

#17 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 only individuals (including sole proprietorship entities) can experience economic hardship.

Reasons for Change

The effect of the Treasury regulations and IRS procedures is to impede businesses from settling their tax debts with collection alternatives. Allowing the IRS to release levies issued to collect the tax debts of businesses that are experiencing an economic hardship would permit the IRS and the taxpayers to work toward resolution of the case through collection alternatives (rather than enforced collection) and give businesses a second chance when facing economic hardship. This is important because forcing viable businesses to declare bankruptcy to protect themselves against a past tax liability often means that the business will terminate, employees will be let go, and the delinquent tax may never be collected. Moreover, lessening the harshness of IRS enforcement actions may avert noncompliance to the extent harsh enforcement actions sometimes force taxpayers into the cash economy.

Recommendation

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 making the determination 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.⁹¹

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 an IRC § 6672 trust fund recovery penalty assessment.

91 See H.R. 4368, 112th Cong. § 1 (2012); Taxpayer Rights Act of 2015, H.R. 4128 114th Cong. § 304 (2015) and S. 2333, 114th Cong. § 304 (2015) containing language that is generally consistent with this recommendation. 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).