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#7**HARDSHIP LEVIES: Four Years After the Tax Court's Holding in *Vinatieri v. Commissioner*, the IRS Continues to Levy on Taxpayers it Acknowledges are in Economic Hardship and then Fails to Release the Levies****RESPONSIBLE OFFICIALS**

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DEFINITION OF PROBLEM

The IRS is required by law to release a levy that it knows is causing an economic hardship due to the financial condition of the taxpayer.¹ In the *Vinatieri* case, the U.S. Tax Court held that when the IRS sustains even a *proposed* levy on a taxpayer it knows is in economic hardship, it abuses its discretion.² In spite of this ruling, in 2011 the IRS levied on the Social Security Administration (SSA) and Railroad Retirement Board (RRB) benefits of nearly 67,000 taxpayers belonging to a group the IRS considers likely to be experiencing economic hardship — those whose incomes were less than 250 percent of the federal poverty level, or about \$27,000 for a single person.³ The median income of taxpayers subject to these levies was at most about \$17,500.⁴ The *least* amount of expenses the IRS would routinely allow, known as Allowable Living Expenses (ALE), added up to approximately \$17,200 for a single person in 2011.⁵ Therefore, it is likely that the expenses of many taxpayers whose benefits were levied exceeded their incomes. The federal poverty level for a single person in 2011 was \$10,890, meaning that some of the 67,000 taxpayers whose benefits were levied were likely actually *living in poverty* and not just considered to be low income.

The court in *Vinatieri* held that the fact that the taxpayer has unfiled returns does not justify proceeding with a levy if the taxpayer has shown he or she is in economic hardship⁶ Of the nearly 67,000 low income (or possibly poverty-stricken) taxpayers whose federal payments the IRS levied, TAS determined

1 IRC § 6343(a)(1)(D).

2 *Vinatieri v. Comm'r*, 133 T.C. 392 (2009).

3 Small Business / Self-Employed Division (SB/SE) Finance, Research and Strategy Project DENO206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* Appx. H, 4 Table H7 (May 2013). There were 66,926 taxpayers in this group. The levies were issued pursuant to the Federal Payment Levy Program (FPLP), discussed below. Appendix A of the study contains federal poverty levels.

4 The median income of taxpayers subject to levies on their SSA or RRB benefits was at most \$17,439 depending on the source the IRS used to measure it. SB/SE Finance, Research and Strategy Project DENO206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* Appx. H, 3 Table H5 (May 2013).

5 As explained below, the IRS publishes allowable expense guidelines based on average, actual taxpayer expenditures. The allowable amounts vary by geographical location. The IRS uses these guidelines to determine a taxpayer's ability to pay delinquent tax liabilities. TAS used the lowest allowable housing expense and the lowest allowable vehicle operation cost to generate a conservative measure of ALE, even though these expenses correspond to different geographic areas and therefore could not have actually been sustained by the same taxpayer.

6 *Vinatieri v. Comm'r*, 133 T.C. 392 (2009).

that the IRS would have spared the accounts of nearly 41,000 — more than half — from the automatic levy program that triggered the levies, if not for these taxpayers' unfiled returns.⁷

Whether they are included in automated levy programs or subjected to levies on their wages or bank accounts, some taxpayers in economic hardship turn to TAS or low income taxpayer clinics (LITCs) for assistance in obtaining levy releases.⁸ Clinic directors report, and TAS cases confirm, that even when the IRS agrees these taxpayers are experiencing economic hardship, it continues to insist on receiving their unfiled returns as a condition of releasing the levies.⁹ When the IRS conditions levy release on securing delinquent returns from taxpayers who have shown they are in economic hardship, it burdens the taxpayers and creates unnecessary work for itself. Most importantly, the IRS in these cases acts in violation of the law, thereby subjecting itself to potential suit for negligent or reckless collection action.¹⁰

ANALYSIS OF PROBLEM

Background

In Vinatieri v. Commissioner, the Tax Court Clarified that Not Only is the IRS Required to Release Levies on Taxpayers who Have Shown they are in Economic Hardship, it Abuses its Discretion When it Sustains a Proposed Levy on These Taxpayers.

