UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF DALLAS
DALLAS DIVISION

Cathy Landers, **Plaintiff,** v. the United States of America, the Internal Revenue Service, and Charles Rettig, in his official capacity as Commissioner of Internal Revenue, **Defendants.**	§ § § § § § § § § § § §	CIVIL CAUSE NO. 3:20-cv-00455-G

PLAINTIFF'S SUR-REPLY

Changing course, the government now contends that the statute at issue authorizes **only** a suit to enjoin the "beginning of" a levy. (Dkt. No. 15, at 3). It not only omitted this argument from its initial Motion to Dismiss, (Dkt. No. 11), it actually argued that Plaintiff's claims should be dismissed because a levy can only be "made,"[1] *not* "begun" or "prosecuted." (Dkt. No. 11, at 5-7). Now, however, the government asks that the Court to dismiss Plaintiff's claims on the ground that she has not sought to enjoin the "beginning of" the levy. (Dkt. No. 15, at 3). This complete 180—combined with several legal and factual misrepresentations—necessitates additional briefing on the question of jurisdiction and whether Ms. Landers is entitled to her day in court.

A. This Court has Subject-Matter Jurisdiction over Plaintiff's Claims under Section 6015(e)(1)(B)(ii).

The government contends that Section 6015(e)(1)(B)(ii)'s jurisdictional grant should be "narrowly construed" to confer jurisdiction only where an innocent spouse seeks to enjoin the

[1] Its argument as to when any such levy was "made" was, nonetheless, flawed as well: "[A] levy made on a bank with respect to the account of a delinquent taxpayer is satisfied if the **bank surrenders** the amount of the taxpayer's balance **at the time the levy is made**." 26 C.F.R. § 301.6331-1(a)(1). Section 6332(c) requires that the bank "shall surrender" the funds "after 21 days." Section 301.6331-1(a)(1), again, provides that the date of surrender *is* "the time the levy is made." Thus, Section 6331 provides that the levy is made at the conclusion of the 21-day period.

"beginning of" a levy. (Dkt. No. 15, at 3). In so contending, the government characterizes the arguments in Plaintiff's Opposition as an attempt to "blur[ ] the line between the prohibition on collection action found in Section 6015(e)(1)(B)(i) and the waiver of sovereign immunity found in Section 6015(e)(1)(B)(ii)." (Id.). But context and common sense demonstrate that the two provisions go hand in hand, as Congress did not create a toothless statutory right. Rather, the prohibition in (B)(i) is paralleled in scope by the acknowledgment of jurisdiction to enforce that right in (B)(ii).

Contrary to the government's assertion, Plaintiff's interpretation does not "blur" the statutory wording in the sister statutes. Rather, plaintiff's interpretation—unlike the government's—gives meaning and effect to each of the words that Congress used in these sister statutory provisions. Section 6015(e)(1)(B)(i) states that "**no levy** or proceeding in court shall be ***made, begun, or prosecuted*** against an individual making . . . [an innocent spouse claim]." (emphasis added).

Section 6015(e)(1)(B)(ii) ties itself directly to the "levy" described in (B)(i)—explicitly by reference, and implicitly by context—thereby recognizing subject-matter jurisdiction with respect to more than the enjoinment of the mere "beginning of" a levy.[2] Specifically, that provision states:

> Notwithstanding the provisions of section 7421(a), the beginning **of *such* levy** or proceeding ***during the time the prohibition under clause (i) is in force*** may be enjoined by a proceeding in the proper court[.]

(emphasis added). By referencing "*such* levy," subsection (ii), which directly follows subsection (i), clearly makes reference to—and pulls within its scope—the levy described in subsection (i). That levy includes one "made, begun, or prosecuted" in violation of Section 6015(e). To read the sister statutes any other way would read the word, "such," out of subsection (ii).

