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to: Associate Area Counsel - Name 2
Attn: Name 3
(Small Business/Self-Employed) Name 4

from: Laurence K. Williams -S-
Senior Counsel, Branch 4 (Procedure & Administration)

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subject: Priority of Security Interest in Time Certificate of Deposit Over Federal Tax Lien

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

LEGEND

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ISSUES

UIL: 6321.01-05, 6331.31-01

(1) Whether the time certificates of deposit (TCD) and checking account are "deposit accounts" under state law for the purpose of determining priority under IRC §§ 6323(a), 6323(b)(10) and 6323(c)(4).

(2) Whether the bank has security interests in the TCDs and the checking account that are prior to the federal tax liens.

CONCLUSIONS

(1) Under sections 6323(a), (b)(10), and (c)(4) a security interest must be perfected under state law. The characterization of a security interest as a "deposit account" is only important for determining whether the security interest has been properly perfected. The TCDs are instruments, not deposit accounts, under state law. The checking account is a deposit account under state law. Sections 6323(a), (b)(10) and (c)(4) impose other requirements that must be satisfied in order for a security interest to exist for federal purposes and for determining whether a federally-recognized security interest is prior to a federal tax lien. These requirements are discussed more fully in the body of this memorandum.

The state law characterization of a TCD or checking account as an instrument or deposit account for perfection purposes is not applicable to whether the TCD or

checking account is an "account" within the meaning of section 6323(b)(10). The meaning of "account" is defined according to the purpose of that section.

(2) The bank's security interests in the TCDs as collateral for its issuance of the standby letters of credit are prior to the federal tax liens because the agreements creating the letters of credit are obligatory disbursement agreements under section 6323(c)(4). The bank's security interests in the checking account as collateral for the $ Amount 1 line of credit and Small Business Administration-guaranteed loan are prior to the federal tax liens because the checking account is an account included in section 6323(b)(10).

FACTS

On Date 1, the Internal Revenue Service (Service) served a notice of levy on the Name 5 (Bank) to collect the delinquent employment tax liabilities of Name 6 (Taxpayer). The liabilities were assessed in Date 2 and Date 3. Prior to the levy, the Service filed Number 1 notices of federal tax lien (NFTL) on Date 4, Date 5, Date 6 and Date 7, listing employment tax liabilities for different periods. The Bank responded by remitting $ Amount 2, the balances of the Taxpayer's five time certificates of deposit (TCD) ($ Amount 3) and checking account ($ Amount 4). On , the Bank requested return of the funds pursuant to Treas. Reg. § 301.6343-2, claiming that the property was wrongfully levied because the Bank's security interests in the TCDs and checking account are entitled to priority over the Service's tax liens.[1]

The Bank is a corporation chartered as a bank by Name 7. A substantial part of its business is receiving deposits and making loans. The Bank's deposits are insured by the Federal Deposit Insurance Corporation.

The Bank issued to the Taxpayer a line of credit in the amount of $ Amount 5 on Date 9. By the end of Date 10, the entire amount of $ Amount 6 was borrowed by the Taxpayer and the entire balance remained unpaid as of the date of the Service's levy. The Commercial Security Agreement lists as collateral for the line of credit "All … instruments … deposit accounts … money". The maturity date of the loan was extended by several timely-executed Change in Terms Agreements, the last of which extended the maturity date to a date after the notice of levy was served.

On Date 11, the Bank also made a loan of $ Amount 7 to the Taxpayer, the repayment of which was guaranteed by the United States Small Business Administration (SBA). On the date of the Service's levy, $ Amount 8 remained outstanding. The collateral for the loan is described in the Commercial Security Agreement as "All … instruments … deposit accounts … money… ." The maturity date for the loan is Date 12.

[1] As the request was within nine months of the levy of the funds, it was timely under Treas. Reg. § 301.6343-2(b).

The Bank issued a Standby Letter of Credit (SLOC) in the amount of $ Amount 9 on Date 13, in favor of an insurance company as a performance bond for the Taxpayer. The Application and Agreement for Standby Letter of Credit lists an account number for a TCD issued on Date 14, in the amount of $ Amount 10, as the primary account to be charged, along with "any deposit account," with any amounts due from the Taxpayer as reimbursement for money drawn on the SLOC.

