American Society of Tax Problem Solvers

LEVY & SALE PROVISIONS

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GENERAL PRINCIPLES APPLICABLE TO LEVIES

A Levy May Be Made by "Any Means'

Notice Must Be Given to the Proper Person

The Levy Seizes Only the Taxpayer's Interest in Property

A Levy on Property Transfers Custody of the Property to the IRS

The Levy Does Not Seize After-Acquired Property

A Summons May Be Used to Discover Property Subject to levy

Collecting Employment Taxes for a Sole Member LLC

IRC §6331

The Service may only levy after sending the t/p a Notice and Demand and the t/p has failed to pay the amount assessed.

IRS may collect the amount of an assessment by levy against all property and rights to property (except property exempt under §6334) in the hands of the taxpayer or subject to the tax lien.

Taxpayer must also be given a 30-day notice of IRS's intent to levy, and the taxpayer's right to a collection due process (CDP) hearing.

Both Notices Must Be Given No Less Than 30 Days Before the Day of the Levy

Notices must include "a brief statement" describing:

1) The Code provisions & procedures dealing with levy/sale of property;
2) Administrative appeal rights and procedures about a levy and sale;
3) The collection alternatives available to a taxpayer to avoid a levy, including an installment payment agreement; and
4) The Code provisions and procedures relating to redemptions of property and release of liens on property.

Collection Hold and Surrender of Property

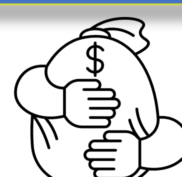
Generally, no collection action can be taken during the 30-day period, or if the taxpayer requests a CDP hearing, during the time the hearing is pending and before any becomes final.

The person in possession of property or rights to property subject to levy on which levy has been made must surrender the property on demand.

Failure to honor the levy renders the person served personally liable and subject to penalty, but if the person does honor the levy, he is discharged from any liability to the taxpayer arising from surrender or payment.

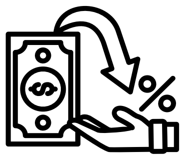
Seizure, Sale, and Redemption

Seized property must be sold quickly after notice within the time limits, at the place, in the manner, and under the conditions set forth in §6335. Special rules are provided for perishable goods.



The person whose property has been levied upon may redeem the property at any time prior to sale by paying the amount due plus costs of the proceeding, personal property may not be redeemed after the sale, and real estate may only be redeemed within 180 days of the sale.

Bank Account Levy



When the IRS levies on a bank account…

…the bank cannot surrender any part of a deposit, including interest, until 21 days have passed. IRC §6332(c).

Generally, the IRS combines…

Notice of Intent to Levy and the notice of the taxpayer’s right to a CDP hearing in one document.

ISSUES RELATING TO THE VALIDITY OF LEVY & SALE.

Levy and sale are authorized only if the IRS has followed the provisions of the Code and taxpayer’s constitutional rights of the have been respected.

A levy may be made only after there has been:

- An assessment, a notice and demand, and, in non-jeopardy situations, a notice of intention to levy given at least thirty days before the levy. (If not previously given)

A levy may not be made:

- If the taxpayer requests a CDP hearing within the 30 days, the levy generally cannot be served until a final determination has been made.
- If the taxpayer has an OIC or an I/A request pending or in effect.

ISSUES RELATING TO THE VALIDITY OF LEVY & SALE.

- The property purportedly seized must have been in the hands of the person served with the levy on the date of the levy.
- There is an exception to this with respect to-salary or wages and federal benefit payments, and IRS may serve a levy, which is continuous from the date of the levy until it is released.
- An authorized revenue officer must have made the levy.
- The levy cannot create an economic hardship for the taxpayer.
- If the seizure is of the principal residence of the taxpayer, spouse, former spouse, or minor child. IRS must obtain judicial approval of the seizure.

The Manner of the Levy Must Be Effective to Seize the Property

The levy is economical; the estimated expenses of seizure and sale cannot exceed the fair market value of the property at the time the levy is made.

