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MEMORANDUM FOR ROCKY MOUNTAIN DISTRICT COUNSEL

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation) CC:EL:GL:Br1

SUBJECT: Revocation of Releases of Self-Releasing Notices of Federal Tax Lien

This responds to your request for advice dated June 23, 1999. This document is not to be cited as precedent.

ISSUES:

1. Whether the release of a federal tax lien, pursuant to I.R.C. § 6325(a), extinguishes the underlying tax liability.

2. Under what circumstances can a certificate of release of lien be revoked and the lien reinstated?

CONCLUSIONS:

1. The release of lien extinguishes the federal tax lien but does not, in and of itself, extinguish the underlying tax liability.

2. A certificate of release of lien may be revoked when "issued erroneously or improvidently." The "self-releasing lien" is a long-utilized device, and the automatic release provision has been treated by the Internal Revenue Service, and recognized by the courts, as the equivalent of the issuance of a certificate of release. Accordingly, the automatic release of a "self-releasing lien" has the same conclusive effect described in I.R.C. § 6325(f)(1)(A). The automatic release may also, therefore, be deemed to be "issued erroneously or improvidently" under circumstances further described below and may be reinstated under those circumstances pursuant to I.R.C. § 6325(f)(2).

LAW AND ANALYSIS:

I.R.C. section 6321 provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal belonging to such person." The federal tax lien arises upon the date of assessment and continues "until the liability for the amount so assessed ... is satisfied or becomes unenforceable by reason of lapse of time." I.R.C. § 6322.

I.R.C. section 6325(a) provides that the Secretary shall issue a certificate of release of any lien when the liability for the amount assessed is fully satisfied or legally unenforceable or when a bond is accepted conditioned upon payment of the amount assessed. Section 6325(a) is, therefore, the counterpart to section 6322–when the duration of the lien has run, that lien must be released.

I.R.C. section 6325(f)(1)(A) further provides that where a certificate of release is "issued" pursuant to "this section" and is filed in the same office as the notice of federal tax lien to which it relates, such certificate is "conclusive that the lien referred to in such certificate is extinguished ... ." Thus, third parties may rely upon a filed certificate of release as evidence that a particular lien no longer exists.

I.R.C. section 6325(f)(2) additionally provides that where a certificate of release is "issued erroneously or improvidently", the Secretary may revoke such certificate and reinstate the lien. The reinstated lien "shall have the same force and effect (as of such date) ... as a lien imposed by section 6321 ... ." I.R.C. § 6325(f)(2)(B). The filing of a notice of revocation does not reinstate the lien retroactively. Rather, the priority of the lien dates from that filing. See Treas. Reg. § 301.6325-1(f)(2)(iii)(b); Treas. Reg. § 301.6325-1(b)(1)(ii), Example. See also United States v. Winchell, 793 F. Supp. 994 (D. Col. 1992).

The Internal Revenue Service (the "Service") generally uses a "self-releasing" lien to effectuate a certificate of release. All federal tax lien notices filed after December 31, 1982, are "self-releasing." In addition to serving the function of protecting the government's priority against other creditors of the taxpayer, a self-releasing lien serves as a certificate of release after the expiration of the statutory period for collection. The form used by the Service to file a notice of federal tax lien provides that "... unless notice of lien is refiled by the date [specified], this notice shall, on the day following such date operate as a certificate of release as defined in I.R.C. § 6325(a)." Courts have recognized the authority of the Service to utilize the self-releasing lien as an effective certificate of release. See Municipal Trust and Savings Bank v. United States, 114 F.3d 99, 102 (7th Cir. 1997), reh'g denied, 1997 U.S.App. LEXIS 16535 (7th Cir. 1997); Griswold v. United States, 59 F.3d 1571, 1579 n.18 (11th Cir. 1995); In re Cole, 205 B.R. 668, 673 (Bankr. D. Mass. 1997).