On Date 15, the Bank issued a Standby Letter of Credit in the amount of $ Amount 11 in favor of an insurance company as a performance bond for the Taxpayer. The Application and Agreement for Standby Letter of Credit lists an account number for a TCD issued on Date 16, in the amount of $ Amount 12, as the primary account to be charged, along with "any deposit account," with any amounts due from the Taxpayer as reimbursement for money drawn on the SLOC.

The Bank issued a Standby Letter of Credit on Date 17, in the amount of $ Amount 13, in favor of an insurance company as a performance bond for the Taxpayer. The Application and Agreement for Standby Letter of Credit lists an account number for a TCD issued on Date 18 in the amount of $ Amount 14, as the primary account to be charged, along with "any deposit account," with any amounts due from the Taxpayer as reimbursement for money drawn on the SLOC.

On Date 19, the Bank issued a Standby Letter of Credit in the amount of $ Amount 15 in favor of an insurance company as a performance bond for the Taxpayer. The Application and Agreement for Standby Letter of Credit does not list a specific account as the primary account to be charged, but states that "any deposit account may" be charged with any amounts due from the Taxpayer as reimbursement for money drawn on the SLOC. A Commercial Security Agreement dated Date 20, lists as collateral for the SLOC "All … instruments … deposit accounts … money…." An Assignment of Deposit Account dated Date 21, lists as collateral an account number for a TCD issued on Date 22, in the amount of $ Amount 16 and an account number for a TCD issued on Date 23, in the amount of $ Amount 17.

Each SLOC by its terms is irrevocable and requires the Bank to honor drafts presented for payment by the insurance company. The Bank's obligation to honor drafts on the SLOC is not contingent upon reimbursement by the Taxpayer. The expiration date of each SLOC was extended through timely amendments to the Application and Agreement for Standby Letter of Credit, the last of which extended the expiration date to a date after the notice of levy was served. The insurance company had not requested any payment under the SLOC as of the dates the NFTL were filed or as of the date of levy.

Each TCD identifies on its face the Taxpayer as the depositor, the Bank, the amount, the interest rate, the date of deposit, and the term. Each of the TCDs is tangible evidence of the Bank's obligation to pay the Taxpayer a specifically-identified deposit account held by the Bank. Each specifically-identified account is a computerized

account (the number for the account is same as one on the certificate) in which the money deposited by the Taxpayer is recorded. Each TCD bears the heading "Time Certificate of Deposit – Non-Negotiable/Non-transferable" and states that the Bank will pay upon presentation and surrender of the certificate on the stated maturity date. The TCDs originally matured on various dates in Date 24, the latest of which was Date 25. In accordance with the standard disclosure given to depositors purchasing a time certificate of deposit, each TCD was automatically renewed on the maturity date and on succeeding maturity dates for the same term as the original term. Under the terms of the TCD, renewal will not occur if the funds in the underlying account are withdrawn by the Taxpayer. The original of each TCD has been in the possession of the Bank since its issuance.

LAW AND ANALYSIS

Holder of Security Interest

The federal tax lien arises at the time of assessment on all property and rights to property belonging to the taxpayer. I.R.C. § 6321. The general rule for determining the priority of a federal tax lien and state-created liens is first in time is first in right. United States v. McDermott, 507 U.S. 447, 449 (1993). A federal tax lien, however, must be filed in accordance with section 6323(f) in order to have priority over a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor. I.R.C. § 6323(a). Thus, the general rule has been modified by statute to "deem the United States' lien to have commenced no sooner than the filing of the notice" for those listed in section 6323(a). Id.

A "security interest" is defined as "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability." I.R.C. § 6323(h)(1); Treas. Reg. § 301.6323(h)-1(a)(1). A "security interest" in property exists at any time (1) the property is in existence, (2) the interest has become protected under local law against a subsequent judgment lien and (3) the holder has parted with money or money's worth. Treas. Reg. § 301.6323(h)-1(a)(1).

