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A COURT DECREE IS NOT A PREREQUISITE FOR THE MAKING OF A LEVY BY AN INTERNAL REVENUE AGENT—COUNTY AUDITOR IS REQUIRED TO TURN OVER PROPERTY OR RIGHTS TO AN AGENT OF THE SECRETARY OF THE TREASURY UPON WHICH A LEVY HAS BEEN MADE—OPINION 923 OAG 1959.

SYLLABUS:

1. A court decree on complaint filed in court is not a prerequisite for the making of a levy under Sections 6331 and 6332, Internal Revenue Code, by an Internal Revenue agent as a delegate of the Secretary of the Treasury.

2. Where a county auditor is in possession of (or obligated with respect to) property or rights to property subject to levy by the United States Treasury Department, upon which a levy has been made, Section 6332, Internal Revenue Code, requires that the Auditor shall, upon demand of the Secretary of the Treasury or his delegate, surrender such property or rights to the Secretary or his delegate, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process; and the county auditor must honor such a levy.

Columbus, Ohio, May 24, 1962

Hon. Dennis J. Callahan, Prosecuting Attorney
Lawrence County, Ironton, Ohio

Dear Sir:

I have before me your request for my opinion which reads:

"I have received a request for an opinion from the Auditor of Lawrence County, Ohio, wherein he advises that he has been served with notice of levy by an agent of the Internal Revenue Service for income tax due and unpaid by a county employee. The Auditor is inquiring as to the legality of this procedure in levying against wages for unpaid income taxes. There is a question as to whether such a levy, to be binding, must be ordered by a court decree on complaint filed in court, or whether the notice of levy is sufficient under the Internal Revenue Code. Reference is made to Section 6331, Levy and Distraint, of the Internal Revenue Code which appears on the reverse side of the levy served upon the County Auditor."

The subject matter of your inquiry was dealt with in my opinion issued November 13, 1959, being Opinion No. 923, Opinions of the Attorney General for 1959, page 623. The second and the third paragraphs of the syllabus in that opinion read:

"2. Where the Auditor of State is in possession of (or obligated with respect to) property or rights to property subject to levy by the United States Treasury Department, upon which a levy has been made, Section 6332, Internal Revenue Code, requires that the Auditor shall, upon demand of the Secretary of the Treasury or his delegate, surrender such property or rights to the Secretary or his delegate, except such part of the

property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process.

“3. Under Section 6332, Internal Revenue Code, the Auditor of State must honor levies from the United States Treasury Department both on salaries of state employees and on other persons where payments to such persons are made on warrants of the Auditor, except such part of the salary or payment as is, at the time of such demand, subject to an attachment or execution under any judicial process.”

In the instant case, the auditor of Lawrence County was served with notice of levy by an agent of the Internal Revenue Service for income tax due and unpaid by a county employee. The specific question you present is whether such notice of levy, to be binding, must be ordered by a court, or is such notice of levy alone sufficient under the Federal Internal Revenue Code. It is to be noted that such question was not discussed in Opinion No. 923, *supra*, although an examination of the paragraphs quoted indicates that the Treasury Department may levy directly, and in the instant case that is what has to be done.

Section 6321, Internal Revenue Code, provides:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”

Also to be considered is Section 6331, Internal Revenue Code, which reads in part:

“(a) If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, *it shall be lawful for the Secretary or his delegate to collect such tax* (and such further sum as shall be sufficient to cover the expenses of the levy) *by levy upon all property and rights to property* (except such property as is exempt under Section 6334) *belonging to such person or on which there is a lien provided in this chapter* (Sections 6301-6344 of this title) *for the payment of such tax.* Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d) of such officer, employee, or elected official. If the Secretary or his dele-

gate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

“(b) The term ‘levy’ as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

“(c) Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

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(Emphasis added)

Further, paragraph (a) of Section 6332, Internal Revenue Code, reads as follows:

“Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.”

A careful reading of the quoted sections of the Internal Revenue Code indicates that the Secretary of the Treasury acting through his agents, is given the authority to make a levy for the purpose of collecting delinquent income taxes, and that a court decree is not required to make such levy. Under those sections, the Secretary or his delegate may collect the tax by levy, and the person in possession of the property subject to levy must surrender such property.

In view of the foregoing, therefore, it is my opinion and you are advised:

1. A court decree on complaint filed in court is not a prerequisite for the making of a levy under Sections 6331 and 6332, Internal Revenue

Code, by an Internal Revenue agent as a delegate of the Secretary of the Treasury.

2. Where a county auditor is in possession of (or obligated with respect to) property or rights to property subject to levy by the United States Treasury Department, upon which a levy has been made, Section 6332, Internal Revenue Code, requires that the Auditor shall, upon demand of the Secretary of the Treasury or his delegate, surrender such property or rights to the Secretary or his delegate, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process; and the county auditor must honor such a levy.

Respectfully,

MARK McELROY

Attorney General