1. Effect of Release of Lien upon Underlying Liability

It has always been the position of this office that the effect of a certificate of release, whether by self-releasing lien or otherwise, is to extinguish the tax lien itself and not merely to rescind the notice of tax lien. We have not previously addressed the issue of the effect of a certificate of release upon the underlying tax liability. The distinction may be illustrated in the following hypothetical: a self-releasing lien is filed which states that it will operate as a certificate of release if notice of lien is not refiled by the date of the running of the 10-year statutory collection period. An event occurs, such as the taxpayer's bankruptcy, which tolls the 10-year period. The Service fails to refile, however, a new notice of lien which reflects the new date for expiration of the collection period and the lien self-releases on the original date provided. Accordingly, the notice on file operates as a certificate of release, which may be relied upon by third parties as conclusive evidence that the lien has been extinguished. However, the collection period remains open and the tax liability has not been satisfied.

We conclude that the release of the lien, in and of itself, does not extinguish the taxpayer's personal liability for the tax. We have found no authority for the position that the release of a lien has any impact on the liability. To the contrary, there is specific authority for the position that a certificate of release, while conclusive that the lien is extinguished, does not conclusively establish that the underlying tax liability is not owed or has been paid. See Urwyler v. United States, 95-1 USTC ¶ 50,238 at 87,862 (E.D. Cal. 1995); Miller v. Commissioner, 23 T.C. 565 (1954), aff'd, 231 F.2d 8 (5th Cir. 1956); Commissioner v. Angier Corporation, 50 F.2d 887, 892 (1st Cir. 1931), cert. denied, 284 U.S. 673 (1931). See also In re Goldston, 104 F.3d 1198 (10th Cir. 1997) (distinguishing the liability for tax from the assessment); Rev. Rul. 85-67, 1985-1 C.B. 364 (same); In re Doerge, 181 B.R. 358, 362 (Bankr. S.D. Ill. 1995) (distinguishes determination of the tax liability and collection of the tax as two distinct steps in the taxation process).

The argument that the release of a lien extinguishes the tax liability is also inconsistent with other aspects of section 6325. Section 6325(a)(2) provides that, in addition to when the liability is satisfied or unenforceable, the Service is authorized to release the lien upon acceptance of a bond. Clearly, in this scenario, the lien may be released, but the liability remains until paid or unenforceable. It would be incongruous to assert that a release of lien under section 6325(a)(1) extinguishes the underlying liability, but a release of lien under section 6325(a)(2) does not. In addition, 6325(f)(2) provides the Service with the authority to revoke a certificate of release and reinstate the lien in certain circumstances by mailing and filing notice of the revocation. Conceptually, the

argument that the liability is extinguished upon issuance of a certificate of release seems inconsistent with our authority to make such a revocation without having to reassess the liability. See also William D. Elliot, Federal Tax Collection, Liens and Levies at 6-13 (Prentice Hall 1988) (citing Treas. Reg. § 301.6325-1(a)(1) for the statement that "[w]hen a lien is released, however, the underlying tax liability is not extinguished until (1) the tax has been paid in full or (2) the statutory period for collection of the tax expires.").

Accordingly, we conclude that the release of a lien does not necessarily establish that the tax liability has been extinguished. The fact that the Service uses self-releasing liens inherently means that, in certain cases, liens will be extinguished prematurely. Under the facts of the hypothetical, for example, the self-releasing lien operates as a certificate of release and conclusively extinguishes the lien; but because the tax liability has not been satisfied and has not become unenforceable by lapse of time, the tax liability is not extinguished. We next address whether the prematurely extinguished lien can be reinstated.

2. Revocation of Certificate of Release

As previously discussed, the Service has utilized the "self-releasing lien" since 1982, and courts have recognized the validity of this device to operate as a certificate of release. In other words, the operation of the "self-release" mechanism equates with the "issuance" of a certificate of release for purposes of I.R.C. § 6325(f)(1). See, e.g., Municipal Trust and Savings Bank v. United States, supra. Accordingly, the operation of the "self-release" mechanism is conclusive that the underlying lien is extinguished, pursuant to section 6325(f)(1)(A).

