“TAX LIENS AND LEVIES”

I. BACKGROUND AND INTRODUCTION.

A. IRS filed 700,000 tax liens and 3,800,000 levies during its fiscal year ending September 30, 2007. Over the past two years this represents a 31% increase in liens and a 37% increase in levies.

B. IRS liens and levies have grown dramatically.

C. IRS liens and levies will undoubtedly increase over the next several years due to the turbulent 2008 financial environment, including the likelihood of a national and global recession.

D. IRS’ tax lien secures an unpaid tax liability. It encumbers a taxpayer’s property and property rights. Unlike a mortgage lien, IRS’ tax lien is involuntary. It is imposed on the taxpayer’s property without the taxpayer’s consent.

E. To the contrary, IRS uses the levy to actually collect an unpaid tax liability. A levy is the same as a seizure of property.

F. This outline explains: (a) the major statutory differences between IRS’ tax lien and tax levy, (b) current methods to release them, and (c) what to do if IRS refuses to release them.

G. It does not address the following Internal Revenue Code (“Code”) sections: (1) the seizure and sale provisions under Code §6335, or (2) the special estate tax lien provisions under Code §6324. Those are appropriate topics for future Tax Institute programs.

II. FEDERAL TAX LIENS.

A. Generally.

1. A lien is a creditor’s security interest in the debtor’s property. The lien is like a shadow—it follows the property if sold or transferred.

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1 IRS’ Fiscal Year 2007 Enforcement and Services Table.
2. IRS’ lien is a statutory lien.\(^2\)

3. IRS’ tax lien secures payment of a federal tax liability. It encumbers the taxpayer’s property and rights to property. It is not a voluntary lien like a mortgage.

4. The tax lien lasts until the lien is satisfied (i.e. the tax liability is paid in full or otherwise settled). Or, becomes unenforceable by lapse of time.

5. State law does not control IRS’ tax lien; State law protections like Homestead Laws do not prevent attachment of the tax lien to the taxpayer’s property.

6. The federal tax lien is a security device—not a collection device.

7. It protects the Government’s priority for collection purposes over the taxpayer’s other creditors—it simply protects the Government’s interest until the tax is paid.

8. It provides the Government with secured creditor status in bankruptcy.

9. It is one of the Government’s powerful tools to ensure that taxpayers liquidate their federal tax liabilities.

B. How is the Federal Tax Lien Created?

1. A statutory lien automatically (and silently) arises and attaches to a taxpayer’s property when three events occur:

   (a) IRS makes a tax assessment against a taxpayer;

   (b) IRS demands payment of the tax; and

   (c) The taxpayer either neglects or refuses to pay the tax.\(^3\)

2. An assessment is made when IRS records an unpaid federal tax liability. This occurs when an IRS employee electronically signs an assessment register.\(^4\) All IRS revenue officers have computer access to the assessment register. The Code requires IRS to provide a copy of the assessment register (Form 23-C) when a taxpayer requests one.\(^5\)

3. The statutory lien is said to be a “secret” or “silent” lien because the Government doesn’t have to notify the taxpayer. Thus, it is a secret lien as to the taxpayer and the taxpayer’s creditors.

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\(^2\) Tax liens are found in §§6320 through 6327 of the Code.
\(^3\) Code §6321.
\(^4\) Code §6203; Treas. Reg. §301.6203-1.
\(^5\) Id.
4. Thus, a client is always unaware of the statutory lien’s existence. The lien arose automatically once the three events occurred.

5. To further protect the Government’s interest, its next step would be to actually record the lien at the courthouse.

6. **Important Practitioner Note:** The statutory or secret tax lien only gives the Government a right to the taxpayer’s property, which is superior only to that of the taxpayer. Until the Government files a “Notice of Federal Tax Lien,” the statutory lien does not provide IRS with a right that is superior to the rights of third parties acquiring an interest in the taxpayer’s property.

7. **Lien Against Taxpayer’s Property.** The statutory lien is a general lien. Thus it attaches to ALL property owned by the taxpayer, and, to property rights. It attaches to real property, personal tangible property, and intangible property. The lien also attaches to property or property interests acquired or transferred to a taxpayer after the lien arises.

   (a) But the federal tax lien statute (Code §6321) itself provides no property rights.

   (b) Until two recent Supreme Court decisions, there was controversy over whether federal or state law applied in determining whether (i) a taxpayer owned a property right, and (ii) whether the federal tax lien attached to that property right.

   (c) Those decisions now provide that (i) state law determines whether a taxpayer owns a property right, and (ii) federal law then applies in determining whether the property right is subject to the lien.  

8. **Property Owned by Two or More Persons.** Whether the lien attaches to property owned by multiple persons creates many issues.