IRC § 6343(a)(1)(D) states that a levy shall be released if “the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer.” Economic hardship “exists when a levy will cause an individual to be unable to pay his or her reasonable living expenses.”¹¹ In the *Vinatieri* case, the IRS sent Ms. Vinatieri a notice of its intent to levy and of her right to a pre-levy collection due process (CDP) hearing. Ms. Vinatieri requested a hearing and demonstrated she was in economic hardship, but the Appeals Officer sustained the proposed levy. Relying on Internal Revenue Manual (IRM) provisions in effect at the time, the Appeals Officer cited Ms. Vinatieri's unfiled returns as justification for sustaining the proposed levy rather than placing the account into Currently Not Collectible (CNC) status.¹² The Tax Court held it was not appropriate to proceed with the levy given that IRC § 6343(a)(1)(D) requires the IRS to release a levy if it is causing economic hardship, and such economic hardship had already been shown. Sustaining a proposed levy that would have to be immediately released constituted an abuse of discretion.

7 TAS analysis of taxpayer accounts that formed the basis of the SB/SE Finance, Research and Strategy Project DENO206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers*. Of the 66,926 levies, TAS found 40,984 accounts (61 percent) that could have been filtered out of the FPLP program but were not, solely because of unfiled returns. TAS Research could not determine how many name mismatches there were, or whether a spouse had an invalid taxpayer identification number. To the extent either of these conditions were present, there may have been fewer than 40,984 such accounts.

8 In recognition of the need for low income taxpayers to have access to representation before the IRS and the courts, Congress in 1998 created the Low Income Taxpayer Clinic (LITC) program. IRC § 7526; Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), § 3601(a), Pub. L. No. 105-206, 112 Stat. 758 (1998). The clinics, which are independent from the IRS, represent low income taxpayers before the IRS and the Tax Court for free or no more than a nominal fee. IRC § 7526(b)(2). According to IRC § 7526(b)(1)(B), taxpayers with income of less than 250 percent of the poverty level are low income taxpayers for purposes of qualifying for LITC assistance.

9 August 7, 2013 conference call with directors of nine low income taxpayer clinics; Taxpayer Advocate Management Information System (TAMIS) cases 5511491, 5503338, and 5379810.

10 IRC § 7433(a) authorizes a taxpayer to bring a civil action for damages if an IRS employee “recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title” in connection with any collection of Federal tax with respect to that taxpayer.

11 Treas. Reg. § 301.6343-1(b)(4).

12 *Vinatieri v. Comm'r*, 133 T.C. 392, 395 (2009). IRS employees may remove an account from active inventory and place it into CNC status where “collection of the liability would create a hardship for taxpayers by leaving them unable to meet necessary living expenses.” IRM 5.16.1.1 (May 22, 2012).

Following the Vinatieri Decision, the IRS Changed Some Provisions of the IRM, but Training Materials, Electronic Job Aids, and Quality Standards Need Adjusting.

In the light of the *Vinatieri* holding, TAS worked with the IRS and the Office of Chief Counsel to revise the IRM.¹³ Various IRM provisions now make clear that unfiled returns are not an impediment to immediate levy release when a taxpayer is in economic hardship, and the account should be classified as CNC even if the taxpayer has unfiled returns.¹⁴ The IRS has also clarified how collection employees should handle the issue of unfiled returns when they talk with taxpayers.¹⁵ The National Taxpayer Advocate applauds the IRS for making these needed changes. They should be incorporated into IRS training materials and job aids, some of which are inadequate. For example, the materials the IRS used to train Automated Collection System (ACS) employees in 2011, 2012, and 2013 did not cover the holding in *Vinatieri*.¹⁶ Moreover, ACS employees and Compliance Services Collection Operation employees rely on automated decision trees, called e-guides, that have not been cleared through the appropriate IRS review process, including vetting by TAS.¹⁷ The IRS should update and vet these materials. More importantly, as the National Taxpayer Advocate has urged, the IRS should evaluate collection employees specifically on whether they recognized, considered, and addressed a taxpayer's economic hardship.¹⁸

The IRS Adopted a Filter Intended to Prevent Automatic Levies on Social Security Payments to Low Income Taxpayers, but Excluded Accounts of Taxpayers with Unfiled Returns from the Filter.

