#21 AUTHORIZE THE IRS TO RELEASE LEVIES THAT CAUSE ECONOMIC HARDSHIP FOR BUSINESS TAXPAYERS

Present Law

IRC § 6343(a)(1)(D) requires the IRS to release a levy if "the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer." Treasury Regulation § 301.6343-1(b)(4) defines economic hardship as arising when "[t]he levy is creating an economic hardship due to the financial condition of an individual taxpayer. This condition applies if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." The regulatory definition of economic hardship as the inability to pay reasonable basic living expenses means that only individuals (including sole proprietorship entities) can experience economic hardship and thereby qualify for a levy release.

Reasons for Change

When the IRS takes enforced collection action against a business, the enforcement action often forces the business into bankruptcy by reducing its available cash and preventing it from obtaining additional financing. In many cases, a business that is delinquent on its taxes is no longer viable. But in other cases, such as when a business is experiencing an economic hardship that is temporary, both the business and the government would benefit if the IRS could release outstanding levies and instead work with the business to resolve its tax debt through collection alternatives.

The IRS should have the discretion to release levies in cases where it determines a business is likely to remain viable. When a levy causes a viable business to terminate, employees may lose their jobs unnecessarily and the delinquent tax may never be collected. Moreover, lessening the harshness of IRS enforcement actions may avert noncompliance, because harsh enforcement actions sometimes force taxpayers into the cash economy.

Recommendations

Amend IRC § 6343 to authorize the IRS to release a levy if it determines that the levy is creating an economic hardship due to the financial condition of the taxpayer's viable trade or business. The legislation should require the IRS, in determining whether to release a levy against a business on economic hardship grounds, to consider the economic viability of the business, the nature and extent of the hardship (including whether the taxpayer exercised ordinary business care and prudence), and the potential harm to individuals if the business is liquidated.[88]

In addition, we recommend Congress clarify that in determining whether to release a levy against a business on economic hardship grounds, the IRS should also consider whether the taxes could be collected from a responsible person through a IRC § 6672 trust fund recovery penalty assessment.

88 For language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 303 (2018); Small Business Taxpayer Bill of Rights Act of 2018, S. 2689, 115th Cong. § 16 (2018); Taxpayer Rights Act of 2015, H.R. 4128 114th Cong. § 304 (2015); S. 2333, 114th Cong. § 304 (2015); H.R. 4368, 112th Cong. § 1 (2012). In the antitrust context, courts strictly interpret the "failing firm" defense, which may permit an anticompetitive merger or acquisition, and the burden of proof falls on the parties invoking the defense. *See, e.g.*, *Citizen Pub. Co. v. U.S.*, 394 U.S. 131 (1969).