The IRS Must Show That:

1. The requirements of the applicable law and the administrative procedures, with respect to the levy have been met;
2. The liability is owed;
3. No reasonable alternative for Collection exists.
   a) The t/p may present any facts to show these requirements have not been met but may not raise the amount of the underlying tax, and
4. Seizure and sale must meet the requirements of the Code as to notice and date of sale.

Levies Considered to be Void

Made before assessment or before the sending of a notice and demand is void unless collection of the tax is in jeopardy. (*Coming Up*)

A t/p is given a 10-day grace period after a notice and demand before "it shall be lawful for the IRS to collect such tax… ," A levy made within the grace period is void.

Levies Considered to be Void

A levy is not permitted until a notice that the IRS intends to levy has been given to the taxpayer no less than 30 days before the day of the levy.

Jeopardy Assessments

The conditions supporting a jeopardy levy are the same as those for making a jeopardy assessment.

Policy Statement 4-88

Jeopardy Assessments

In deciding whether a jeopardy situation exists under the standards listed above, the courts have looked to a number of facts, including…

Jeopardy Assessments Slide 1 of 3

1. **The t/p is or appears to be designing to quickly depart from the USA or to conceal himself/herself,**
2. **The t/p is or appears to be designing quickly to place his/her or its property beyond the reach of the government either by removing it from the USA, by concealing it by dissipating it, or by transferring it to other persons.**
3. **The t/p's financial solvency is or appears to be imperiled.**

Jeopardy Assessments Slide 2 of 3

Physical possession of cash, or its equivalent, exceeding $10,000 who does not claim it as his, or as belonging to another whose identity can be readily ascertained and who acknowledges ownership of it, is presumed to be in jeopardy within the meaning of §6867.

Whether the taxpayer possesses or deals in large amounts of **cash**;

Is involved in **illegal** activities; or has filed tax returns in the past reporting **little or no income**;

Jeopardy Assessments Slide 3 of 3

Dissipated assets through forfeiture, expenditures for attorneys' fees, and similar expenses;

Lacks assets from which the tax liability can be collected; uses **aliases** or **multiple addresses**; and

Failed to provide appropriate **financial information** when requested.

Section-6331(a) **Allows** IRS to Satisfy a Tax Liability by Levy

But, it ***does not prescribe how*** a levy should be made.

The levy statute only says that levy "includes the power of distraint and seizure **by any means**" and that in any case in which the IRS may levy on property, it may seize and sell property.

§6331(b)

The Distinction is Between Intangible and Tangible Property

The terms "levy" and ."seizure" are often used interchangeably, but there is a difference.

A levy may be made either by actually seizing property or by serving a notice of levy that transfers constructive possession of the property to the government.

Securing Possession for Intangibles

Intangible

Generally, a notice of levy is sufficient to reach intangible cash or cash-like property.

Levy on property in the hands of a third party is generally, made by only serving a notice of levy on the third party if the taxpayer's property can be turned over by writing a check.

Where intangible property is levied upon a notice of levy is usually sufficient.

- **A promissory note or a stock certificate (actual seizure of the document)**
- **Property is in the hands of a third party, a notice of levy is used.**

Securing Possession for Tangibles

Tangible

When tangible property is involved, the Service must both serve a levy and seize the property and reduce it to actual or constructive possession or control by seizing, posting, or tagging the property.

Tangible personal property capable of delivery is physically seized, for example:

- **Automobile**
- **House**
- **Boat**
- **Movable equipment/machinery**

Assets of size, bulk, or quantity require steps such as notice and padlocking.

- **On-going businesses**
- **Inventory**
- **Immovable property**
- **Real property**

Notice Must Be Given to the Proper Person Examples

1 An A/R levy is not affected padlocking the business location where the account creditor's books are located; levy notice must be served on the individual account debtors.