   (a) Some of the potential joint ownership forms include tenancy in common, joint tenancy, community property, and partnership or limited liability company structures.

   (b) The key in these situations is identifying what property belongs to the taxpayer without subjecting the rights of the other nondebtor owners to the lien.

   (c) Again, state law controls what property belongs to the taxpayer in multiple or joint ownership situations.

C. **Filing the Lien: “Notice of Federal Tax Lien.”**

1. The lien must be formally filed by IRS for the Government to achieve maximum protection. The federal tax lien is perfected by filing a Notice of

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Federal Tax Lien. This step establishes the priority of the lien over other unsecured creditors.

(a) IRS currently uses Form 668 “Notice of Federal Tax Lien” to perfect its interest in the taxpayer’s property. Form 668 is attached as Exhibit A to the outline.

2. The filing puts the world on constructive notice that the tax lien exists.

3. The filing does not itself allow IRS to automatically take a taxpayer’s property or property rights. IRS may only seize property by formal levy or judicial action.

4. The lien filing creates several important issues such as (i) whether extant competing creditors receive priority over the lien, (ii) whether secured interests that arise after the lien filing lose protection, and (iii) when bankruptcy is a consideration.

5. In practice, the lien filing is controlled by IRS revenue officers. A revenue officer has discretion whether to file it. The Internal Revenue Manual, which revenue officers must follow, goes to great lengths regarding how a revenue officer makes that decision.7

6. The Notice of Federal Tax Lien is required to be filed and recorded at various locations, depending on the nature of the property involved.

(a) For example, if a taxpayer owns real estate, IRS must file the lien according to state law governing liens against realty. Normally, this would be in the county where the realty is located.

(b) For personalty, whether tangible or intangible, IRS must follow state law lien filing protocol governing liens against such property.

(c) Where state law fails to provide filing procedures, IRS will file the lien with the United States District Court having jurisdiction over the taxpayer’s property.

(d) The statutory lien filing rules are explicitly provided for in the Code and Treasury Department regulations.8

Generally, the validity of federal tax liens is rarely called into question where, for example, the lien fails to correctly describe the property, or, other errors of a minor nature appear on it.9

7. **Validity and Priority Against Others.**

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7 See Internal Revenue Manual §5355.11, et. seq.
8 See Code §6323 and Treas. Regs. §301.6323(a)-1, et. seq.
9 See Treas. Regs. §301.6323(f), and, United States vs. Union Central Life Insurance Company, 368 U.S. 291 (1961).
(a) The Code provides that the federal tax lien is not valid against a purchaser of the taxpayer’s property, secured creditors, mechanic’s lienors, or judgment lien creditors UNLESS OR UNTIL IRS formally records and perfects its lien.10

(b) Thus, those persons possess senior creditor status concerning the taxpayer’s property before the tax lien is filed. So, for example, if a mortgagee bank has an existing lien against the taxpayer’s real estate before IRS files its lien, the mortgagee has senior status vis-à-vis IRS’ lien.

(c) Where a taxpayer has extended the 10-year statute of limitations on collections, the Code requires IRS to refile its lien. A filed lien loses its priority as a filed lien unless IRS refiles it during a “required refiling period.”11 The first required refiling period is the one-year period ending 30 days after the expiration of ten years after the assessment of the tax. A subsequent required refiling period is the one year period ending with the expiration of ten years after the close of the preceding required refiling period. Thus, IRS must refile its Notice of Federal Tax Lien every ten years if the taxpayer has extended the 10-year collection statute.

(d) If IRS fails to make a timely refiling, a purchaser of the taxpayer’s property, secured creditors, mechanic’s lienors, or judgment lien creditors coming into existence after the initial tax lien filing and before the late refiling will have priority over IRS’ tax lien.

(e) Super Priority Persons. There are certain persons whose interest in the taxpayer’s property takes precedence EVEN THOUGH IRS HAS FILED ITS TAX LIEN. And this is true even though their interests occur AFTER IRS has filed its tax lien. These persons are known as “super priority persons.”12 There are 10 Super Priority Persons:

1) Purchasers of securities from the taxpayer13;

2) Purchasers of a motor vehicle from the taxpayer14;

3) Purchasers of personal property from the taxpayer if the taxpayer sells retail property in the ordinary course of the taxpayer’s trade or business15;

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10 Code §6323(a).
11 Code §6323(g).
12 Code §6323(b).
13 Code §6323(b)(1).
14 Code §6323(b)(2).
15 Code §6323(b)(3).
4) Purchasers of the taxpayer's household goods, personal effects, or other tangible personal property in a casual sale for less than $1,000\textsuperscript{16};

5) Certain tangible personal property lien holders securing the reasonable price of the repair or improvement of such property\textsuperscript{17};

6) Real property tax and special assessment liens\textsuperscript{18};

7) Residential property subject to a mechanic's lien for certain repairs and improvements\textsuperscript{19};

8) Certain attorney fees for reasonable compensation in settling claims for the taxpayer\textsuperscript{20};

9) Where an insurance company makes a policy loan to the taxpayer under an insurance policy, endowment, or annuity contract\textsuperscript{21}; and

10) Passbook loans by a bank or savings and loan association\textsuperscript{22}.