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[2] *Util. Air. Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) (reasoning that statutes should not be read in isolation but rather it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *Zemurray Found. v. U.S.*, 687 F.2d 97, 102 (5th Cir. 1982) ("Statutory meaning . . . is to be derived not from reading of a single sentence or section, but from the provisions of the whole law, and its object and policy.") (citing *Philbrook v. Glodgett*, 421 U.S. 707 (1975) and *Kokoszka v. Belford*, 417 U.S. 642 (1974)).

Read together as a harmonious whole,[3] the jurisdictional grant in Section 6015(e)(1)(B)(ii) embraces the prohibition on making, beginning, or prosecuting a levy under Section 6015(e)(1)(B)(i).[4] This reading also harmonizes the sister statutes with 26 U.S.C. § 7421(a) and 28 U.S.C. § 1346.

First, 28 U.S.C. § 1346(a) provides that:

> The district courts shall have original jurisdiction . . . of any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . or any sum alleged to have been . . . in any manner wrongfully collected under the internal-revenue laws.

Second, 26 U.S.C. § 7421(a) provides that:

> *Except as provided in section 6015(e)* . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person….

(emphasis added). Section 1346(a) thus creates a presumptive broad jurisdictional scope that (absent a specific exception clearly removing that jurisdiction) generally applies here. Section 7421, in turn, provides an exception to Section 1346(a), and scales back that jurisdictional grant—"except," it makes clear, "as provided in section 6015(e)."

Notably, Section 7421(a) does not refer to a specific subsection of 6015(e); rather, it references the provision generally, thus removing suits for the enforcement of violations under 6015(e) from the exceptions to jurisdiction that are otherwise contained in § 7421(a). Structurally-speaking, § 1346(a) expressly *provides* for general jurisdiction, and § 7421(a) (by referencing to § 6015(e) generally) does not remove that jurisdiction; rather, it effectuates the general jurisdictional grant where, as here, a plaintiff alleges that the government "wrongfully collected under the internal-revenue laws" (in the language of § 1346(a)) funds by levy in a manner that violated § 6015(e).

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[3] *See John Doe 1 v. KPMG, LLP*, 398 F.3d 686, 688 (5th Cir. 2005) ("When interpreting a statute, we start with the plain text, and read all parts of the statute together to produce a harmonious whole."); *see also Va. Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 317 (4th Cir. 2005) ("[U]nder a longstanding canon of interpretation, adjacent statutory subsections that refer to the same subject matter . . . must be read *in pari materi* as if they were a single statute."); *Action All. of Senior Citizens v. Johnson*, 607 F. Supp. 2d 33 (D.D.C. 2009), *aff'd*, 607 F.3d 860 (D.C. Cir. 2010) ("[A] statute is to be read as a whole, especially where construing adjacent subsections with remarkably similar structures.").

[4] By enjoining the making or prosecuting of a levy, one is logically enjoining the beginning.

While Plaintiff's interpretation lends fidelity to every aspect of the statutory language, it also has the added virtue of effectuating congressional intent. The Tax Court has repeatedly recognized, "section 6015 was designed to correct perceived deficiencies and inequities" and was enacted as a means of *expanding* relief to innocent spouses.[5] Section 6015 is remedial legislation that "should be liberally construed to effectuate its remedial purpose."[6] The government's position would thwart this Congressional intent and constrict the remedial nature of Section 6015(e)(1)(B).

Finally, Plaintiff's interpretation ensures that the statute is given an interpretation that is logical. It would make little sense for Congress to prohibit *three* categories of conduct—the making, beginning, or prosecuting of a levy—in Section 6015(e)(1)(B)(i) only to then provide limited judicial relief to innocent spouses with respect to *one* category—the beginning of a levy—in Section 6015(e)(1)(B)(ii). Moreover, because the IRS never telecasts the "beginning of" a bank levy to the innocent spouse (for example, the IRS does not contact the innocent spouse 24 hours prior to the "beginning of" a specific bank levy—a step that would obviously be counterproductive to its collection efforts), Section 6015(e)(1)(B)(ii) would be rendered meaningless and rarely, if ever, utilized under the government's interpretation. In fact, it is hard to envision a realistic or likely scenario in which an innocent spouse would *ever* be able to seek an injunction under Section 6015(e)(1)(B)(ii), unless they filed an anticipatory action for injunction to stop the "beginning of" the levy.

