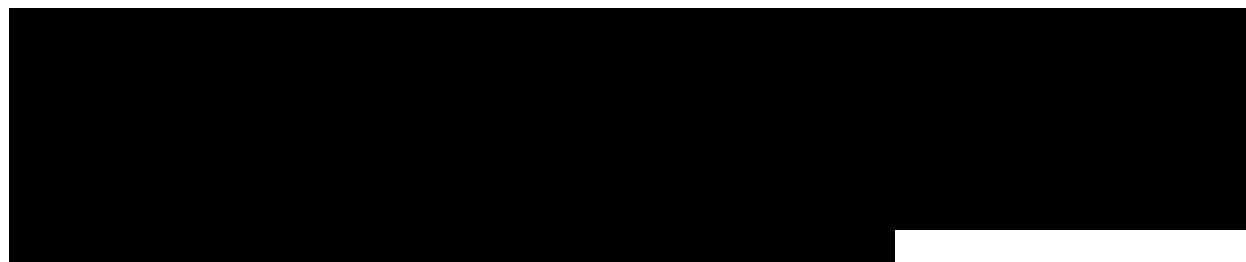

In Oxford, a wrongful levy case, the Government's levy was issued on "Oxford as nominee, transferee, alter ego, agent and/or holder of a beneficial interest of taxpayer RX Staffing Corporation". 211 F.3d at 283.

The Fifth Circuit Court of Appeals observed that based on the record before it, the Government may have had cause to believe that Oxford held the property of RX, its wholly owned subsidiary corporation (the delinquent taxpayer) as a nominee, but not cause to believe that RX was Oxford's alter ego. The appellate court opined that at the time of levy, the record reflected that the Service had cause to believe only one bank account of Oxford, the "2020 account", held the property of the taxpayer. As a result, the levy upon the other bank accounts would have been wrongful under I.R.C. § 7426

³ With respect to notices of levy that name alter egos or nominees, I.R.M. section 5.11.1.2.5(4) states that Area Counsel is to advise the revenue officer in regard to the issuance of such levies and the language to be included on the pre-levy notice and levy.

because at the time of levy there was no reason to believe that the other accounts held property of the delinquent taxpayer. 211 F.3d at 285.

The appeals court in Oxford found that because the magistrate judge did not apply the proper burden-shifting framework under Texas Commerce Bank-Fort Worth v. United States, 896 F.2d 152 (5th Cir. 1990), it was not possible to determine based on the record whether the IRS had cause to believe that: (1) RX was Oxford's alter ego; or (2) whether the Service developed substantial evidence of nominee liability at the time of the evidentiary hearing sufficient to prevent a finding of wrongful levy. Accordingly, the case was remanded back to the magistrate judge for further proceedings to apply the proper burden-shifting framework to determine: (1) if the Service proved nexus by substantial evidence; and (2) if Oxford could then prove that the levy was otherwise wrongful, e.g. that the levy was imposed without a sufficient evidentiary basis to do so. 211 F.3d at 286. Under Oxford therefore the Service must develop facts sufficient to support the alter ego theory at the time the levy is imposed; see *also* United States v. Swan, 467 F.3d 655 (7th Cir. 2006)(in lien foreclosure action, Government failed to present evidence that property owner was the nominee or alter ego of his taxpayer-tenants where evidence showed only that taxpayers were friends of the owner and taxpayers held only contractual right to purchase property).



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Please call _____ if you have any further questions.