

# IRS Abuse of Discretion

## IRS Notice of Tax Lien Abuses

After a tax has been assessed by the IRS and a demand for payment has been made upon the taxpayer, a lien arises in favor of the United States upon all real and personal property of the delinquent taxpayer<sup>1</sup> (the “statutory lien”). The statutory lien includes not only property held by the taxpayer at the time of assessment, but also all after-acquired property<sup>2</sup>. The statutory lien continues until the liability for the amount assessed is satisfied or becomes unenforceable from the expiration of the statute of limitations.<sup>3</sup> However, a statutory lien is not valid against any potential mortgagee, pledgee, purchaser, or judgment creditor **until a notice of lien has been filed by the Secretary or his delegate in the public records**<sup>4</sup> to perfect the surviving statutory lien.

The IRS must elect to file a Notice of Lien. The IRS has the **discretionary authority** to perfect the statutory lien by filing the tax lien in the public records; it is not a mandatory filing requirement. With that discretionary authority, Congress has (in effect) instructed the IRS to weigh the advantages for the IRS and the disadvantages to a taxpayer before filing a Notice of Lien in the public records.

A tax lien in the public records has very serious and devastating consequences. After the Notice has been filed, individual and business taxpayers will immediately be encumbered with bad credit that is likely to be a stain on their credit report for approximately ten years.

After the credit agencies and lending institutions note the Notice of Lien, individuals will have difficulty getting a credit card, buying a home, renting an apartment, buying a car, and other items to provide for their reasonable and necessary living expenses. The few taxpayers able to get credit through other resources will still have to pay higher credit rates than the normal rates. In some industries, an IRS tax lien will cause the loss of a job or a business relationship (e.g. those who work in the defense industry, the banking

---

<sup>1</sup> Section 6321 of the Internal Revenue Code provides that: If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) 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.

<sup>2</sup> *United States v. McDermott*, 507 U.S. 447, 455 (1993).

<sup>3</sup> Section 6322 of the Code.

<sup>4</sup> Section 6323(a) of the Code. Section 6323(f) of the Code identifies the place that the IRS need to go to perfect its lien. In the case of real estate, the IRS statutory lien can be cut off unless the IRS files its lien in the office within the State (or the county, or other government subdivision), as designated by the laws of the State in which the property subject to the lien is stated.

industry, the securities industry and the insurance industry which all require high qualification standards to maintain employment status). The credit agencies normally sustain data on the tax lien for ten years; a very long time to deny access to credit when the taxpayer needs a home or a new car.

Individuals may suffer a temporary job loss; there may be an illness in the family; or some other emergencies that prevent them from being current on their taxes. When the emergency is over, taxpayers have the potential to regain their ability to pay their tax debt in full. After the personal or business problems are resolved, the Notice of Lien adds enormously to the inability of the individual to pay their tax debt. Their credit score will disqualify them from many job opportunities. In those situations, the Notice is counter productive.

For businesses, the credit stain is equally devastating. Creditors will stop shipping inventory unless paid for by cash and banks will withdraw lines of credit, results that will cause most businesses to immediately fail. A sudden loss of a line of credit is toxic to the ability of a business to survive in circumstances where the business is dependant on that line of credit. All businesses need credit to function efficiently and effectively. This may be the reason for a very high percentage of business failures.

For those businesses that would survive without the Notice of Lien, the Lien is obviously counter productive. Most businesses have similar temporary financial problems: there are losses of key employees, hurricanes, the impact of 9/11, embezzlements, loss of a key customer account, etc. The problems that businesses have, temporarily leaving them tax-delinquent, are not insurmountable as the businesses stabilize and grow. There is a substantial economic loss to the Treasury when businesses do not survive to pay taxes, provide employment income to others, and continue to grow their business enterprise.

It is agreed that the IRS Notice of Lien is appropriate in many cases<sup>5</sup>. The Notice gives the IRS the obvious advantage of getting priority in bankruptcy and the filing cuts off the rights of non-perfected claims of other creditors. But the IRS ignores the intent of Congress when it uses the bankruptcy-priority argument in all cases. The IRS Revenue Officers and Revenue Agents and their managers do not take into account their obligation to weigh the equities and the risks in determining whether they should file a Notice of Lien in most cases, and never in mandatory lien situations (i.e. where the tax liability exceeds the IRS threshold).

---

<sup>5</sup> Internal Revenue Manual 5.12.1.1(05-20-2005) states its purpose of filing a Notice of Federal Tax Lien (NFTL):

1. *The purpose of filing the NFTL is to protect the Government's right of priority against certain third parties, typically a purchaser, holder of a security interest, mechanic's lien or, or judgment lien creditor*

The threshold for Filing a Notice of Lien in most IRS offices is \$5,000; anytime the threshold is exceeded, the IRS Notice of Tax Lien is automatically filed. That automatic filing means that the IRS has transmuted a discretionary Congressional statute into a **mandatory lien statute contrary to the clear intent of the Congress**. The mandatory lien filings are also contrary to the IRS Manual.<sup>6</sup>

All Installment Agreements give the IRS the authority to file a Notice of Lien as part of the terms of an Installment Agreement<sup>7</sup>. An Installment Agreement is a contract by a taxpayer to pay their tax debt in installments over a period of years. Installment Agreements are based upon the premise that the taxpayer can afford to make the payments. It is anomalous to file the Notice of Tax Lien when the taxpayer agrees to pay the tax debt. Further, the Installment Agreement is automatically cancelled by the IRS if the taxpayer misses a payment, a built-in trigger that protects the IRS; the IRS could always file a Notice of Lien if a taxpayer is in default of the agreement.

