

Tax Procedure: A Look at Jeopardy Assessments, Part Two.

As I outlined in the prior post, a jeopardy assessment permits the IRS to start collection activity *before* a judge has determined whether the assessment is actually correct, including third party collection actions. In the case of former Senator Fumo, Sunday's article in *The Philadelphia Inquirer* suggests that the IRS has levied against one or more of his bank accounts, and also apparently filed nominee liens against his son, his fiancée or both. Given the impact of the jeopardy assessment on the taxpayer and his property, what are the safeguards?

First, the taxpayer has the option of posting a bond, which will stay all collection activity and permit the taxpayer to pursue Tax Court review of the assessment. See I.R.C. § 6863(a). While this option puts the taxpayer back in the everyday world where he can have the assessment reviewed by the Tax Court before his property is seized, many taxpayers won't have enough money to post a sufficient bond.

As a consequence, Congress has put in place several procedural safeguards:

- Under Section 7429 of the Internal Revenue Code, a jeopardy assessment has to be approved in advance by the IRS Office of Chief Counsel. I.R.C. § 7429(a)(1)(A).
- The taxpayer receives a statement of the basis for the jeopardy determination within five days of a jeopardy assessment or levy. I.R.C. § 7429(a)(1)(B); Proc. & Admin. Reg. § 301.7429-1.
- The taxpayer has the right to file an administrative appeal within thirty days; this appeal will involve both the basis for the jeopardy determination and the reasonableness of the amount of the assessment. I.R.C. § 7429(a)(2), (3); Proc. & Admin. Reg. § 301.7429-2.
- The taxpayer has the right to judicial review of jeopardy assessments and jeopardy levies. I.R.C. § 7429(b).
- Sale of any of the taxpayer's property that has been seized is stayed while the taxpayer pursues these avenues. I.R.C. § 6863(c). The IRS remains free, however, to levy against bank accounts and seize tangible property.

A taxpayer who wants judicial review may seek it within ninety days after the issuance of a determination on the taxpayer's administrative appeal or the sixteenth day after the filing of the administrative appeal, whichever is earlier. I.R.C. § 7429(b)(1). Normally, review is in the district court, however, the Tax Court has concurrent jurisdiction if a petition was previously filed for tax years covered by the jeopardy assessment. I.R.C. § 7429(b)(2).

In either forum, the process moves quickly: the court is supposed to make a final determination within twenty days, although that period can be extended by request of the taxpayer. I.R.C. § 7429(b)(3), (c). Review under Section 7429 focuses on the reasonableness of the jeopardy determination, the reasonableness of the amount of the assessment, and the reasonableness of any levy. I.R.C. § 7429(b)(3)(A), (B). The government bears the burden of proof on the reasonableness of the jeopardy assessment or levy, while the taxpayer bears the burden of proof on the reasonableness of the amount of the assessment. I.R.C. § 7429(g).

On the merits, if the court determines that the assessment or levy was unreasonable or that the amount assessed was excessive, it can direct the Secretary of the Treasury to release the levy, abate the assessment, or redetermine the amount assessed. I.R.C. § 7429(b)(4). The court is also authorized "to take such further action" that it considers "appropriate." *Id.* On its face, Section

7429 appears to bar further judicial review of the court's determination: "Any determination made by a court under this section shall be final and conclusive and shall not be reviewed by any other court." I.R.C. § 7429(f). Courts have, however, recognized some limited appellate review is available if the question is a procedural one of whether the district court is acting outside of its authority. *See Schuster v. United States*, 765 F.2d 1047, 1049 (11th Cir. 1985); *see also La Rosa v. United States*, 841 F.2d 544, 545-46 (4th Cir. 1988).

When taxpayers have pursued relief under Section 7429, they have had mixed results. Since the standard of review for the jeopardy assessment or jeopardy levy is reasonableness, the government has prevailed in most cases. On the question whether the amount of the assessment is reasonable, the taxpayer may have a better chance at relief, as jeopardy assessments typically rest upon estimates or upon indirect methods of proof used to calculate unreported income; while courts have upheld both approaches, they are susceptible to attack on the facts of a particular case.

The remaining alternative to Section 7429 is to seek normal Tax Court review. Under Section 6861(b) of the Code, the IRS is required to issue a notice of deficiency within sixty days of a jeopardy assessment, unless it has already done so. Once the taxpayer files a petition for review, the IRS is generally precluded from selling any property that it has seized pending disposition of the taxpayer's petition. I.R.C. § 6863(b)(3). It remains free, however, to levy against bank accounts or seize tangible property.

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