

Legislative Recommendation #25**Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence****SUMMARY**

- *Problem:* One of the most severe and potentially devastating actions the IRS can take to collect a tax debt is to seize and sell a taxpayer's home. The IRS can do this in one of two ways – administratively (seizure and sale) or judicially (lien foreclosure). The law provides significant and meaningful taxpayer protections before an administrative seizure and sale may take place. However, far fewer procedural safeguards exist for taxpayers in judicial lien foreclosure suits.
- *Solution:* Provide taxpayers and their families who are subject to judicial lien foreclosure suits the same protections as taxpayers who are subject to administrative seizure and sale of their principal residence.

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."¹ In these 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 a taxpayer's principal residence 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 U.S. district court judge or magistrate "approves (in writing) the levy of such residence." An administrative seizure is generally subject to significant taxpayer protections. The government must show that "the taxpayer's other assets subject to collection are insufficient to pay the amount due,"² and that "no reasonable alternative for collection of a taxpayer's debt exists."³ In addition, if the property is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, former spouse, or minor child, the IRS is required to send a letter addressed to or on behalf of each such person providing notice of the commencement of the proceeding. If "it is unclear who is living in the principal residence property and/or what such person's relationship is to the taxpayer," the IRS must address the letter to "Occupant."⁴ Additionally, 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."⁵

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 § 6334(e).

3 Treas. Reg. § 301.6334-1(d)(1). This requirement in the regulations is consistent with the legislative history of IRC § 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).

4 Treas. Reg. § 301.6334-1(d)(3).

5 IRC § 6343(a)(1)(D).

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."⁶ 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.⁷ 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.⁸

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 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. 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.¹⁰ The IRM prescribes certain initial steps the IRS must take, such as attempting to identify the occupants of a residence and advising the taxpayer about TAS assistance options. It also sets forth an internal approval process prior to referring a lien 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 suits should be codified and not left for the IRS to determine through IRM procedures.

⁶ *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

⁷ *Id.* at 680, 709-710.

⁸ In *United States v. Maris*, 109 A.F.T.R.2d 2012-775 (D. Nev. 2012), the court held that the United States was required to establish that no reasonable alternative existed for collection of the taxpayer's debt before foreclosing tax liens on a principal residence. See also *United States v. Maris*, 111 A.F.T.R.2d 2013-2475 (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 (S.D.N.Y. 2015) (declining to follow *Maris*) and the cases cited therein.

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

¹⁰ 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.

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 the IRS 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 IRS 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 the 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, former spouse, or 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.¹¹

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