There is a systemic problem in Notice of Lien case. Since 1998, a taxpayer has the “due process” right to appeal the Notice; however, the damage to credit is unforgiving and immediate. It takes two or three months to get the case to the IRS Office of Appeals.

The ability to require the filing of a Notice of a Tax Lien as part of the terms of an Installment Agreement is **contrary to the intent of the Congress because it punishes a taxpayer for agreeing to pay his tax debt. Congress has gone out of its way to encourage Installment Agreements as good tax policy.**<sup>8</sup> **Further, Congress has expressly authorized the IRS to withdraw a Notice of Tax Lien when taxpayers enter into an Installment Agreement.**<sup>9</sup> The basic tax policy of the Congress is to encourage Installment Agreements. The basic policy of the IRS is to discourage Installment Agreements because it (mostly<sup>10</sup>) requires a tax lien as a term and condition of the Installment Agreement.

Congress wants both taxpayers and the IRS to follow the tax law passed by the Congress. The failure of the IRS to follow the law and its clear tax policy is unacceptable.

From a database of unlimited duration based upon actual case histories of IRS lien abuse case histories, the IRS Forum will accomplish the following objectives

---

<sup>6</sup> IRM 5.12.2.4.2 (06-09-2005)

<sup>7</sup> See the bottom of IRS Form 433-D

<sup>8</sup> Title X-B.27 of the Conference Report to the American Jobs Creation Act of 2004 provides new authority to the IRS to accept part pay Installment Agreements even if the Installment Agreement does not full-pay the tax debt within the 10 year statute of limitations for collection by the IRS. This provision reflects the very strong intent of the Congress to encourage Installment Agreements.

<sup>9</sup> Section 6323(j)(1)(B) and (C) of the Internal Revenue Code.

<sup>10</sup> We know of no cases where the Notice of Lien was not required as an essential term and condition for an Installment Agreement.

- The above analysis defines IRS abuse of the tax law dealing with tax liens, and it identifies the failure of the IRS to follow the Congressional tax policy to encourage Installment Agreements.
- The IRS Forum is the “repository” that will receive and document case histories from taxpayers throughout the U.S. to support the conclusion that the IRS has failed to follow the law on tax liens (e.g., mandatory tax liens). The same case histories will also document the failure of the IRS to follow the tax policy articulated by the Congress to encourage Installment Agreements.
- One taxpayer complaint to a Congressman or Senator gets little or no attention because Congress cannot interfere with the administration of the tax law by the IRS. However, when large scale abuses are documented and collected within the IRS Forum database, this data will be available to Congress to evaluate when considering any tax legislation or other action to correct the documented lien abuse cases.
- The IRS Forum empowers taxpayers, by uniting them as a group, thereby enhancing their ability to effectively communicate their IRS abuse issues with greater impact to the public and to the Congress.
- The IRS Forum is a vehicle to educate the Congress, the media, and the public about documented IRS Notice of Lien abuse case histories (e.g., viable businesses that failed solely because of a capricious tax lien).
- The IRS Forum will create “talking points” for those individuals and groups looking to facilitate IRS reform and/or basic tax reform with documented cases of IRS lien abuse cases.
- Data will be available for targeted remediation. For example, Congress may want to consider a “safe harbor” (i.e., no tax lien) in specific situations. The Congress may want to draft threshold procedures before the IRS can file a Notice of Lien that would otherwise unnecessarily destroy the economic stability of a family or a business.
- It is important to document instances where the IRS does not follow the tax policy mandated to them by the Congress. Treasury has the authority to establish tax policy where none is stated but not in the present situation, where the Congressional tax policy is clear. The IRS is required to follow the clearly expressed intent of the Congress to encourage Installment Agreements, not penalize taxpayers for entering into Installment Agreements with a devastating and automatic Notice of Lien.
- The data solicited from the victims of IRS lien abuse cases will provide evidence to the members of the Congress, the Treasury, and the Federal Reserve Board proving that the capricious failure of the IRS to follow the intent of Congress is **counter productive to the economy**. Credit is stimulative to the economy, businesses, to the labor market, and the general welfare of the American public. The premise for this statement is that most Notices of Liens (most noticeably in mandatory lien cases, including Installment Agreements) are avoidable and not necessary to enforce the IRS collection efforts in many cases.

Blog #2 was drafted by [irstaxattorney](#)<sup>11</sup> and is intended as a public educational service. For any questions, contact [irstaxattorney@irsforum.org](mailto:irstaxattorney@irsforum.org).

---

<sup>11</sup> IRStaxattorney is a tax attorney who specialized in IRS controversies, issues and problems. We see IRS abuses of power on a daily basis. It is hoped that others who practice before the IRS will also have their abuse cases posted to the IRS Forum. The IRS Forum does not accept advertising, and there are no membership fees. The IRS Forum will depend on voluntary donations, tax deductible under section 501(c)(3), for its support for editors and other basic staffing to serve its mandate to provide educational and non-political objectives.