

Legislative Recommendation #24**Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence****SUMMARY**

- *Problem:* Seizing and selling a taxpayer's home is one of the most severe and potentially devastating actions the IRS may take to collect a tax debt. The law provides two alternative procedures by which the IRS may sell a taxpayer's home for delinquent taxes – one administrative and one judicial. Under the administrative procedure (levy), the law provides significant and meaningful taxpayer protections before a seizure and sale may take place. Under the judicial procedure (lien foreclosure), far fewer procedural safeguards exist.
- *Solution:* Provide the same protections to taxpayers and their families who are subject to lien foreclosure suits against their principal residences as the law provides to taxpayers who are subject to administrative sales of their principal residences.

PRESENT LAW

Selling a taxpayer's principal residence to satisfy a tax liability is one of the most intrusive collection remedies the IRS can impose against a taxpayer. The IRS has two different procedures to collect delinquent taxes from a taxpayer's principal residence: (1) an administrative seizure and sale; or (2) a lien foreclosure suit. The two cannot be used concurrently. The IRS generally uses the administrative seizure and sale procedures unless there are "questions concerning title to the particular property or priorities of liens that create an unfavorable or impossible market for administrative sale," or "it may be difficult to obtain the property or to preserve its value, and the aid of the court is necessary through specific order or the appointment of a receiver."¹ In these types of situations, the IRS uses the lien foreclosure procedure to enhance its ability to sell the property and obtain a higher sale price.

Administrative Seizure

IRC § 6334(a)(13) provides that the principal residence of a taxpayer is generally exempt from levy, except as provided in subsection (e). IRC § 6334(e)(1)(A) provides that a principal residence shall not be exempt from levy if a judge or magistrate of a U.S. district court "approves (in writing) the levy of such residence." An administrative seizure is generally subject to significant taxpayer protections. Among them, IRC § 6343(a) requires the IRS to release a levy under certain circumstances, including where it determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."² The government must show that "the taxpayer's other assets subject to collection are insufficient to pay the amount due,"³ and that "no reasonable alternative for collection of a taxpayer's debt exists."⁴ In addition, "[i]f the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the government will send a letter to each such person providing notice of the commencement of the proceeding. The letter will be addressed in the name of the taxpayer's spouse

1 Chief Counsel Directives Manual 34.6.2.2(1), Judicial Enforcement of the Tax Lien (Aug. 8, 2023), https://www.irs.gov/irm/part34/irm_34-006-002; see also Internal Revenue Manual (IRM) 5.17.4.8.2.1, Administrative Collection Devices Are Not Feasible or Adequate (Mar. 25, 2022), https://www.irs.gov/irm/part5/irm_05-017-004.

2 IRC § 6343(a)(1)(D).

3 IRC § 6334(e).

4 Treas. Reg. § 301.6334-1(d)(1). This requirement in the regulations is consistent with the legislative history of section 6334(e), which states that a principal residence "should only be seized to satisfy tax liability as a last resort." S. REP. No. 105-174, at 86-87 (1998).

or ex-spouse, individually or on behalf of any minor children.”⁵ A letter will be addressed to “Occupant” if “it is unclear who is living in the principal residence property and/or what such person’s relationship is to the taxpayer.”⁶

Lien Foreclosure Suit

IRC § 7403 authorizes the Department of Justice (DOJ) to file a civil action against a taxpayer in a U.S. district court to enforce a tax lien and foreclose on a taxpayer’s property. There is no exclusion for property consisting of a taxpayer’s principal residence. As compared with administrative seizures, statutory taxpayer protections are considerably more limited in lien foreclosure suits. For example, the Supreme Court has held: “We can think of virtually no circumstances . . . in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself.”⁷ A court has some discretion to refuse to authorize a sale that would impact a spouse, children, or other third parties, but even in that circumstance, the discretion is limited.⁸ Further, there is no requirement the IRS establish that “no reasonable alternative for collection of a taxpayer’s debt exists” or that the IRS notify the taxpayer’s spouse, former spouse, or family unless they have an ownership interest in the property to be foreclosed.