To be a security interest under section 6323(a), the security interest must be in existence before the notice of federal tax lien is filed. Treas. Reg. § 301.6323(h)-1(a)(1). Each of the original TCDs was issued and each underlying account was created prior to the filing dates of the NFTLs. Although the original maturity dates for the TCDs were reached before the filing of the NFTLs, the TCDs automatically renewed upon the expiration of the maturity date for the same term as the original TCD. Some of the TCDs automatically renewed more than once before the NFTLs were filed. If each renewal of a TCD is viewed as the acquisition of new property by the Taxpayer, then the tax liens would gain priority over the Bank's security interest in a TCD when a renewal occurred after the filing of one or more of the NFTL. The federal tax lien prevails where a perfected state-created lien interest and a tax lien for which a notice of federal tax lien has been filed attach simultaneously to a taxpayer's after-acquired property. United

States v. McDermott, 507 U.S. 447, 450-453 (1993). In this case, however, there is no after-acquired property. The renewed TCDs are not new property but a continuation of the original TCDs. In accordance with the terms of each TCD, the original TCD automatically renewed because the deposited funds were not (and could not be) withdrawn by the Taxpayer. The original TCDs were not replaced by new TCDs. Because the renewed TCDs are a continuation of the original TCDs, the Bank's security interests were in existence prior to the dates the NFTLs were filed.

By contrast, it is unlikely that the money in the checking account was in existence before the dates the NFTLs were filed. A bank account is deemed to come into existence only after funds are deposited into the account and a security interest in the account "can only arise post-deposit." Texas Commerce Bank-Fort Worth, N.A. v. United States, 896 F.2d 152, 161-62 (5th Cir. 1990). For most businesses, deposits and withdrawals are made on an ongoing basis and the deposits made before the NFTLs were filed would have been withdrawn long before the date the notice of levy was served. The security interest in the money in the checking account probably did not exist before the NFTLs were filed.

To be a security interest under section 6323(a), the security interest must have been protected under local law against a subsequent judgment lien before the notice of federal tax lien is filed. I.R.C. § 6323(a), (h); Treas. Reg. § 301.6323(h)-1(a)(2). A judgment lien is equivalent to the interest of a Uniform Commercial Code (UCC) lien creditor. Litton Indus. Automation Systems, Inc. v. Nationwide, 106 F.3d 366, 373-74(11th Cir. 1997). A security interest perfected under the UCC is superior to a subsequent judgment lien. Slodov v. United States, 436 U.S. 238, 257 n. 22 (1978).

Perfection of the Bank's security interests in the TCDs and underlying accounts and in the checking account are governed by Article 9 of the revised UCC adopted Name 8. Name 9 9-102(a) defines "deposit account" as "time … or similar account maintained with a bank [but] does not include … accounts evidenced by an instrument." Comment 12 to that section states the following:

> Deposit accounts evidenced by Article 9 "instruments" are excluded from the term "deposit account." … The revised definition clarifies the proper treatment of nonnegotiable or uncertificated certificates of deposit. Under the definition, an uncertificated certificate of deposit would be a deposit account (assuming there is no writing evidencing the bank's obligation to pay) whereas a nonnegotiable certificate of deposit would be a deposit account only if it is not an "instrument" as defined in this section (a question that turns on whether the nonnegotiable certificate of deposit is "of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.")

Name 10 9-102(a) defines "instrument" as "a negotiable instrument or any other writing that evidences a right to payment of a monetary obligation, is not itself a security

agreement or lease, and is of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment."

The TCDs were certificated on the date the NFTLs were filed for the reasons previously discussed. Each certificate has printed on it "Non-negotiable/Nontransferable." As explained in Comment 12 above, a certificate of deposit may be an instrument despite being designated as non-negotiable. A majority of courts examining certificates of deposit similar to the ones in this case have held that they fall within the category "any other writing that evidences a right to payment" found in the UCC definition of "instrument."[2] Cadle Company v. Citizens Nat'l Bank, 200 W.Va. 515, 490 S.E.2d 334, 338 (W. Va. 1993) (collecting cases). The UCC Article 3 definition of certificate of deposit (UCC § 3-104(2)(c)) as "[a] writing [which constitutes] an acknowledgement by a bank of receipt of money with an engagement to repay it" applies to Article 9 and is a writing within the definition of "instrument." In re Latin Investment Corporation, 156 B.R. 102, 105 (Bankr. D.C. 1993).