The IRS has the authority to issue a continuous levy on a variety of federal sources of income, including Social Security and Railroad Retirement Board benefits, and since 2000 has carried out automatic levies on these sources pursuant to the Federal Payment Levy Program (FPLP).¹⁹ The IRS has long recognized that most FPLP levies are on taxpayers' Social Security payments, and has sought to avoid levying on

13 National Taxpayer Advocate 2010 Annual Report to Congress 85 (Most Serious Problem: *IRS Collection Policies and Procedures Fail to Adequately Protect Taxpayers Suffering an Economic Hardship*).

14 See, e.g., IRM 5.19.4.4.10.5(j) (Sept, 10, 2013) (for release of levy); IRM 5.16.1.2.9(9) (May 22, 2012) (for CNC status). IRM 5.16.1.1 (May 22, 2012).

15 IRM 5.19.4.4.10.5(j) (Sept, 10, 2013), which ACS employees consult, now provides: "When the Service determines that the levy is creating an economic hardship, do not refuse, delay or understate the release amount as a means to secure other compliance, e.g., missing tax returns. When there are also open delinquent returns, do not condition relief of the economic hardship upon receiving the delinquent returns. Inform the taxpayer of the financial information needed to make a collection determination and provide relief of the economic hardship if appropriate. You may, as a separate issue, inform the taxpayer of the unfiled tax returns and pursue appropriate actions to resolve them separate from the economic hardship relief issue. You may also inform the taxpayer before an installment agreement can be established delinquent returns must be filed." The IRS agreed to revise IRM 5.11.2.3.1.4(5), directed to Field Revenue Officers, to provide: "When contacted by a taxpayer claiming an inability to meet basic living expenses due to the levy and there are also open Del Rets [delinquent returns], do not condition relief of the economic hardship upon receiving the delinquent returns. These are separate collection issues. Inform the taxpayer of the financial information needed to make a collection determination and provide relief of the hardship if appropriate. You may, as a separate issue, inform the taxpayer of the unfiled tax returns and pursue appropriate actions to resolve them separate from the hardship relief issue. You may also inform the taxpayer before an installment agreement can be established delinquent returns must be filed." TAS Systemic Advocacy Management System Internal Management Document IRM review 27283 (July 30, 2013).

16 IRS response to TAS information request (Sept. 16, 2013).

17 The e-Guides are available at http://serp.enterprise.irs.gov/databases/irm-sup.dr/compliance_eguides.htm For a discussion on how IRS materials are vetted, see National Taxpayer Advocate, *Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration* (Nov. 4, 2013); National Taxpayer Advocate's Report in Response to the Acting Commissioner's 30-day Report: *Analysis and Recommendations to Raise Taxpayer and Employee Awareness of the Taxpayer Advocate Service and Taxpayer Rights* (Aug. 23, 2013).

18 See National Taxpayer Advocate 2010 Annual Report to Congress 85 (Most Serious Problem: *IRS Collection Policies and Procedures Fail to Adequately Protect Taxpayers Suffering an Economic Hardship*) which includes a discussion of collection case quality measurement and the recommendation that the IRS "[e]stablish quality review procedures that measure whether employees considered the possibility that a taxpayer was in economic hardship and managed the account appropriately." The IRS recently revised some quality standards, see IRM 21.10.1-6 (Oct. 1, 2013), available at <http://serp.enterprise.irs.gov/databases/irm.dr/current/21.dr/21.10.dr/21.10.1.dr/21.10.1-6.htm>, but they still do not measure whether the employee considered whether a taxpayer is in economic hardship before taking enforced collection action.

19 IRC § 6331(h)(2). IRM 5.11.7.2.1.1 (2) (Aug. 28, 2012).

Social Security payments to low income taxpayers.²⁰ In 2002, the IRS developed a filter to exclude from the FPLP program the accounts of low income taxpayers, relying on the total positive income (TPI) reported on the taxpayer's last filed return as its sole measure of the taxpayer's financial situation.²¹ The IRS filter did not recognize that taxpayers may not have recently filed a return, making available data potentially dated and unreliable, and did not consider the possibility the taxpayer could have assets from which the tax liability could be paid. For these reasons, the General Accounting Office (GAO, now the Government Accountability Office) in 2003 questioned the effectiveness of the filter, and the IRS removed it in 2005.²² TAS cases with FPLP levies immediately increased sharply.²³

