

#19 PROTECT RETIREMENT FUNDS FROM IRS LEVIES IN THE ABSENCE OF “FLAGRANT CONDUCT” BY A TAXPAYER

Present Law

The IRS has wide discretion to exercise its levy authority. IRC § 6331(a) provides that the IRS generally may “levy upon all property and rights to property,” which includes retirement savings. Some property is exempt from levy pursuant to IRC § 6334. Under IRC § 6331(h), the IRS may place a continuing levy on a series of specified payments to or received by a taxpayer, which will run from the date the levy is first made until the date the levy is released.

As a policy matter, the IRS has decided it will not levy on a taxpayer’s retirement savings unless it has made a determination that the taxpayer engaged in “flagrant conduct.”⁸⁵ Neither the Code, the regulations, nor internal IRS guidance defines the term “flagrant conduct” for purposes of this analysis.

Reasons for Change

There are strong public policy reasons to encourage retirement savings and to shield retirement savings from IRS levies. Almost all workers eventually retire, and they require retirement savings for support. In addition, retired taxpayers who do not have sufficient savings are more likely to experience economic hardship and qualify for public assistance, which other taxpayers pay to support.

For these reasons, Congress has provided significant tax incentives to encourage taxpayers to save for retirement. Similarly, the IRS has taken certain steps to protect retirement savings by requiring a specialized analysis prior to levy, including a determination of whether the taxpayer engaged in “flagrant conduct.” However, recent changes in IRS procedures have eroded these protections. Specifically, the IRS recently adopted procedures that allow taxpayers to request or agree to “voluntary” levies on retirement accounts.⁸⁶ If a taxpayer agrees to a “voluntary” levy, the IRS bypasses the determination of “flagrant conduct.”

Without protection from levy, taxpayers who have not engaged in “flagrant conduct” in their tax matters and who therefore would have been shielded from levies on their retirement accounts in the past may agree to “voluntary” levies out of fear or anxiety and thus find themselves in economic hardship during retirement.

Under IRC § 6334, the IRS is prohibited from levying on certain sources of payment, such as unemployment benefits and child support. These exceptions reflect policy determinations. For example, Congress has determined that the IRS should not levy on child support payments because doing so would likely harm the children who rely on those benefits for support. For the reasons described above, the National Taxpayer Advocate believes that retirement savings should be added to the list of exempt property absent “flagrant conduct” and that the term “flagrant conduct” should be defined in the statute.

Recommendations

Amend IRC § 6334(a) to include qualified retirement savings as a category of property exempt from levy if it is determined that (i) the levy would, in retirement, create an economic hardship within the meaning of Treas. Reg. § 301.6343-1(b)(4)(i) based on a review of the taxpayer’s financial condition and (ii) the taxpayer has not engaged in “flagrant conduct.”

85 IRM 5.11.6.3(5) (Aug. 16, 2017).

86 IRM 5.11.6.3(3) (Aug. 16, 2017).

Amend IRC § 6331 to stop the accrual of penalties and interest when a levy has attached to a retirement account and the period of limitation in IRC § 6502 has elapsed (generally ten years from the date of assessment of the liability). Consider a levy on retirement funds to be unenforceable after the period of limitations provided in IRC § 6502 has elapsed.

Amend IRC § 6334 to define “flagrant conduct” as willful action (or failure to act) that is voluntarily, consciously, and knowingly committed in violation of any provision of chapters 1, 61, 62, 65, 68, 70, or 75 and that appears to a reasonable person to be a gross violation of any such provision.⁸⁷

⁸⁷ For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 4912, 114th Cong. § 203 (2016) and Taxpayer Rights Act, S. 2333 and H.R. 4128, 114th Cong. §§ 306 & 307 (2015).