(f) Semi-Super Priority Status. The Code also provides a “semi-super priority” status to certain secured lenders who make advances or loans to a taxpayer after IRS has filed a federal tax lien\textsuperscript{23}. There are four semi-super priority creditors:

1) Real property construction or improvement financing loans;

2) Obligatory disbursement financing agreements;

3) Commercial transaction financing agreements; and

4) Secured interests created by advances made within 45 days after the federal tax lien was filed.

All of the semi-super priority interests require a written agreement entered into before the tax lien has been filed.


\textsuperscript{16} Code §6323(b)(4).
\textsuperscript{17} Code §6323(b)(5).
\textsuperscript{18} Code §6323(b)(6).
\textsuperscript{19} Code §6323(b)(7).
\textsuperscript{20} Code §6323(b)(8).
\textsuperscript{21} Code §6323(b)(9).
\textsuperscript{22} Code §6323(b)(10).
\textsuperscript{23} Code §§6323(c) and (d).
(a) The Code provides specific procedures to appeal IRS’ filing of a tax lien.24

(b) IRS must notify a taxpayer within 5 days after filing the tax lien.25 The notice must include certain information including the right to request a hearing within 30 days.

(c) Generally, tax liens can be appealed using two main IRS procedures: (1) a Collection Due Process (or “CDP”) appeal, or (2) a Collection Appeals Program (or “CAP”) appeal.

(d) The CDP Appeal. The CDP appeal must be filed within 30 days after the 5-day notice period. The IRS’ lien notice will indicate when the 30-day period expires.

1) Use Form 12153, Request for a Collection Due Process or Equivalent Hearing, to appeal the lien.

2) File the appeal with the IRS office designated in the lien notice. The appeal will suspend the 10-year collection statute, and, generally suspend any further IRS collection activity.

3) The appeal must explain your reasons for disagreeing with the lien filing. Include alternative reasons such as (a) using an installment agreement, (b) an offer-in-compromise, (c) subordinating the lien to allow your client to secure financing, (d) withdrawing the lien because the tax was paid or the 10-year collection statute has expired, (e) innocent spouse defense, or, (f) the tax is in dispute (but only if your client hasn’t received a formal statutory notice of deficiency).

4) The IRS appeals office will contact you to schedule a conference.

5) The IRS appeals office will issue a formal report concerning the appeal.

6) The client will have 30 days to appeal the IRS’ determination to the U.S. Tax Court.

7) This author recommends the CDP appeal as the most efficient and protective procedure to appeal a federal tax lien. The Treasury Department has promulgated excellent

24 See Code §6320.
25 Code §6320(a)(2).
(e) **The Collection Appeals Program (or “CAP”) Appeal.** The CAP appeal is available under more circumstances than the CDP appeal.

1) But there are two problems with CAP: (1) you may not challenge the underlying tax liability, and (2) you cannot proceed to the U.S. Tax Court if you disagree with the appeal findings.

2) Before using the CAP appeal, you must discuss the lien with the revenue officer's manager.

3) If the disagreement is not resolved, file Form 9423, Collection Appeal Request, to appeal the lien to IRS’ appeals office.

(f) **The Equivalent Hearing Request.** If the 30-day appeal period expired to file a CDP appeal, you may request an Equivalent Hearing with IRS.

1) File the Form 12153, which is the same form used to file for a CDP hearing.

2) Equivalent Hearing requests may be filed within one year plus five business days after the lien was filed.

3) There are two problems associated with an Equivalent Hearing: (1) the request does not suspend ongoing IRS collection activity, and (2) you may not appeal IRS’ findings to the U.S. Tax Court.