2 To levy on the contents of a safe-deposit box, the notice of levy must be served on the bailee bank.

3 To levy credit card sales the levy will be on taxpayer's merchant service provider

The Levy Seizes Only the T/p's Interest in Property

- The effect of a levy is to seize and transfer to the Service the **taxpayer's right, title, and interest in the seized property**.
- A levy seizes only property **"belonging"** to the taxpayer or property in the hands of a third person who is subject to the lien.
- Where the IRS sells seized property, the **certificate of sale only transfers** "to the purchaser all right, title, and interest of the party delinquent in and to the property sold."
- The sale provisions indicate that a levy seizes only the taxpayer's interest in the property and that the **taxpayer's interest, whatever it may be, is transferred to the Service for later sale**.

IRC §6339(a)(2) (personal property)
IRC §6339(b)(2) (real property)

A Levy on Property Transfers Custody to the IRS Not Title

Case law supports this position despite the fact that the Code generally does not mention the sale provisions.

Phelps v. United States
United States v. Whiting Pools, Inc.

The Levy Does Not Seize After-Acquired Property

A notice of levy does not operate to seize property acquired by the taxpayer or a third person holding property of the taxpayer after the date of the levy.

IRC §6331(b) states, "A levy shall extend only to property possessed and obligations existing at the time thereof."

The Levy Does Not Seize After-Acquired Property

- A levy served on a bank at which a taxpayer has an account does not operate to seize a **deposit made** to the taxpayer's account **after** the date of the notice.
- Since a levy has **no prospective effect**, the statute contemplates that successive seizures will be made until the amount due from the taxpayer is fully paid.
- **Exceptions** to this rule:
- 1. A levy on **salary/wages** is **continuous** from the levy date until the levy is released. under §6343.
- 2. Another exception permits continuous levy of up to 15% of certain **federal payments** such as Social Security.

A Summons May Be Used to Discover Property Subject to Levy

The IRS may order a person to **produce books and records** to permit them to identify property subject to levy.

To effect a levy made, or about to be made, the IRS may require "**any person** having custody or control of any books or records, containing evidence of statements relating to the property" of the taxpayer to supply information.

IRS typically uses §6333 to obtain information from a bank concerning the balances and accounts of a taxpayer.

Collecting Employment Taxes for a SMLLC

With the promulgation of the "check-the-box regulations," when an SMLLC had delinquent employment taxes, there has been, **confusion** as to whether the IRS can collect the unpaid taxes from the property of the SMLLC or from the sole member owner, and how collection should occur.

Collecting Employment Taxes for a SMLLC

IRS amended the applicable regulations. For wages paid on or after 1/01/2009, a disregarded SMLLC **will be treated as a corporation** for purposes of employment taxes.

Therefore, **IRS must look to the assets of the SMLLC** for unpaid employment taxes and will only be able to reach the assets of the sole member-owner in those situations where the sole member-owner would be liable if the employment taxes were accrued by a corporation.

Property Subject to Levy

There are **two broad categories of property subject to levy**. A levy may be made on “all property and rights to property”

[1] Belonging to… (the taxpayer) or

[2] On which there is a lien provided in this chapter for the payment of such tax (the assessed tax set forth in the notice and demand).

It is **understandable** that property belonging to a taxpayer—that is, in which he has “property or rights to property”—may be seized by levy where that **property is in the taxpayer’s possession**.

Alter Ego

It is understandable that property belonging to a taxpayer—that is, in which he has “property or rights to property”—may be seized by levy where that property is **in the taxpayer’s possession**. However…

The taxpayer’s property may be levied even if it is **not formally in his possession,** under the equitable doctrines that the third party holding the property is the alter ego of the taxpayer, or that the third party is the taxpayer’s nominee.

The alter-ego theory generally involves a corporation or other legal entity, and focuses on the facts involved in **“piercing the corporate veil.”**

When facts are present showing that an alter ego situation exists, the Service may seize by levy any **property in the hands of the alter ego**.

Oxford Capital v. United States, 211 F3d 280, 284 (5th Cir. 2000)

Salary and Wages

1

The Service must serve a notice of levy to seize any property of a taxpayer.

2

When the seizure involves salary/wages, IRS uses Form 668-W, Notice of Levy on Wages, Salary, and Other Income make the levy.