In 2008, TAS Research began to design, develop, and test an improved filtering or screening model.²⁴ The purpose of the low income filter was to identify and remove low income taxpayers that the model demonstrated would experience economic hardship and thus be entitled to immediate levy release under IRC § 6343(a)(1)(D). The new TAS model, in addition to using taxpayers' income information from filed individual income tax returns, used third-party payor documents supplied to the IRS to estimate the

taxpayers' incomes.²⁵ The TAS model then used other tax return data to estimate ALE (living expenses the IRS routinely allows when determining a taxpayer's ability to pay).²⁶ If the most recent year's tax return was not filed, allowable expenses were based on a household size of one, since the number of dependents could not be determined.²⁷ The TAS model was designed to offer a conservative estimate of taxpayer expenses, while also using multiple sources to ascertain all taxpayer income, even if unreported. TAS then performed additional analyses to explore the availability of other taxpayer assets to satisfy the liability and investigated whether IRS databases are sufficient to detect such available assets. The study findings suggested that a significant number of taxpayers are subject to a levy on their SSA income even though they cannot afford the levy.²⁸

It is likely that the expenses of many taxpayers whose benefits were levied exceeded their incomes.

Subsequent to the publication of TAS's study findings, the National Taxpayer Advocate engaged in ongoing discussions with the IRS Director of Compliance, Wage & Investment Division, to discuss the development of a new low income filter for taxpayers otherwise subject to FPLP levies. The IRS accepted the results of the TAS study, but expressed concern about the difficulties of automating the algorithm TAS

20 For example, in 2008, the IRS received more than two million FPLP levy payments from taxpayers, with more than 83 percent of those payments coming from Social Security benefits. National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 48 (*Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

21 TPI is simply the sum of the values shown in various income fields on a return (wages; interest; dividends; distributions from partnerships, small business corporations, estates, or trusts; Schedule C net profits; Schedule F net profits; and other income such as Schedule D profits and capital gains distributions. Losses reported for any of these values are treated as a zero.).

22 GAO, GAO 03-356, *Tax Administration, Federal Payment Levy Payment Program Measures, Performance and Equity Can Be Improved* 13-15 (Mar. 6, 2003). The General Accounting Office was renamed the Government Accountability Office in July 2004.

23 National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 48 (*Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

24 *Id.*

25 *Id.*

26 Allowable expenses for some items (e.g., food, clothing, and health care) are based on national standards, while allowable expenses for other items (e.g., housing and transportation) are based on local standards. See IRM 5.15.1.7 *Allowable Expense Overview* (Oct. 2, 2012). The IRS ALEs are available at <http://mysbse.web.irs.gov/Collection/toolsprocesses/AllowExp/Standards/default.aspx>.

27 National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 54 n. 31 (*Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

28 *Id.* at 57.

used in its research study to determine economic hardship.²⁹ A more administrable measure, such as a minimum dollar amount of income, or income as a percentage of the federal poverty level, was needed as a proxy for economic hardship. The discussions culminated in a meeting on October 6, 2009, at which the IRS proposed a filter that, among other things, would exclude the accounts of taxpayers with unfiled returns, leaving them subject to FPLP levies even though they were low income.³⁰ Although the National Taxpayer Advocate was uncomfortable with this approach, the IRS assured her that it would exclude these taxpayers from the filter only if they appeared to have a filing requirement.³¹ The Deputy Commissioner for Services and Enforcement and the Commissioner of the Wage and Investment Division had collectively determined that the low income filter would be set at 250 percent of the federal poverty level.³²

This low income filter, which failed to protect the accounts of taxpayers with unfiled returns, was adopted prior to the Tax Court's decision in *Vinatieri*. As discussed above, the court in *Vinatieri* found that IRC § 6343(a)(1)(D) requires the IRS to release a levy that would cause the taxpayer economic hardship, with no exception to that mandate for taxpayers who have unfiled returns. After the *Vinatieri* decision, despite urging by the National Taxpayer Advocate, the IRS refused to adjust the filter to cover accounts with unfiled returns.³³ The National Taxpayer Advocate responded on January 12, 2012 by issuing Taxpayer Advocate Directive 2012-2, "Taxpayers Whose Incomes Are Below 250 percent of the Federal Poverty Level Set by the Department of Health and Human Services and who receive Social Security or Railroad Retirement Board Benefits Should Be Screened Out of the Federal Payment Levy Program, regardless of unfiled returns or outstanding business debts."³⁴

The IRS studied the effect that the mandate in the Taxpayer Advocate Directive would have and prepared a report in May of 2013.³⁵ It stated that about 151,000 low income taxpayers received Social Security or Railroad Retirement Board benefits in 2010, had an outstanding tax liability in 2011, and had unfiled returns or business debt.³⁶ They were consequently subject to levy under the FPLP program in 2011 rather than excluded through the low income filter. Of these approximately 151,000 taxpayers, the IRS actually

29 It would be difficult for the IRS to create a program that could manually draw data from multiple databases, as the TAS study did, to identify taxpayer income, household size, and allowable expense information.