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[5] *See Washington v. Commissioner*, 120 T.C. 137, 155 (2003); *Hopkins v. Commissioner*, 120 T.C. 451, 458-59 (2003) ("section 6015 was enacted to provide spouses with broader access to relief from joint and several tax liabilities"). Accordingly, Section 6015 constitutes remedial legislation that "should be liberally construed to effectuate its remedial purpose." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (remedial legislation should be construed broadly to effectuate its purpose); *see also Washington v. Commissioner*, 120 T.C. 137, 155-56 (2003) (recognizing that Section 6015 was "curative legislation" that "should be liberally construed to effectuate its remedial purpose.").

[6] *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (remedial legislation should be construed broadly to effectuate its purpose); *see also Washington v. Commissioner*, 120 T.C. 137, 155-56 (2003) (recognizing that Section 6015 was "curative legislation" that "should be liberally construed to effectuate its remedial purpose.").

B. The IRS Improperly "Made" the Levy After Plaintiff's Innocent Spouse Request was Filed.

Recognizing as it must, that its interpretation of Section 6015(e)(1)(B)(ii) is untenable, the government alternatively contends that "[e]ven if the proscriptions found in Section 6015(e)(1)(B)(i) are a component of the waiver of sovereign immunity found in Section 6015(e)(1)(B)(ii), the IRS did not violate them." (Dkt. No. 15, at 3). In support of its contention that the levy was "made" on December 11, 2019, the government relies solely on language in Section 6331 and its regulations and dismisses entirely the provisions in Section 6332 and its regulations. (Dkt. No. 15, at 4 n. 2).

First, the government misreads the regulations under Section 6331. Those regulations provide that: "[A] levy made on a bank with respect to the account of a delinquent taxpayer is satisfied if the **bank surrenders** the amount of the taxpayer's balance **at the time the levy is made**." 26 C.F.R. § 301.6331-1(a)(1). Section 6332(c) requires that the bank "shall surrender" the funds "after 21 days." Section 301.6311-1(a)(1), again, provides that the date of surrender *is* "the time the levy is made." Thus, Section 6331 itself supports Petitioner's position, not the government's.

But the government is nonetheless incorrect in asserting that Section 6332 and its regulations have no place in the Court's analysis of when a levy has been "made" for purposes of Section 6015(e)(1)(B)(i). It, along with other provisions of the statutory whole, confirm this interpretation. The provisions set out in Sections 6331 through 6344 comprise a part of the Internal Revenue Code entitled, "Levy," and each of those sections ascribes limiting rules, clarifications, and special provisions with respect to the levy process depending upon the particular subject of the levy—those rules, in other words, modify and interact with the general rules of Section 6331. Some such sections and provisions (like those specifically at issue here) were enacted *after* Section 6331 in order to address perceived ills and to modify prior rules. Would it have made a difference if they were codified under

the same statutory number? Why should it? The levy sections must be read as a statutory whole.[7] And the IRS' prior APA-compliant, duly-promulgated interpretation of an important part (Section 6332) of that statutory whole is absolutely relevant.