3

Unlike a levy served to seize other property, a levy served on salary/wages is continuous and reaches all "compensation for services paid in the form of fees, commissions, bonuses and similar items.

Insurance Policies

Life insurance and endowment policies of living taxpayers may be levied upon.

A special procedure has been provided in §6332(b).

- The taxpayer has 90 days after the service of a levy on an insurer to find the funds to pay the delinquent tax or work out some other arrangement with the IRS.
- After the 90-day period, the insurer is required to honor the levy by paying over the amount the taxpayer could have had advanced to him on the 90th day (i.e., the cash, loan value of the policy), plus any amounts the insurer improperly advanced the taxpayer-insured after the insurer had actual notice or knowledge of the tax lien.
- NB: If the taxpayer defaults in paying premiums during the ninety-day period and the policy is automatically converted to paid-up term insurance, the levy may reach nothing.

Bank Accounts

<u>Irrespective of state banking laws or bylaws of the banking institution</u> providing that the amount on deposit may not be paid except on presentation of the passbook, the bank must honor a notice of levy served on it notwithstanding a failure on the part of the government to present, the passbook, or to guarantee to indemnify the bank if necessary for having paid over the funds, without the passbook being-presented.

On the other hand, where the bank, account is evidenced by a **negotiable certificate of deposit**, the government must actually seize the certificate and present that certificate to obtain payment.

Bank Accounts

A special rule applies to the surrender of deposits by a bank. Under §6332(c) a bank need only surrender deposits after the expiration of 21 days following service of the levy.

Therefore, a taxpayer has 21 days after the levy is served on the bank to resolve the delinquent account with the IRS.

A joint checking or savings account may be seized by levy even if only one of the co-owners is liable for the tax.

Supreme Court, in United States v National Bank of Commerce

Savings Account

A savings account may be in the name of the taxpayer in trust for another party, a type of account referred to as a “Totten trust.”

Whether a levy will reach a Totten trust depends on whether the taxpayer is the depositor or the beneficiary, and whether an irrevocable trust was established.

Savings Account

Where the taxpayer is in possession of checks to be deposited into his account at the time of the levy, but the **checks are not presented to the debtor bank until after the notice of levy** is served, the **levy will not reach** the amounts deposited.

If the t/p draws checks on the account and they are honored before the service of levy, but the amounts paid have not been charged on the bank’s books to the depositor’s account by the time the levy is served, the levy is **also ineffective** to reach the amount of the checks previously honored.

Property Not Subject to Levy

Property in the Custody of a Court

Apart from property exempt from levy under §6334, and regardless of the priority of the tax lien, property is also not subject to levy if it has already been subjected to attachment or execution under judicial process.

Similarly, taxes cannot be collected by levy upon assets in the custody of a court in which a bankruptcy or receivership proceeding is pending.

When funds are in the custody of a court, but not in connection with a bankruptcy or receivership proceeding, the funds are subject to both lien and levy.

Property Not Subject to Levy

After-Acquired Property

Once a general tax lien exists, it makes no difference when the taxpayer's property or right to property comes into existence because the lien attaches to after-acquired property.

Consequently, a lien collects property or rights to property that come into existence after the date the tax is assessed, but a levy extends "only to property possessed and obligations existing^ at the time thereof."

A notice of levy results in the seizure of property or rights to property' existing at the time the levy is served. If property comes into the possession of the taxpayer or third party after service of the levy, another levy must be made to seize the property, although the tax lien itself automatically attaches to the after-acquired property.

Property Exempt from Levy

The next 3 slides are a summary of the items exempt from levy per IRC §6334. They are included for your use – we will only look at a select few, review more on your own and note that this is a summary and not a comprehensive list.

Property Exempt from Levy

- Wearing apparel and schoolbooks that are necessary for the taxpayer or for members of his family.
- Fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as long as they do not exceed $6,250 in value.
- Books and tools necessary for the trade, business, or profession of the taxpayer, as long as they do not exceed $3,125 in value.
- Unemployment benefits.