In addition, a majority of courts have held that certificates of deposit payable to the depositor and delivered to a bank as security are "of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment," even if the certificates were marked with the words non-negotiable or non-transferable. In McFarland v. Brier, 850 A.2d 965, 975-77 (R.I. 2004) the Rhode Island Supreme Court followed the prevailing view that the words "non-negotiable" or "non-transferable" on the face of the certificate were not controlling. Instead, the court held that the test for transferability turns on what "professionals ordinarily would do to transfer an interest in the claim evidenced by the writing in question." Id. at 976, quoting Stephen L. Harris, "Non-Negotiable Certificates of Deposit: An Article 9 Problem," 29 U.C.L.A. L. Rev. 330, 372 (1981). The issuing bank's requirement that the certificate be returned to the bank and endorsed as a precondition to payment implicitly recognized that the certificate was transferable and that possession is the means by which it is transferred. Id. at 977. Therefore the certificate of deposit was of a type that was transferable in the ordinary course of business. Id.; In re Latin Investment Corporation, 156 B.R. 102, 107-8 (Bankr. D.C. 1993); In re Kroh Bros. Dev. Co., 101 B.R. 114, 120 (Bankr. W.D. Mo. 1989); In re Coral Petroleum, Inc., 50 B.R. 830, 838 (Bankr. S.D. Tex. 1985); Craft Prods., Inc. v. Hartford Fire Ins. Co., 670 N.E.2d 959, 961 (Ind.Ct.App. 1996); First

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[2] Prior to the 2001 revision of Article 9 of the Uniform Commercial Code (both the model act Name 11 adoption thereof), deposit accounts were excluded as original collateral under Article 9 of the UCC, leaving security interests in deposit accounts to be governed by common law. Name 12 9-109 Date 26, comment 16. Prior to the revision, certificates of deposit were excluded from the definition of deposit accounts. As a result, certificates could serve as collateral under the UCC as either an instrument or a general intangible. McFarland v. Brier, 850 A.2d 965, 974 (R.I. 2004). Under the 2001 revision, except in consumer transactions, deposit accounts may be taken as original collateral within the meaning of Article 9 of the UCC. Name 13 9-109(a), (d)(13) Date 27 and comment 16. Post-revision, certificates of deposit may be given as collateral as either a deposit account or as an instrument. Because the Article 9 revision did not alter the definition of "instrument," pre-revision cases examining whether certificates of deposit are instruments are applicable.

National Bank in Grand Prairie v. Lone Star Life Insurance Company, 524 S.W.2d 525, 530 (Tex.Civ.App. 1975). See also Omega Environmental, Inc., 219 F.3d 984, 987-88 (9th Cir. 2000); In re United Energy Coal, Inc., 2008 WL 496142, *5 (Bankr. N.D. W. Va. 2008).

The TCDs in this case are "instruments" as defined by Name 14 9-102. Each of them is a writing evidencing the Bank's agreement to pay the amount deposited, as defined in UCC Article 3 (codified at Name 15 3-104(j)). The Bank requires that each TCD be presented and surrendered as a condition for payment by the Bank. As a result, the Bank implicitly recognizes that possession of the TCDs is the method by which an interest in them is transferred in the ordinary course of business. Because these requirements are satisfied, the TCDs are instruments under Name 16.