30 IRS PowerPoint presentation, *Federal Payment Levy Program: Proposed Process to Implement Low Income Filter for Social Security and Railroad Retirement* (Sept. 29, 2009), presented to the National Taxpayer Advocate on Oct. 6, 2009.

31 Notes of Oct. 6, 2009 meeting, on file with National Taxpayer Advocate.

32 *Id.*

33 See, e.g., National Taxpayer Advocate 2011 Annual Report to Congress 350, 365 (Most Serious Problem: *The New Income Filter for the Federal Payment Levy Program Does Not Fully Protect Low Income Taxpayers from Levies on Social Security Benefits*).

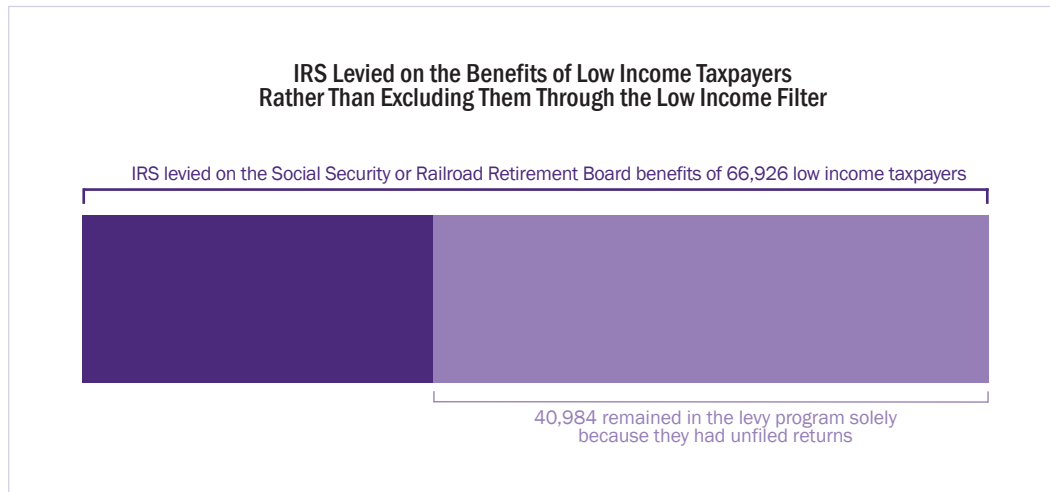
34 Delegation Order No. 13-3 grants the National Taxpayer Advocate the authority to issue a TAD to mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment, or provide an essential service to taxpayers. IRM 1.2.50.4, Delegation Order O-3 (formerly DO-250, Rev. 1), Authority to Issue Taxpayer Assistance Directives, (Jan. 17, 2001). See also IRM 13.2.1.6, Taxpayer Advocate Directives (July 16, 2009). Almost two years after the National Taxpayer issued the TAD, the Deputy Commissioner for Services and Enforcement sustained the appeal of the portion of the TAD pertaining to unfiled returns, refusing to adopt the National Taxpayer Advocate's position that the low income filter should cover these accounts. His memo notes: "Nonfilers are not compliant with their filing requirements and, thus, the IRS does not have the information to be able to determine if their income is less than 250% of the poverty level. Failing to comply with filing requirements is a threshold requirement that disqualifies taxpayers from consideration in other collection programs, such as installment agreement or offers in compromise." Memorandum from John M. Dalrymple, IRS Deputy Commissioner, Services and Enforcement to Nina E. Olson, National Taxpayer Advocate, TAD 2012-2, Low Income Filter in the Federal Payment Levy Program (Dec. 20, 2013). The Deputy Commissioner sustained the TAD on the issue of whether outstanding business debt should disqualify an account from the filter, and agreed to change the current policy as soon as practical.