Property Exempt from Levy

- Mail addressed to any person that has not been delivered to the addressee.
- Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll, and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.
- Workmen's compensation.
- So much of the taxpayer's salary, wages, or other income as is necessary to comply with a court order requiring the taxpayer to contribute to the support of his minor children.

Property Exempt from Levy

- Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).
- Any amount payable to an individual as a service-connected disability benefit under the Railroad Retirement Act.
- Please note that this is a summary and not a comprehensive list.

Other Limitations on the Levy Authority

Constitutional*, Statutory, and Administrative

***RRA '98 added §6304**

Constitutional Limits on Levy Authority

A revenue officer is <u>not</u> permitted to:

- Use force in the seizure of property,
- Attempt to enter a personal residence
  - Unless the taxpayer or another adult gives him specific permission
  - Nonconsensual entry is unconstitutional, under *GM Leasing Corp, v. US*
- Unimproved real property may be seized without obtaining the taxpayer's consent or a writ.

Constitutional Limits on Levy Authority

However, a revenue officer is permitted to:

- Seize personal property, in public or open space without requiring a taxpayer's permission or invading his privacy.
- If personal property is located outside the residence but on private premises, the revenue officer may enter on the premises and seize the property if there is no obstruction or enclosure that would indicate entry would constitute invasion of the taxpayer's privacy.
- To avoid constitutional issues, consent of the taxpayer or a writ of entry is necessary to seize property in a taxpayer's personal residence.

Statutory Limits on Levy Authority

Prohibition on Uneconomical Levies

- ✓ IRS may not levy if the expense of levy and sale exceed the FMV of the property. RO is required to complete equity determination prior to recommending seizure.

Prohibition on Levies Causing Economic Hardship

- ✓ RO is prohibited from making levies on individuals that that cause economic hardship due to the financial condition of the taxpayer.

Statute of Limitations

- ✓ As a general rule, any tax may be collected by levy only if it is made within 10 years after the assessment of the tax.

Application of Fair Debt Collection Procedures

- ✓ The IRS Restructuring and Reform Act of 1998 added new §6304, which imposes fair tax collection procedures on the IRS.

Administrative Limits on Levy Authority

§6303	§6330	§6331(d)
Notice and Demand for Payment of Tax Due	Right to a Collection Due Process (CDP) Hearing	Notice of Intent to Levy L1058, LT11, et al.

Fair Debt Collection Procedures

Application of fair debt collection procedures.
The IRS Restructuring and Reform Act of 1998 added a new §6304, which imposes fair tax collection-practices on the IRS.

> Unless the taxpayer has given prior consent, or a court of competent jurisdiction has given express permission, the Service may not communicate with a taxpayer about the collection of an unpaid tax in the **following times and places:**

Fair Debt Collection Procedures

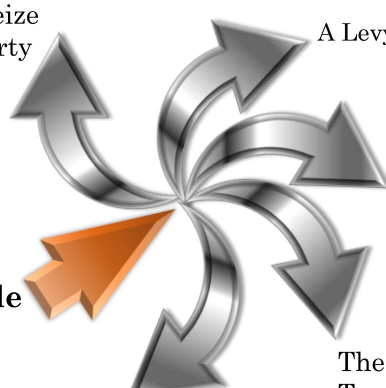
1) At the taxpayer's place of employment,
2) At any unusual time or place,
3) A time or place that should be known to be inconvenient to a taxpayer,
4) If the IRS knows that the taxpayer is represented, unless the rep fails to communicate with the IRS within a reasonable time, or
5) The representative consents to communication with the taxpayer.

The generally authorized hours of contact are between 8am and 9pm. The IRS is also not permitted to engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of an unpaid tax.

Key Takeaways

The Levy Does Not Seize After-Acquired Property

A Levy May Be Made by "Any Means'



Notice Must Be Given to the Proper Person

Levy, Seizure, and Sale

The Levy Seizes Only the Taxpayer's Interest in Property

Levies are limited in 3 way: Constitutional, statutory, and administrative limits

The End

We are done for today, hope you learned something useful, and look forward to seeing you next year!