4) The Treasury Department has promulgated regulations in a question and answer format that assists in filing for an Equivalent Hearing.²⁷

9. **Withdrawing a Notice of Federal Tax Lien.** The Code also provides specific procedures that IRS must follow to withdraw a tax lien.²⁸

(a) IRS may withdraw a lien if:

1) The lien was premature or not in accordance with proper administrative procedures; that is, the IRS failed to follow procedures provided by the Internal Revenue Manual (e.g., failing to secure manager approval, etc.);

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²⁶ See Treas. Regs. §301.6320-1(a) through (h).
²⁷ See Treas. Regs. §301.6320-1(i).
²⁸ Code §6323(j) and Treas. Regs. §301.6323(j)-1.
2) The taxpayer entered into a monthly installment payment arrangement to pay the tax;

3) Withdrawal will facilitate collecting the tax; or

4) Withdrawal would be in the best interests of the taxpayer and the National Taxpayer Advocate’s office consents.\(^{29}\)

(b) Note that withdrawal is discretionary with IRS. IRS must also notify credit reporting agencies and any relevant financial institutions (or other creditors) that the lien has been withdrawn. But the taxpayer must make a written request with IRS to do so.\(^{30}\)

10. **Release of Federal Tax Lien.** Contrary to IRS’ discretionary authority to withdraw a tax lien, the Code mandates IRS to issue a certificate of lien release under certain specified circumstances.\(^{31}\)

(a) IRS must issue a formal Certificate of Release of Federal tax Lien if the tax liability (including interest and any penalties) has been fully paid, or, the tax liability becomes legally unenforceable.\(^{32}\)

(b) The term “legally unenforceable” means the 10-year collection statute expired.

(c) IRS shall issue the certificate not later than 30 days after the date on which IRS determines the entire tax liability has been fully paid or has become legally unenforceable.\(^{33}\)

(d) It is rare that IRS automatically releases a lien without a formal request from practitioners. The certificate request may be accomplished either by calling IRS (1-800-913-6050), or, by writing or faxing the request to IRS.

(e) Practitioners should refer to IRS Publication 1450 for instructions to request the certificate of lien release. Publication 1450 is attached as *Exhibit B* to the outline.

11. **Discharging Property from Tax Lien.** Often a client may have equity in real estate or other property to encumber to borrow funds to pay the delinquent tax liability. But the lender or buyer is reluctant to supply the funds without having IRS release its lien. In such cases, there is a statutory procedure authorizing IRS to discharge the property from the effect of the tax lien.

\(^{29}\) Code §6323(j)(1)(A) through (D).

\(^{30}\) Code §6323(j)(2).

\(^{31}\) Code §6325(a).

\(^{32}\) Code §6325(a)(1).

\(^{33}\) Treas. Regs. §401.6325-1(a).
(a) IRS is authorized to discharge that property from the lien if either of the following circumstances is present:

1) The client’s remaining other property covered by the tax lien has a value at least twice the unpaid tax liability, plus the sum of all encumbrances having priority over the IRS’ lien; or

2) The client pays an amount to IRS that is equivalent to the IRS’ interest in the property to be encumbered.\(^34\)

(b) The effect of this procedure is to allow your client to use equity in property to borrow funds or secure sales proceeds to pay the tax liability. And the IRS tax lien would still attach to the client’s other property. This is often referred to as a partial discharge of the client’s property from the effect of the lien.

(c) IRS Publication 783 provides detailed instructions on how to request a discharge under these provisions. Publication 783 is attached as Exhibit C to the outline.

12. **Subordinating the Federal Tax Lien.** As an alternative to requesting a discharge of property from the lien, there is another statutory provision that is very useful. This procedure authorizes IRS to formally subordinate its tax lien to a new creditor who will provide funds to pay off all or a portion of the tax liability.

(a) This procedure is known as lien subordination.

(b) The Code authorizes IRS to subordinate its lien to a new security interest if the new loan proceeds are paid to IRS, or, if IRS believes that the subordination ultimately will increase the amount realized from the property.\(^35\)

(c) IRS is usually amenable to this procedure providing the new loan proceeds are payable to IRS. This procedure is also acceptable to a new lender since its lien will be senior to IRS’ lien.

(d) The subordination procedure is usually more beneficial for a client unable to get a partial discharge if the client can’t pay the value of IRS’s interest in the property. IRS is more likely to approve a lien subordination because an amount equal to the amount of the subordinated lien is paid to IRS.

(e) IRS Publication 784 provides detailed instructions on how to request a lien subordination under these provisions. Publication 784 is attached as Exhibit D to the outline.

\(^{34}\) Code §6325(b)(1) and (2).
\(^{35}\) Code §6325(d).
13. **Certificate of Nonattachment.** The Code provides a procedure certifying that property is not subject to the tax lien against a person with a similar name.

(a) The Code authorizes IRS to issue a Certificate of Nonattachment of Federal Tax Lien if a person (other than the taxpayer) may be injured by the tax lien.\(^{36}\)

(b) Thus, assume John A. Smith has a federal tax lien filed against him. But the lien is filed against “John Smith.” Another person John B. Smith is selling his property. Since the tax lien doesn’t distinguish which John Smith the lien applies to, the innocent John B. Smith may request IRS to issue a Certificate of Nonattachment certifying that his property is not subject to the tax lien.