Regardless of whether the TCDs are instruments or deposit accounts under Name 17 they may serve as security only for the issuance of the SLOCs. A fund deposited in a bank to be used as collateral to secure a bank's obligation to third parties in the event of a draw on a letter of credit is a special purpose fund. In re United Airlines, Inc., 438 F.3d 720, 731 (7th Cir. 2006). A bank may only set off a special purpose fund against the debt under the letter of credit agreement unless there is an explicit agreement between the bank and the debtor permitting set off of the special purpose fund against another debt owed the bank. In re Ben Franklin Retail Store, Inc., 202 B.R. 955 (Bankr. N.D. Ill. 1996) (certificates of deposit pledged as collateral to secure payment under letter of credit issued by bank are special purpose funds not subject to set off by the bank against other amounts loaned to debtor); In re Airwest International d/b/a Air Hawaii, 70 B.R. 914 (Bankr. D. Haw. 1987)(the certificates of deposit were special purpose funds not subject to setoff of a debt unrelated to the letters of credit because, despite language in the preprinted agreements indicating the certificates would secure all indebtedness, debtor intended to pledge the certificates only to secure its obligations to reimburse the bank for any amount drawn on the letters of credit). See also In re Gesas, 146 F.734, 736 (9th Cir. 1906).

There is nothing in the agreements relating to the $ Amount 18 line of credit or the SBA-guaranteed loan providing explicit authorization for the Bank to set off the TCDs against the amounts borrowed under these loans. In addition, there is nothing in any of the SLOC agreements explicitly authorizing the Bank to set off a TCD other than the one(s) specifically listed. For this reason, the TCD(s) specifically identified as collateral for a particular SLOC may only serve as collateral for that SLOC.

The Bank's security interest in each of the TCDs was perfected before the filing of the NFTLs. Under Name 18, a security interest in instruments may be perfected by taking possession of the original of the instrument. Name 19 9-310(b)(5) Name 20 9-313(a) Date 28. The Bank took possession of the original of each TCD prior to the dates the NFTLs were filed. As a result, the Bank's security interests in the TCDs and underlying accounts were perfected under Name 21 before the filing of the NFTLs.

The checking account is unquestionably a UCC "deposit account" under the agreements governing the $ Amount line of credit, the SBA-guaranteed loan and the SLOCs, because it is an "account maintained with a bank" as provided by Name 22 9-102(a). The Bank's security interests in the funds in the checking account were probably not perfected prior to the NFTLs filings. Perfection of a security interest in a deposit account must be through control by the secured party. Name 23 9-314(a) Date 29. A bank is deemed to have control if it is the financial institution in which the deposit account is maintained even if the depositor retains the right to withdraw the funds. Name 24 9-104(a)(1),(b) Date 30. A bank does not have control over funds in an account until they are deposited. Therefore, a bank's security interest is not perfected until the funds are deposited. See Texas Commerce Bank-Fort Worth, N.A. v. United States, 896 F.2d 152, 161-62 (5th Cir. 1990). As discussed above, it is likely that the funds in the checking account on the date the levy was served were deposited after the NFTLs were filed and the perfection of security interest in such funds would be after the NFTL filings. Even if the money was deposited on the same date the NFTLs were filed, the federal tax liens would be prior in time. United States v. McDermott, 507 U.S. 447, 450-53 (1993). It is unlikely the security interest in the money in the checking account was perfected under Name 25 before the NFTLs were filed.

To be a security interest under section 6323(a), a creditor must also have parted with money or money's worth in exchange for the security interest. I.R.C. § 6323(h)(1); Treas. Reg. § 301.6323(h)-1(a)(3). The value of the security interest is measured by the extent to which the holder has parted with money or money's worth as of the time the priority of the security interest against a tax lien is determined. I.R.C. § 6323(h)(1); Treas. Reg. § 301.6323(h)-1(a)(1)(ii). The Bank has not parted with money or money's worth by issuing the SLOCs. A standby letter of credit is issued by a financial institution at the direction of its customer to a beneficiary in order to provide security for a contract between the customer and the beneficiary. If there is a default in the underlying contract, then the letter of credit provides a source of funds to satisfy the debt owed. "[T]he standby letter of credit acts as a 'back up' against customer default on obligations of all kinds." Colonial Courts Apartment Company v. Proc Associates, Inc., 57 F.3d 119, 123 (1st Cir. 1995). Like a surety contract, the standby letter of credit ensures against the customer's nonperformance; unlike a surety contract, the beneficiary may get paid without regard to its dispute with the customer. 50 Am. Jur. 2d Letters of Credit § 9 (2008). The standby letter of credit "creates an absolute, independent obligation and payment must be made upon presentation of the proper documents regardless of any dispute between the buyer and the seller concerning their agreement… ." First Empire Bank-New York v. Federal Deposit Insurance Corporation, 572 F.2d 1361, 1366 (9th Cir. 1978).