In its Reply, the government maintains that its interpretation harmonizes the overall framework. (Dkt. No. 15, at 6). Except, of course, where that framework is inconsistent, such as the one regulatory provision that speaks with unmistakable clarity to the precise issue:

> **[T]he 21-day rule [of 26 U.S.C. § 6332(c)] effectively change[d] the date of the *making* of a levy on bank deposits *to the date of the expiration of the 21-day holding period* or any extension of the period granted by the Internal Revenue Service**.[8]

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[7] There is, in fact, even more context that comprises that "statutory whole." Indeed, as Plaintiff explained in her Opposition, the statutes must be read as a whole, and that background makes clear that a levy has long been interpreted as a process. Within the "Levy" subchapter of the IRC, which spans Sections 6331 through 6344, numerous provisions demonstrate that the concept of a levy is a process. For example, section 6342 governs the "application of proceeds of levy." It references "proceedings" under this [the "Levy"] subchapter (i.e., levy proceedings). The term proceeding is, of course, etymologically linked to the term "prosecute." This statute, which again governs the "**proceeds of levy**" (implying the ultimate sale or acceptance of funds is *a part* of the overall levy process) immediately refers to "any money realized by proceedings under this subchapter [titled, "Levy,"] (whether by seizure, ***by surrender*** under Section 6332 . . . or by sale . . . .") Thus, the seizure envisioned by the Levy subchapter is a "proceeding." Likewise, the turning over of cash from a bank account under Section 6332 is defined as a "proceeding" under the Levy subchapter and is part of the process that leads to the "proceeds of levy" that are governed by the statute. Indeed, **the levy statute specifically refers to the "surrender" of the funds as the relevant event that generates the "proceeds of levy."** Likewise, even the ultimate "sale" of the seized property is defined as a "proceeding" under the Levy subchapter that results in the "proceeds of levy"—further underscoring the fact that a "levy" is a *process* and that the ultimate receipt of the funds is part of that process. See Plaintiff's Response p. 1 et. seq. The relevant portion of such section is set forth below:

> 26 U.S. Code § 6342. Application of **proceeds of levy**
>
> **(a) Collection of liability** Any money realized **by proceedings** under this subchapter (**whether by seizure, by surrender under section 6332 (except pursuant to subsection (d)(2) thereof), or by sale of seized property**) or by sale of property redeemed by the United States (if the interest of the United States in such property was a lien arising under the provisions of this title) shall be applied as follows. . . .

In addition, and again by way of example, section 6337 demonstrates that the levy process encompasses the seizure aspect of the process, as well as subsequent proceedings that presumably involve the *prosecution* of the levy process:

> 26 U.S. Code § 6337. Redemption of property
>
> **(a) Before sale**
>
> Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and **all further proceedings in connection with the levy** on such property shall cease from the time of such payment.

[8] Fed. Reg. Vol. 58, No. 1, p. 16 (Jan. 4, 1993) (emphasis added), available at https://www.govinfo.gov/content/pkg/FR-1993-01-04/pdf/FR-1993-01-04.pdf#page=26.

This particular section, the government argues, need not be harmonized with the overall structure. It is inapposite, "out of context," and can shed no light on the question of whether Congress's enactment of the 21-day holding period impacted the date on which a levy is considered to have been "made" by the IRS. (Dkt. No. 15, at 4-5) Its position: that date is *not* the expiration of the 21-day holding period. That position takes maximum literary license with the rule of construction, straining credulity and truly begging the question of what, exactly, the meaning of "is," is?

The levy at issue was a bank account levy. Section 6332(c) applies a "special rule" for bank levies: a bank may not surrender any deposits until 21 days after service of the levy. Section 6332(c) and its interplay with Section 6015(e)(1)(B)(i) is squarely at issue in this case. This specifically addresses the government's contention that the preamble to the Section 6332 regulations is not applicable here, (Dkt. No. 15, at 4-5), a contention that runs counter to the rule of construction—cited by *both* parties in this case—that statutory and regulatory regimes should be construed in harmony and in like manner.