(c) IRS Publication 1024 provides detailed instructions on how to request a lien nonattachment certificate. Publication 1024 is attached as Exhibit E to the outline.

14. **Judicial Relief.** If a practitioner is unsuccessful in obtaining the administrative release of a tax lien, relief may be obtained judicially.

(a) The Code provides that a lawsuit can be filed in a U.S. District Court to seek judicial release of a tax lien.\(^{37}\)

(b) Relief will be considered only if the taxpayer’s complaint is based on procedural defects in the lien, or, an abuse of discretion by IRS in refusing to release or discharge the lien. In addition, IRS can be liable for damages for knowingly or negligently failing to release the lien under the discharge, subordination, or nonattachment provisions of the Code.\(^{38}\)

(c) The Code requires the taxpayer to have exhausted administrative remedies before filing a lawsuit.\(^{39}\) This means the client properly appealed the lien issues within IRS’ office of appeals.

(d) Also, the taxpayer must mitigate damages and bring the lawsuit within two years after the cause of action accrued.\(^{40}\)

III. **LEVIES**

A. Generally, IRS has the same collection tools available to other creditors. They include: (a) initiating a lawsuit; (b) obtaining a judgment, (c) conducting a judgment debtor examination to determine assets, income, etc., and (d)

\(^{36}\) Code §6325(e).
\(^{37}\) Code §7432.
\(^{38}\) Id.
\(^{39}\) Code §7432(d)(1).
\(^{40}\) Code §7432(d)(2) and (3).
requesting service by the U.S. Marshall or county sheriff to seize and sell the debtor’s assets.

B. But the Code provides IRS with a special collection tool known as a levy.\textsuperscript{41}

C. IRS also has available criminal procedures to further induce payment of federal taxes. The Code contains several criminal offenses for willfully failing to pay taxes, concealing assets, etc. Those criminal provisions are mostly felony offenses and can result in imprisonment in a federal penitentiary, plus fines and costs.\textsuperscript{42} Therefore, clients wishing to take affirmative steps to defeat the Government’s efforts to collect properly assessed taxes must be properly advised against such steps.

D. The IRS’ levy power separates it from other creditors since the levy is authorized by the Code without judicial intervention or permission. Generally, no judicial action or proceeding is required when IRS exercises its levy power.

E. Thus, the tax levy separates itself from the tax lien. The tax lien encumbers and maintains the Government’s interest in the taxpayer’s property. While the tax levy allows IRS to seize the taxpayer’s assets from the taxpayer or third parties possessing that property.

F. The levy is a collection tool. It doesn’t necessarily resolve the underlying tax liability. It’s a step towards paying the delinquent tax liability.

G. The levy’s purpose is to encourage clients to pay their tax liabilities and to facilitate collection.

H. The levy power permits IRS to seize a taxpayer’s property or rights to the taxpayer’s property. Thus, assets in the hands of third parties belonging to the taxpayer may be seized. For example, the accounts receivable of a delinquent taxpayer can be seized when IRS issues a levy notice to the taxpayer’s customers. Or, wages due to a delinquent taxpayer can be levied when IRS issues a wage levy notice to the employer. Or, financial or brokerage accounts can be levied upon when IRS issues a levy notice to the account custodian.

I. Property subject to a tax lien can also be levied upon. Thus, if the taxpayer sells property subject to the tax lien, IRS may levy or seize that property from the transferee.\textsuperscript{43}

J. \underline{Residential Seizures.}

1. A taxpayer’s residence is not exempt from seizure. But special rules apply to residences.

\textsuperscript{41} Code §6331.
\textsuperscript{42} For example, see Code §§7201 (willfully evading payment of taxes), 7202 (willfully failing to collect and pay taxes), 7203 (willfully failing to make estimated tax payments), 7512 (willfully failing to pay payroll taxes).
\textsuperscript{43} Treas. Regs §301.6331-1(a)(1).
2. **Juridical Approval Mandatory.** A principal residence shall not be exempt from levy only if a judge or magistrate of a federal district court approves the levy or seizure of such residence.\(^{44}\) The Government’s petition will request a court order to the taxpayer to show cause why the principal residence should not be levied and will also ask the court to issue a notice of hearing. Notice of the judicial hearing must be provided to the taxpayer. If the residence is used as the principal residence of the taxpayer's spouse or former spouse, or the taxpayer's minor child, the Government will send a letter to them providing notice of the commencement of the proceeding. The letter will be addressed in the name of the taxpayer's spouse or ex-spouse, individually or on behalf of any minor children. If it is unclear who is living in the principal residence property and/ or what such person's relationship is to the taxpayer, a letter will be addressed to “Occupant.” The purpose of the letter is to provide notice to family members that the property may be levied. The family members may not be joined as parties to the judicial proceeding because the levy attaches only to the taxpayer's legal interest in the residence. Thus, the family members have no legal standing to contest the proposed levy.