Despite its status as an independent obligation of the issuer, a standby letter of credit is a contingent obligation until the beneficiary makes a draw on the letter of credit. See In re Bergner & Company, 140 F.3d 1111, 1120 (7th Cir. 1998). If the beneficiary does not draw on the letter of credit, then the bank has no contractual claim against the customer for reimbursement. See 3 James J. White & Robert S. Summers, Uniform Commercial

Code § 26-10 a. at 206-8 (5th ed. 2008). Until a draw is made on the letter of credit, the bank has only made a commitment to make a payment. Such a commitment is not "money or money's worth" under section 6323(h)(1). See In re Littleton, 177 B.R. 407, 410 (S.D. Ga. 1995) (bank's security interest in collateral does not secure future advances made after a notice of federal tax lien is filed because at the time the original loan was made the bank had not parted with money or money's worth with respect to those advances); Simmons First Nat'l Bank v. United States, 1990 WL 18063 (E.D. Ar. 1990) (bank's security interest in contract rights assigned by taxpayer did not secure payment of indebtedness under a commercial letter of credit because no advances under the letter of credit had been made at the time the notice of federal tax lien was filed and therefore the bank had not parted with money or money's worth). See also Plumb, "Federal Liens and Priorities-Agenda for the Next Decade II," 77 Yale L.J. 605, 671 n. 399 (1968). Cf. In re Prescott, 805 F.2d 719, 728 (7th Cir. 1986) (debtor's delivery of a certificate of deposit within 90-day period before filing of bankruptcy petition was not entitled to the exception to the trustee's power to avoid preferences under 11 U.S.C. § 547(c)(4) because the bank had not given "new value," which is defined by 11 U.S.C. § 547(a)(2) as "money or money's worth," by making an additional loan to debtor). On the dates the NFTLs were filed, the Bank had not made any payments under the SLOCs. Accordingly, the Bank has not parted with money or money's worth in exchange for its security interests in the TCDs or in the checking account under the SLOC agreements.

Moreover, the Bank did not have perfected security interests in the TCDs or in the checking account at the time the NFTLs were filed because its interests under the agreements governing the SLOCs were not choate. In United States v. McDermott, 507 U.S. 447 (1993), the United States Supreme Court reaffirmed the continued vitality of the choateness test after the enactment of the Federal Tax Lien Act of 1966 . A competing state-created lien is choate at the time a notice of federal tax lien is filed and therefore entitled to priority if "'the identify of the lienor, the property subject to the lien, and the amount of the lien are established.'" Id. at 449-450, quoting United States v. City of New Britain, 347 U.S. 81, 85 (1954). In this case, the amount of the security interests had not been established on the dates the NFTLs were filed because the Bank had yet to make any payments under the SLOCs. See United States v. R.F. Ball Const. Co., 355 U.S. 587 (1958) (surety's security interest in contract rights of subcontractor as security for performance bond was not choate when the notice of federal tax lien was filed because surety's obligation under the bond was contingent and unliquidated); Capitol Indemnity Corporation v. United States, 41 F.3d 320, 326 (7th Cir. 1994) (surety's security interest in contract payments not choate because it had not made any payments before notice of federal tax lien was filed); Sgro v. United States, 609 F.2d 1259, 1261 (7th Cir. 1979)("further advancement of funds on the same secured line of credit does not give rise to a choate lien until the funds are actually advanced and the amount of the lien can be established"). The Bank's security interests in the TCDs were not choate when the NFTLs were filed because there had been no draws on any of the SLOCs and amount of the Bank's security interests was unknown. Accordingly, none of the security interests in the TCDs or in the checking account is a security interest under

section 6323(a) and none of them is not entitled to priority under section 6323(a) over the federal tax liens.