C. <u>The IRS "Prosecuted" the Levy after Plaintiff's Innocent Spouse Claim was Filed</u>.

In addition to contending that the IRS did not make the levy after Plaintiff filed her innocent spouse claim, the government contends in its Reply that the IRS did not violate Section 6015(e)(1)(B)(i) because the levy was not prosecuted. (Dkt. No. 15, at 6). According to the government, in fact, levies can never be "prosecuted." The government informs the Court that "levies by the IRS are not 'prosecuted' . . . any more than court proceedings are 'made.'" (Id.). But courts and parties, of course, routinely speak of "making" motions, which are "proceedings." *See, e.g.,* F. R. Civ. Pro. 12(f) (referring to "[a]ll proceedings at a motion hearing"). The fact is: our legal system regularly interchanges the words motion, hearing, and proceedings, depending on the context. Levies can be prosecuted just as court proceedings and motions can be made or begun—as with most things in the English language, precise meaning often depends on the usage and context (such as in the context of a 21-day period before bank funds are surrendered and accepted).

But the government does not stop there. It assures the Court with absolute confidence that: "There is **no instance** in the IRC where the words 'levy' and 'prosecute' even occur in the same sentence except for when they are found in the nearly identical phrase used in Section 6015(e)(1)(B)(i) in which 'proceeding in court' also appears." (Dkt. No. 15, at 7) (emphasis added). That, however, is not correct. Take, for example, Section 6694(c) of the "IRC," which provides as follows:

> If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is a tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, ***no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted*** until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a) , the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Section 6694(c)(1) (emphasis added). It also makes incorrect factual representations. In absolute terms, it claims that: "[t]he IRS took **no action** on the levy after it was made on December 11." (Dkt. No. 15, at 8) (emphasis added). In fact, the IRS took many actions *after* December 11, 2019, including:

1. The Revenue Officer engaged in multiple conference calls with undersigned counsel regarding the levy, and rendered a decision that the levy process should continue despite undersigned counsel's arguments that Section 6015(e)(1)(B) had been violated;

2. The Revenue Officer, his manager, and the IRS Territory Manager coordinated with respect to levy requirements and made a specific decision to proceed with the levy process, including making legally-required determinations (*all after the innocent spouse claim was filed, and after undersigned counsel corresponded regarding the matter, and before and after the funds were sent to, and accepted by, the IRS from the bank*);

3. The IRS Taxpayer Advocate Service officer held conferences regarding Plaintiff's case with undersigned counsel and directly interfaced with the IRS Revenue Officer and his manager regarding the levy process (*all after the innocent spouse claim had been filed*);

4. An IRS Appeals officer held a "Collection Appeal Process" appeal (CAP Appeal) with undersigned counsel, involving his challenge to the levy *after the innocent spouse claim was filed*;

5. The IRS Appeals officer interacted with and had discussions with the Revenue Officer and his manager in their joint efforts to justify and continue to prosecute the levy.

But coming back to the government's first unfounded statement with respect to § 6694(c)(1): As it turns out, the interpretation that the IRS and Treasury gave to that particular statutory language (in yet another regulation), specifically calls the basis for the government's arguments into question:

> **(5)** If the tax return preparer pays an amount and files a claim for refund under paragraph (a)(4)(ii) of this section, the IRS may not **make, begin, or prosecute a levy or proceeding in court** for collection of the unpaid remainder of the amount assessed until the later of—

26 C.F.R. § 1.6694-4. The slight changes in wording and ordering in the relevant language—notably, language used by the IRS and Treasury to help *explain* the precise meaning of the statute—as well as the changes it *did not* make, are instructive. Here, the IRS took statutory language that provided that "*no levy or proceeding in court . . . shall be made, begun, or prosecuted*" and, in promulgating its explanatory regulation, flipped the ordering of the phraseology and the nouns that it modifies, providing: "[T]he IRS may not make, begin, or prosecute a levy or proceeding in court."