3. At the hearing, IRS must demonstrate that: (a) the levy was issued according to appropriate law and regulations, (b) the tax remains unpaid, and (c) no reasonable alternative exists to collect the tax.

4. IRS rarely seizes a taxpayer’s residence. Usually, the tax lien protects the Government's interest until the taxpayer sells it or the taxpayer dies.

K. **General Levy Procedures.**

1. IRS must give notice of intent to levy by certified or registered mail to the taxpayer 30 days prior to the time it levies upon any property.\(^{45}\)

2. **Levy Appeals.** IRS’ notice must allow the taxpayer to appeal the proposed levy.\(^ {46}\) The appeal is known as a Collection Due Process Hearing. The same appeal procedures that apply to the tax lien also apply to the levy appeal.\(^ {47}\)

   (a) If the taxpayer appeals the levy, IRS may not execute the levy during the appeal period or any subsequent litigation.

   (b) At the appeals hearing, the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy, including—

   1) appropriate spousal defenses;

   2) challenges to the appropriateness of collection actions; and

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\(^{44}\) Code §6334(e).

\(^{45}\) Code §6331(d).

\(^{46}\) Code §6330.

\(^{47}\) See this outline at II.C.8.d, *supra*, page 7.
3) offers of collection alternatives including the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.48

4) Underlying Tax Liability. Challenges to the existence or amount of the underlying tax liability can also be raised at the hearing for any tax period but only if the taxpayer did not receive a statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.49

L. Property Subject to IRS’ Levy.

1. The levy attaches to (i) all property currently owned by the taxpayer, (ii) property acquired after the levy attaches, and (iii) the taxpayer’s rights to property (e.g., accounts receivable, future wages, etc.).

2. The levy attaches to realty, personal tangible property, and intangible personal property.

3. Levy Notice, Form 668-A.

(a) Form 668-A, Notice of Levy, is used by IRS when a levy is issued. Form 668-A is attached as Exhibit F.

(b) The levy is issued and served upon third parties who may owe money to the taxpayer, or, who are custodians of the taxpayer’s assets.

(c) With some exceptions, the levy only attaches to the right, title, and interest held by the taxpayer at the time the levy is served on the third party.

Example. IRS serves Form 668-A to a financial institution to levy against your client’s checking account. The financial institution must remit the balance in the account at the time of service, including the “float” for outstanding checks.

The levy will not attach to any funds that your client deposits subsequent to the time of service of the levy. In order to attach those funds, IRS must serve another levy notice.

(d) Certain Levies Are Continuous. Generally, levies are not continuous. But the Code designates certain specified payments that are subject to a continuing levy (i.e., only one levy notice need be served by IRS):

48 Code §6330(c)(2)(A).
49 Code §6330(c)(2)(B).
1) Federal payments other than a payment for which eligibility is based on the income or assets (or both) of a payee;\(^{50}\)

2) Certain public assistance or welfare benefits such as federal or state unemployment, workers' compensation, or state or federal benefits based on need or income;\(^{51}\) and

3) annuities or pension payments under the Railroad Retirement Act or the Railroad Unemployment Insurance Act.\(^{52}\)


   (a) Accounts or notes receivable are subject to levy. IRS may serve one levy notice for any receivable due in a single payment or in multiple installment payments.

5. Lump Sum Levy on Client’s IRA.

   (a) The standard levy notice states: “This levy won’t attach funds in IRAs, self-employed individuals’ retirement plans, or any other retirement plans in your possession or control, unless it is signed in the block at the right.”

   (b) But, with management approval, a revenue officer may still levy against your client’s IRA or other retirement plan (e.g., a 401(k) plan).

   (c) Generally, IRS may not force a pension plan distribution if the employee doesn’t have the present right to benefits.

   (d) Nonetheless, IRS usually requests the client to voluntarily withdraw from an IRA or retirement plan before levying against the plan.

   (e) If IRS levies your client’s IRA or other qualified retirement plan account, the client is not subject to the 10% early withdrawal penalty.\(^{53}\)

6. Cash Loan Value Life Insurance.

   (a) The cash loan value of a life insurance policy is subject to levy.\(^{54}\)

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\(^{50}\) Code §6331(h)(2)(A).

\(^{51}\) Code §6331(h)(2)(B).

\(^{52}\) Code §6331(h)(2)(C).