The Bank, however, has parted with money or money's worth in exchange for its security interest in the checking account under the agreements governing the $ Amount 20 line of credit and the SBA-guaranteed loan. The Bank has actually parted with money under those loan agreements and is entitled to priority under section 6323(a) to the extent the Bank satisfies the other requirements for becoming a "holder of a security interest." As discussed above, it is unlikely the funds in the checking account were deposited prior to the filing of the NFTLs. If deposited on or after the NFTL filings, the funds were not in existence and the security interests in the funds were not perfected prior to the dates the NFTL were filed.

Superpriorities

Notwithstanding the Bank's failure to achieve priority of its security interests in the TCDs and the checking account under section 6323(a), the Bank's security interests in the checking account are prior to the federal tax liens under section 6323(b)(10) and the Bank's security interests in the TCDs are prior to the federal tax liens under 6323(c)(4). Under section 6323(b)(10), an institution described in section 581 or 591 is given a superpriority in "a savings deposit, share or other account to the extent of a loan made by the bank" without notice of a tax lien if such loan is secured by such account. I.R.C. § 6323(b)(10). The bank is an institution under section 581 because it is chartered as a bank under state law, a substantial part of its business is receiving deposits and making loans and it holds deposits insured by the Federal Deposit Insurance Corporation. Each of the TCDs and the underlying accounts fall within the meaning of the term "accounts" found in section 6323(b)(10). Although for perfection purposes under Article 9 of the UCC the TCDs are instruments and not deposit accounts, the meaning of "account" in section 6323(b)(10) is defined according to the purpose of the statute. The legislative history of the provision shows that it was originally intended to cover deposits for which there existed a passbook as evidence of the bank's obligation to pay the depositor. H. Rep. No. 1884, 89th Cong., 2d Sess., p. 7, and S. Rep. No. 1708, 89th Cong., 2d Sess., p. 7 (1966). Section 6323(b)(10) was amended in 1998 to remove the evidence requirement and the requirement that the bank have possession of the passbook continuously since the loan was made. The reason for this change was to make section 6323(b)(10) consistent with modern banking practice, which may include passbook-type loans without the use of actual passbooks. H. Rep. No. 105-599, 105th Cong., 2d Sess., p. 281 (1998). The amendment, however, did not change the original Congressional intent to include within section 6323(b)(10) all accounts in financial institutions resulting from deposits and for which the financial institution has an obligation to pay. The Taxpayer's accounts as evidenced by the TCDs fall squarely within the category of accounts Congress intended to be covered by this provision. The Taxpayer's checking account also is an account within the meaning of section 6323(b)(10) for the same reason.

Section 6323(b)(10) requires the loan to be "secured by such account." To determine whether the loan is secured by the account, the security interest must be perfected under local law. See I.R.C. § 6323(h)(1); Treas. Reg. § 301.6323(h)-1(a)(1)(i). As described above, the Bank's possession of the TCDs perfected its security interest under Name 26 in the TCDs and underlying accounts. The maintenance of the checking account in the Bank perfects its security interest in the checking account with respect to the funds deposited therein.

Section 6323(b)(10), however, only includes security interests granted in return for money actually given as loans to the depositor. The statutory language provides that the priority is granted "to the extent of a loan made by the bank." The plain meaning of this phrase is that the bank must have actually parted with money. A nearly identical phrase in section 6323(c)(2) ("to the extent that such loan … is made") has been interpreted in this manner. Texas Oil & Gas Corporation v. United States, 466 F.2d 1040, 1048-49 (5th Cir. 1972) (loan of money must be made and account receivable securing loan must be acquired during 45-day period after filing of notice of federal tax lien in order to be prior to federal tax lien). Identical terms used in different provisions of the Internal Revenue Code are presumed to have the same meaning. Commissioner v. Lundy, 516 U.S. 235, 249-50 (1996); Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986). In addition, section 6323(h)(1), applicable by its terms to all of section 6323 including section 6323(b)(10), requires a secured party to have parted with money or money's worth in order for the security interest to exist. To satisfy this requirement, as discussed above, the secured party must have actually made payments under a loan or letter of credit. On the date the levy was served, the Bank had not made any payments under any of the SLOCs and as a result, had not made a loan for purposes of section 6323(b)(10). Accordingly, the Bank's interests in the TCDs and underlying accounts as security for the SLOCs are not security interests under section 6323(b)(10) and are not entitled to priority over the federal tax liens. For the same reason, the Bank's interests in the checking account as security for the SLOCs are not section 6323(b)(10) security interests and are not entitled to priority.