While it took the step of (i) changing the tense of the phrase from the past tense to present tense; (ii) altering those verbs from passive to active; and (iii) even moving the phrase in front of the noun phrase, "levy or proceeding;" it did not break the noun and verb phrases up to clarify that "make" referred only to a levy, and that "begin" and "prosecute" refer only to proceedings. It could easily have done so. But, again, it did not. Perhaps that is because people and our legal system have long used the terms in various ways and have often referred to the prosecution of a levy.[9]

Finally, after all this, the Court's focus should come back, full circle, to the statutory language defining a levy, which carries within it the very concept of a process and, therefore, prosecution of that process. Section 6331 defines a "levy,"[10] in *non-exclusive* terms, as follows:

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[9] 78 A.L.R.2d 1414 (Originally published in 1961) ("It will be observed that the release of the attachment amounted to forbearance to prosecute the levy."); IRS CCA 200518079 (May 6, 2005) ("the government may not . . . begin or prosecute a levy **or** a court proceeding . . . .) (IRS Chief Counsel describing its legal interpretation) (emphasis added); *De Haas v. Comm'r*, 97 T.C.M. (CCH) 1104 (T.C. 2009), *aff'd*, 418 F. App'x 637 (9th Cir. 2011) ("[IRS's] determination to proceed with a levy to collect . . . .).

[10] Also relevant to defining and understanding the nature of a levy and the scope of the concept is an understanding of *what* exactly it applies to and operates on. Notably, an IRS levy applies to "all property and *rights to property*" of the taxpayer.

> The term "levy" as used in this title includes **the power of distraint** and seizure by any means.

I.R.C. 6331 (emphasis added). The concept of a levy includes the power of "distraint," a concept that connotes *ongoing* action. That fact is particularly relevant in the context of a 21-day levy period.

Indeed, Meriam-Webster defines "distraint" as "the act or action of distraining." Dictionary.com likewise defines "distraint" as "the act of distraining." "Distraining," of course, is a present participle, which denotes an *ongoing*, or continuous action. The implicit ongoing nature of the power of distraint is amplified by its juxtaposition against the separate and distinct power of "seizure," which generally connotes a more discrete event that is part of the levy process. Again, this language, against the backdrop of the statutory whole, the legislative intent, and the applicable rules of construction, points to only one answer.

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Respectfully submitted,

By: */s/ Jason B. Freeman*
Jason B. Freeman
Texas Bar No. 24069736

By: */s/ Matthew L. Roberts*
Matthew L. Roberts
Texas Bar No. 24098330

Freeman Law, PLLC
2595 Dallas Parkway, Suite 420
Frisco, Texas 75034
Telephone: 214.984.3410
Facsimile: 214.984.3409

I.R.C. 6331(a). Thus, the levy at issue encompassed not only the funds ultimately seized and accepted, but also any rights to property that were encumbered or extinguished by, or during, the levy process. As has been discussed, the IRS's distraint of the account funds at issue was required to last a minimum of a 21-day period. The taxpayer, however, did have rights with respect to such property during that 21-day period: for example, a right to waive the 21-day period, §301.6332-3(c)(4). Indeed, as demonstrated in *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), the Supreme Court has long recognized that while a taxpayer's rights to property may be impacted or removed through a levy, the seizure portion of the levy does not necessarily actually transfer ownership—a process of conversion that would generally not be complete until the property is sold or possession and dominion over the funds is exercised without recognizing the possibility of a competing claim (a possibility that is legally required under the 21-day holding period). Likewise, from another angle, an account holder with disputed or weakened claims to an account would also have the "right" to utilize the account as collateral to obtain other funds, if she had another willing lender on the market (who might, perhaps, increase their interest rate and fees to account for the increased risk). Those rights, however, would effectively be seized/levied the moment that the funds are transmitted to, and accepted by, the IRS in completing the prosecution of the levy process.

jason@freemanlaw.com
mroberts@freemanlaw.com

ATTORNEYS FOR PLAINTIFF

Certificate of Service

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/s/ Jason B. Freeman
Jason B. Freeman