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Tax Regs in Plain English

# IRS Restructuring and Reform Act of 1998

## 3433 - Levy Prohibited during Pendency of Refund Proceedings

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### Section 3433

**A. Provision covered:** Section 3433 (Levy Prohibited during Pendency of Refund Proceedings) I.R.C. §§ 6331(i)(1) through (i)(6).

**B. Background:** Generally, full payment of the tax at issue is a prerequisite to a refund suit. However, if the tax is divisible, the taxpayer need only pay the tax for an applicable period before filing a refund claim. A divisible tax is defined in Policy Statement P-5-16 as a tax assessment which may be divided into separate portions or transactions. An example of this would be a quarterly withholding employment tax liability which may be sub-divided into individual liabilities covering each employee. Most divisible taxes are not within the Tax Court's jurisdiction; accordingly, the taxpayer has no pre-payment forum for contesting such taxes. In the case of divisible taxes, it is possible that the taxpayer could be properly under the refund jurisdiction of the District Court or the U.S. Court of Federal Claims and still be subject to collection by levy with respect to the remaining amount of tax at issue. The Service's policy was generally to exercise forbearance with respect to collection while the refund suit was pending, so long as the interests of the Government were adequately protected (e.g., by the filing of a notice of Federal tax lien) and collection was not in jeopardy. Any refunds due the taxpayer could be credited to the unpaid portion of the liability pending the outcome of the suit.

**C. Changes:** RRA § 3433 adds new I.R.C. §§ 6331(i)(1) through (i)(6) to provide that the Service may not levy on the assets of a taxpayer for any unpaid "divisible tax" during the pendency of a refund action over such taxes. The term "divisible tax" is defined to mean any tax imposed by subtitle C (employment taxes) and the penalty imposed by section 6672 with respect to those employment taxes. Collection by levy would be withheld unless jeopardy exists or the taxpayer waives the suspension of collection in writing (because collection will stop the running of interest and penalties on the tax liability). The provision will not affect the Service's ability to collect other assessments that are not the subject of the refund suit, to offset refunds, to counterclaim in a refund suit or related proceeding, or to file a notice of Federal tax lien. The statute of limitations on collection is stayed for the period during which the IRS is prohibited from collecting by levy.

**D. Impact** The provision codifies the Service's current practice of not levying while a refund suit is pending with respect to employment taxes and the section 6672 penalty that may be applicable with respect to those taxes. The provision is effective with respect to unpaid tax attributable to taxable periods beginning after December 31, 1998.

### E. Necessary Actions

1. **Actions/Procedures:** Instructions by memorandum or IRM revision must be issued before the effective date.
2. **Things we CAN do:** Continue the Service's current practice of not levying while a refund suit is pending with respect to excise taxes (except chapters 41-44 taxes), such as the taxes on petroleum products, communications, and the transportation of persons by air.

**F. Other Special Comments:** Section 6331(i)(3)(B)(i) provides that the prohibition against levy does not apply to "any levy to carry out an offset under section 6402, ... ." The meaning of this phrase is unclear. The Service is not required to levy on itself for any overpayment due a taxpayer. It merely offsets. The phrase could be read as requiring the Service to levy on itself before making an offset, an interpretation that we do not endorse.

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