\(^{54}\) Code §6332(b).
(b) This is subject to the rule that the client has ninety days after service of a levy on an insurer to find funds to pay the delinquent tax or work out some other arrangement with IRS.55

7. **Social Security Benefits.**

(a) IRS can levy on Social Security Benefits.56

(b) With management approval, IRS issues Form 668-W to the Social Security Administration. This levy is continuous and only applies up to 15 percent of monthly payments.57

8. **Bank Accounts.**

(a) IRS often levies against bank accounts.

(b) When IRS levies against bank accounts, the financial institution is served with IRS’ levy. The client receives a copy of the levy notice.

(c) The Code requires the financial institution to hold the levied account funds in escrow for at least 21 days after service.58 This will allow your client time to correct the levy if it is erroneous.

(d) The escrowed monies are not available to the client or the IRS during the 21-day period. The financial institution may not clear outstanding checks from the escrowed fund.

(e) This levy is not continuous. That means it reaches the balance in the client’s account as of the levy service date. But it does not attach any funds that your client deposits subsequent to the levy service date. Therefore, IRS must issue another levy to reach those funds. The Code permits IRS to serve successive levies as often as may be necessary.59

(f) **Note to Practitioners.** Some financial institutions will release the levied funds to IRS immediately before the 21-day required holding period. Therefore, practitioners should contact the client’s financial institution as soon as possible reminding the institution of the 21-day holding period. Also remind the financial institution that any deposits subsequent to the levy are not subject to the levy. Then, practitioners should contact the IRS revenue officer to request release of the levy.

9. **Wage Levy.**

55 Code §6332(b)(1).
56 Code §6331(h)(1).
57 Id.
58 Code §6332(c).
59 Code §6331(c).
(a) The wage levy is nasty. It is continuous and served only once.\(^{60}\)

(b) IRS uses Form 668-W, Notice of Levy on Wages and Other Income. Form 668-W is attached as Exhibit G. IRS serves the wage levy on the client’s employer.

(c) The only good news about the wage levy is the amount that is exempt from it. A minimum amount of wages is exempt from the levy.\(^{61}\) The exempt amount is equivalent to the client’s standard deduction plus personal dependency exemptions, divided by 52. IRS publishes an annual table that facilitates calculation of the amount of take home pay exempt from the levy. The 2008 table is attached as Exhibit H.

(d) The client should be advised to complete the statement attached to the wage levy to claim the exempt portion of the levy. If the client fails to complete the statement and provide it to the employer, the employer must base the exempt amount as if the client was married filing separately with one personal dependency exemption.

(e) The employer is required to remit the nonexempt amount of the wage to IRS each pay period until IRS releases the levy. If the employer fails to remit the nonexempt wage amount to IRS, the employer is liable for the unremitting amount, plus a 50% penalty.\(^{62}\)

(f) IRS’ policy is to limit the wage levy to the amount of take home pay. That means IRS will allow the employer to deduct the usual withholding deductions from the client’s paycheck, (e.g., income and FICA taxes, health insurance, 401(k) contribution, employer reimbursements, etc.).\(^{63}\)

(g) The wage levy doesn’t attach to so much of the client’s wages, which the employer withholds for the court-ordered support of the client’s minor children.\(^{64}\)

(h) Requesting Release of Wage Levy.

1) IRS is authorized to release a wage levy if it is in the Government’s interest. If it creates an economic hardship due to the client’s financial condition, IRS is authorized to release it.\(^{65}\)

\(^{60}\) Code §6331(e).

\(^{61}\) Code §6334(d).

\(^{62}\) Code §6332(d).


\(^{64}\) Code §6334(a)(8).

\(^{65}\) Code §6343(a)(1)(D).
2) Practitioners should provide the client’s financial statements, Form 433-A, Form 433-B to demonstrate the economic hardship that could result from the levy.

3) Practitioners should propose an installment payment plan with IRS as an alternative to the harsh consequences of the wage levy.

10. Joint Accounts.
   (a) Sometimes IRS issues a levy against a joint bank account.
   (b) Currently, IRS takes the position that the levy may be released to the extent the nonliable taxpayer can prove that the joint funds do not belong to the delinquent taxpayer.
   (c) The Supreme Court has upheld IRS’ position that a levy against a joint account is proper even though one of the joint owners is not liable for the unpaid tax liability.66

M. Requesting Levy Release.
1. The Code contains six circumstances that require IRS to release the levy.67 They are:
   (a) The tax liability has been paid68;
   (b) The 10-year collection statute expired69;
   (c) Releasing the levy could facilitate collecting the tax liability70;
   (d) The client entered into an installment payment plan with IRS71;
   (e) The levy creates an economic hardship to the client72; or
   (f) The property’s value exceeds the tax liability, and, releasing the levy would not hinder collection of the tax.73

2. Whether the levy creates an economic hardship is determined by IRS. This condition generally applies if the levy causes your client to be unable to pay reasonable basic living expenses. But “reasonable basic living