The Bank's security interest in the checking account, however, is entitled to priority over the federal tax liens under section 6323(b)(10) to secure repayment of the $ Amount 21 line of credit and the SBA-guaranteed loan because the Bank has actually paid money under those loans. As discussed above, the TCDs and underlying accounts cannot serve as security for the $ Amount 22 line of credit and the SBA–guaranteed loan due to their status as special purpose funds.

The Bank is entitled to priority over the federal tax liens with respect to the TCDs under section 6323(c)(4). Section 6323(c)(4) provides that even though a notice of federal tax lien has been filed a security interest in qualified property under an obligatory disbursement agreement is prior to the federal tax lien if the interest is protected against a judgment lien arising out of an unsecured obligation at the time the notice of federal tax lien is filed. Treas. Reg. § 301.6323(c)-3(a). Qualified property includes property subject to the federal tax lien at the time the notice of federal tax lien is filed. I.R.C.

§ 6323(c)(4)(B). An obligatory disbursement agreement is a written agreement under which a person in the ordinary course of the person's trade or business of making disbursements agrees to make disbursements required to be made by reason of the intervention of the rights of a person other than the taxpayer. I.R.C. § 6323(c)(4)(A); Treas. Reg. § 301.6323(c)-3(a). The obligation to make a disbursement must be conditioned upon an event beyond the person's control. Treas. Reg. § 301.6323(c)-3(a).

Each of the agreements creating the SLOCs is an obligatory disbursement agreement. The Bank is in the business of issuing standby letters of credit, so the Bank's issuance of the SLOCs is in the ordinary course of its trade or business. The Bank is required to make payments under the SLOCs upon the proper presentation of documents by the beneficiary, who is not the Taxpayer. The Bank's obligation to honor the beneficiary's request is conditioned only on the proper presentation, which is an event beyond the Bank's control. The Bank's security interests in the TCDs were perfected under Name 27 by its possession of the certificates prior to the dates when the NFTLs were filed.

The Bank's security interests are prior to the federal tax liens under section 6323(c)(4) even though no payments had been made under the SLOCs on the date of levy. Unlike sections 6323(a), (b)(10) and (c)(2), section 6323(c)(4) does not require money to have been paid as a prerequisite to obtaining priority over a federal tax lien. Under the plain language of section 6323(c))(4)(A), only the obligation to make a disbursement is needed. A security interest falls within an obligatory disbursement agreement "to the extent of disbursements required to be made…," not disbursements already made. The legislative history of the Federal Tax Lien Act of 1966 confirms this interpretation.

> In these cases no limitation is placed on the time during which a disbursement may be made as long as the person is obligated to do so at the time of the tax lien filing by a written agreement. As a result, if an effort is made to foreclose on a Federal tax lien before all of the potential obligations under an obligatory disbursement contract are met, these potential obligatory disbursements are given priority over the Federal tax lien. In such a case an amount sufficient to cover the potential obligations usually is set aside and used for these obligations. Only after these obligations have been met is any remainder available to satisfy the liability secured by the Federal tax lien.

H. Rep. No. 1884, 89th Cong., 2d Sess., p. 9 (1966) and S. Rep. No. 1708, 89th Cong., 2d Sess., p. 9 (1966). When the notice of levy was served, the SLOCs were in effect and the Bank was obligated to make payments. Based on the statutory language and clear expression of Congressional intent in the legislative history, the Bank's security interests in the TCDs, perfected prior to the NFTL filings, were prior to the federal tax liens on the date the notice of levy was served, even though no payments had been made under the SLOCs. The priority under section 6323(c)(4) continues until all obligations under the SLOCs have been satisfied or the SLOCs are no longer in effect.

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Please call (202) 622-3630 if you have any further questions.