REASONS FOR CHANGE

IRC § 6334(e), requiring judicial approval of the administrative sale of principal residences, was enacted as part of the IRS Restructuring and Reform Act of 1998. The Senate Finance Committee report stated that the “seizure of the taxpayer’s principal residence is particularly disruptive to the taxpayer as well as the taxpayer’s family,” and a principal residence therefore “should only be seized to satisfy tax liability as a last resort.”⁹

This code section provided protections to taxpayers subject to administrative seizures of principal residences but offered no such protections to taxpayers subject to judicial foreclosures of principal residences. While the IRS may prefer one procedure over the other depending on the circumstances, from a taxpayer’s standpoint there is no meaningful difference between these two actions. A lien foreclosure in this circumstance has the same devastating impact as an administrative seizure. The result is that the taxpayer’s principal residence is sold, and the proceeds are applied to his or her tax liability.¹⁰ Both groups of taxpayers deserve the same protections, as do their families.

At the recommendation of the Office of the Taxpayer Advocate, the IRS has written procedures into its Internal Revenue Manual (IRM) that provide additional taxpayer protections before a case may be referred to DOJ for the filing of a lien foreclosure suit.¹¹ The IRM prescribes certain initial steps IRS employees must take, such as attempting to identify the occupants of a residence and advising the taxpayer about Taxpayer Advocate Service assistance options. It also sets forth an internal approval process prior to referring a lien

5 Treas. Reg. § 301.6334-1(d)(3).

6 *Id.*

7 *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

8 *Id.* at 680, 709-710.

9 S. REP. NO. 105-174, at 86-87 (1998).

10 For example, in *United States v. Maris*, 109 A.F.T.R.2d 2012-775, 2012-1 USTC P 50,182 (D. Nev. 2012), the court issued an order denying a request to foreclose tax liens on a principal residence because the government had not established that no reasonable alternative existed for collection of the taxpayer’s debt. On reconsideration, the government argued that this requirement only applied to an order approving an administrative seizure and sale under IRC § 6334(e), but the court disagreed. *United States v. Maris*, 2013 WL 3200079, 111 A.F.T.R.2d 2013-2475, 2013-2 USTC P 50,403 (D. Nev. 2013). However, other courts have held that the requirements for administrative seizure and sale of a principal residence are not applicable to lien foreclosure under IRC § 7403. See, e.g., *United States v. Martynuk*, 115 A.F.T.R.2d 2015-613, 2015-1 USTC P 50,168 (S.D.N.Y. 2015) (declining to follow *Maris*) and the cases cited therein. From the standpoint of protecting a taxpayer’s rights, the considerations of either cause of action are identical. There is no reason to afford fewer taxpayer protections in one circumstance than the other.

11 See IRM 5.17.4.8.2.5, Lien Foreclosure on a Principal Residence (Sept. 8, 2023), https://www.irs.gov/irm/part5/irm_05-017-004; IRM 5.17.12.20.2.2.4, Additional Items for Lien Foreclosure of Taxpayer’s Principal Residence (Nov. 9, 2023), https://www.irs.gov/irm/part5/irm_05-017-012; IRM 25.3.2.4.5.2(3), Actions Involving the Principal Residence of the Taxpayer (Nov. 9, 2023), https://www.irs.gov/irm/part25/irm_25-003-002r.

enforcement case to DOJ. However, the IRM is simply a set of instructions to IRS staff. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time.

Because of the devastating impact the seizure of a taxpayer's principal residence may have on the taxpayer and his or her family, the National Taxpayer Advocate believes taxpayer protections from lien foreclosure suit referrals should be codified and not left for the IRS to determine through IRM procedures.

RECOMMENDATIONS

- Amend IRC § 7403 to codify current IRM administrative protections, including that an IRS employee must receive executive-level written approval to proceed with a lien foreclosure suit referral.
- Amend IRC § 7403 to preclude IRS employees from requesting that DOJ file a civil action in a U.S. district court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence, except where the employee has determined that:
 - (1) The taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings, and no reasonable alternative exists for collection of a taxpayer's debt;
 - (2) The foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer; and
 - (3) If the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the IRS has sent a notice addressed in the name of the taxpayer's spouse or ex-spouse, individually or on behalf of any minor children.¹²

¹² For legislative language generally consistent with this recommendation, see Small Business Taxpayer Bill of Rights Act of 2023, S. 1177, 118th Cong. § 11 (2023); Small Business Taxpayer Bill of Rights Act of 2023, H.R. 2681, 118th Cong. § 11 (2023); Small Business Taxpayer Bill of Rights Act of 2015, H.R. 1828, 114th Cong. § 16 (2015); Small Business Taxpayer Bill of Rights Act of 2015, S. 949, 114th Cong. § 16 (2015); and Eliminating Improper and Abusive IRS Audits Act of 2014, S. 2215, 113th Cong. § 8 (2014).