Also as previously discussed, the statutory authority to revoke a certificate of release is found in I.R.C. 6325(f)(2). Section 6325(f)(2) authorizes the Service to revoke a certificate of release and reinstate the lien where the certificate of release was "issued erroneously or improvidently." We recognize that, in one sense, a self-releasing lien which self-releases under facts such as those described in the hypothetical was not issued erroneously or improvidently because the mechanism for automatic release was "issued" simultaneously with the filing of the notice of lien.

This interpretation is inconsistent with the position previously described, however, that the self-release of a lien itself operates as the "issuance" of a certificate of release for purposes of section 6325(f)(1), and is conclusive that the underlying lien is extinguished. It would be inconsistent to assert that the self-release of a lien operates as the issuance of a certificate of release for purposes of determining the conclusive effect of such certificate under section 6325(f)(1), but does not constitute the issuance of a certificate of release for purposes of revocation of such certificate under section 6325(f)(2).

The question remains whether the issuance of the certificate of release, pursuant to a

self-release, can be considered "erroneous or improvident." More specifically, under the facts of the hypothetical, may the Service's acts of negligent omission in failing to timely refile the notice of the lien with the correct extended collection period date be considered the erroneous or improvident issuance of a certificate of release?

We consider the terms "erroneously or improvidently" to cover the universe of possible errors, both of omission and commission. A wrongful release of a self-releasing lien does not occur simply because time elapses; it is the result of some failure to act properly and timely. The Third College Edition of Webster's New World Dictionary defines improvident as "failing to provide for the future." The failure to act properly and timely to refile a lien so as to preserve the future efficacy of the lien is thus erroneous and improvident.

There is little guidance from the courts on what constitutes the sort of "error" or "improvidence" permitting the government to revoke a release under section 6325(f)(2). However, courts have generally not focused upon whether a premature filing of a certificate of release is "erroneous or improvident" but have just looked at whether or not the lien should have been released. See O'Bryant v. United States, 839 F. Supp. 1321, 1324 n. 5 (C.D. Ill. 1993), aff'd without discussion of this point, 49 F.3d 340 (7th Cir. 1995) (release of lien for liability already paid in erroneous refund case was not erroneous because the Service had to sue to collect such refund rather than treat the originally assessed liability as unpaid); United States v. Peterson, 93-1 U.S.T.C. ¶ 50,230 (W.D. Wash. 1993) (lien erroneously released where the Service determined that taxes were discharged in bankruptcy without considering whether the taxes were still collectible from certain assets); United States v. Winchell, 793 F. Supp. 994, 996 (D. Colo. 1992) (court acknowledged that lien was released prematurely and that such release could be revoked without discussing whether such release was "erroneous or improvident").

It has always been the business practice of the Service to file a notice of revocation in the case of a self-releasing lien which prematurely releases under facts such as those in the hypothetical. See IRM 5.12.2.19, Revocation of Certificates (CCH 1999). This practice has been expressly approved by this office. In addition, the ability of the Service to revoke self-releasing liens has been recognized by the courts. See Municipal Trust and Savings Bank v. United States, supra, at 102; In re Cole, supra, at 673.

The self-releasing lien program has long been recognized as valuable and cost-effective for the Service. The effectiveness of self-releasing liens would be undermined if the premature release of those liens could never be revoked. We would not reverse the long-standing business practice of the Service (endorsed by this office) that self-releasing liens that release prematurely may be reinstated by filing notices of revocation.

To summarize, the fact that a certificate of release has been filed does not establish that the underlying tax liability is extinguished. A notice of revocation of the certificate of release can and should be filed whenever the certificate of release was issued erroneously or improvidently. A self-releasing lien that self-releases while the collection period remains open, is “issued erroneously or improvidently.”

If you have any further questions, please call the attorney assigned to this case, who may be reached at 202-622-3610.