67 Code §6343(a).
68 Code §6343(a)(1)(A).
69 Id.
70 Code §6343(a)(1)(B).
71 Code §6343(a)(1)(C).
72 Code §6343(a)(1)(D).
expenses” does not mean maintaining an affluent or luxurious living standard.74

3. Practitioners should make a written request for IRS to release the levy. Those procedures are contained in the regulations.75

4. IRS will issue Form 668-D, Release of Levy/Release of Property from Levy, to release a levy.

5. If IRS refuses to release a levy, there are two options:
   (a) Appeal the levy administratively within IRS; or
   (b) Appeal the levy to the local Taxpayer Advocate Office using Form 911, Taxpayer Assistance Order. The Taxpayer Advocate Office is authorized to instruct IRS to release a levy as long as the conditions for release exist.

6. A Taxpayer Assistance Order (“TAO”) is an appropriate procedure to secure a levy release where IRS refuses to release it. The TAO procedures are outlined in the Code and related regulations.76
   (a) Generally, the TAO can be issued to prevent a levy where the client can show a “significant hardship.”77
   (b) To IRS, a “significant hardship” means a “serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the Internal Revenue Service; mere economic or personal inconvenience to the taxpayer does not constitute “significant hardship.”78

N. Anti-Injunction Act.

1. The Code prohibits a taxpayer’s lawsuit to enjoin or prevent IRS from collecting a tax liability, including issuing a levy.79

2. Nevertheless, the Supreme Court has held that an injunction against IRS’ levy can be appropriate where it is clear that IRS couldn’t prevail and collection could cause irreparable injury to the taxpayer.80 Such suits will be the exception, rather than the rule.

O. Wrongful Levy Lawsuits.

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75 U.S. Treas. Reg. §301.6343-1(c).
77 Code §7811(a)(1)(A).
79 Code §7421.
1. Nevertheless, if a levy has been issued, or, property has been sold as a result of a levy, any person other than the taxpayer who claims:

   (a) an interest in or lien on the property and
   
   (b) that IRS wrongfully levied the property may bring a civil action directly against the United States in federal district court. 81

2. But a wrongful levy suit must be commenced within 9 months after the levy is served. 82

P. Property Exempt from Levy.

1. No property or rights to property shall be exempt from levy other than the property specifically made exempt by the Code; and this includes the Social Security Act. 83

2. The Code exempts 13 property types or property rights from IRS’ levy power. 84 They are:

   (a) Necessary wearing apparel and school books 85;
   
   (b) So much of the 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 does not exceed $8,230 in value (for 2009) 86;
   
   (c) Business books and tools necessary for the taxpayer's trade or profession not exceeding $4,120 for calendar year 2009 in the aggregate 87;
   
   (d) Federal or State unemployment benefits 88;
   
   (e) Mail, addressed to any person, which has not been delivered to the addressee 89;
   
   (f) Certain federal annuity and pension payments 90;
   
   (g) Workers’ compensation benefits 91;

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81 Code §7426(a)(1).
82 Code §6532(c)(1).
83 Code §6334(c).
84 Code §6334(a)(1) through (13).
85 Code §6334(a)(1).
86 Code §6334(a)(2). The exempt amount is indexed for inflation.
87 Code §6334(a)(3). The exempt amount is indexed for inflation.
88 Code §6334(a)(4).
89 Code §6334(a)(5).
90 Code §6334(a)(6).
91 Code §6334(a)(7).
(h) Judgments for support of minor children. If the taxpayer is required by judgment of a court, entered prior to the levy date, to contribute to the support of the taxpayer’s minor children, so much salary, wages, or other income as is necessary to comply with such judgment;  

(i) Minimum exemption for wages, salary, and other income;  

(j) Armed service-connected disability benefits for: (1) wartime disability compensation, wartime death compensation, peacetime disability compensation, peacetime death compensation or general compensation, or (2) dependency and indemnity compensation, specially adapted housing for disabled veterans, burial benefits, vocational rehabilitation, post-Vietnam era veterans' educational assistance, survivors' and dependents' educational assistance, home, condominium and mobile home loans or automobiles and adaptive equipment for certain disabled veterans and members of the armed forces;  

(k) Aid to needy families with children; supplemental security income for the aged, blind and disabled; public assistance and welfare payments;  

(l) Assistance under job training partnership act; and  

(m) If the amount of the levy does not exceed $5,000, any real property used as a residence by the taxpayer.

92 Code §6334(a)(8).
93 Code §6334(a)(9). Wage levies are addressed in the outline at III. L. 9, supra, page 16.
94 Code §6334(a)(10).
95 Code §6334(a)(11).
96 Code §6334(a)(12).
97 Code §6334(a)(13).