35 SB/SE Finance, Research and Strategy Project DEN0206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* (May 2013).

36 *Id.* at 6, identifying 150,963 of these taxpayers.

levied on the Social Security or RRB benefits of 66,926.³⁷ Of these 66,926 taxpayers, 40,984 (61 percent) remained in the levy program solely because they had unfiled returns.³⁸

FIGURE 1.7.1, IRS Levies on Benefits



Had any of these taxpayers, prior to the levy, demonstrated their economic hardship (which, but for the unfiled returns, the IRS would have already presumed by running them through the low income filter), the IRS would have been prohibited from proceeding with the levy, according to the holding in *Vinaieri*.³⁹ Post levy, if any of these taxpayers requested a levy release and showed that he or she was experiencing economic hardship because of the levy, the IRS would be required to release it under IRC § 6343. Many taxpayers probably were experiencing economic hardship. For 2011, the *lowest* amount of ALE for a hypothetical single person who lived in the part of the country with the least expensive housing and also lived in the part of the country with the least expensive vehicle operating cost was \$17,200.⁴⁰ As discussed above, the median income of the taxpayers whose SSA or RRB benefits were levied was at most about \$17,500.⁴¹

³⁷ *Id.*

³⁸ TAS analysis of taxpayer accounts that formed the basis of the SB/SE Finance, Research and Strategy Project DENO206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers*. Throughout the study, SB/SE overstated the number of accounts with unfiled returns. Although the status code that indicates an unfiled return for purposes of the filter is 3, the SB/SE study also included, as accounts with unfiled returns for purposes of the filter, accounts with other status codes. TAS Research could not determine how many name mismatches there were, or whether a spouse had an invalid taxpayer identification number. To the extent either of these conditions were present, there may have been fewer than 40,984 such accounts.

³⁹ As discussed above, the IRS determined that 250 percent of the federal poverty level fairly approximates the regulatory definition of economic hardship and that determination operates as a presumption, at least for purposes of the FPLP levy filter.

⁴⁰ The lowest amount allowed for housing and utilities was \$645 per month, which is the amount allowed for taxpayers who live in Arthur County, Nebraska. The lowest amount of operating costs for one vehicle (not including ownership costs) was \$192 per month, the amount allowed for taxpayers who live in Seattle, Washington. The national standard for food and clothing was \$534 per month and for health care was \$60 per month. Thus, the least amount of ALE for a hypothetical taxpayer who lived in Arthur County, Nebraska but used the vehicle operating cost for Seattle, Washington was \$1,431. Total annual expenses for this hypothetical taxpayer would be \$1,431 X 12 = \$17,172. The October 2011 version of the IRS ALEs is available at <http://mysbse.web.irs.gov/Collection/toolsprocesses/AllowExp/Standards/default.aspx>.

⁴¹ The median income of taxpayers subject to levies on their SSA or RRB benefits was at most \$17,439 depending on the source the IRS used to measure it. SB/SE Finance, Research and Strategy Project DENO206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* Appx. H, 3 Table H5 (May 2013). The study does not provide the range of these taxpayers' incomes.

Moreover, Appendix A of the IRS study shows that the federal poverty level in 2011 was:

- \$10,890 for one person;
- \$14,710 for a couple;
- \$18,530 for a family of three; and
- \$22,350 for a family of four.⁴²

The median annual income of taxpayers whose SSA and RRB benefits were levied was at most about \$17,500.⁴³ Thus, the taxpayers whose payments were levied were not only low income in the sense that their incomes were less than 250 percent of the poverty guidelines, but there is a very real possibility they were actually living in poverty.⁴⁴ Taxpayers in these circumstances may not have protested the levies because they were incompetent, infirm, or intimidated by the IRS. Their Social Security benefits may have been payable, but for the levy, directly to nursing homes or other caregivers. That the IRS was able to actually collect money from these vulnerable taxpayers is not a justification for leaving the levies in place.

The characteristics of taxpayers whose SSA payments were levied in FY 2012 demonstrate the needless burden placed on taxpayers who, but for unfiled returns, would have been excluded from levy. A TAS Research analysis found about 53,000 taxpayers were subject to FPLP levies in 2012, and they collectively failed to file about 95,000 returns.⁴⁵ By July 2013, only slightly more than 16,000 returns had been secured.⁴⁶

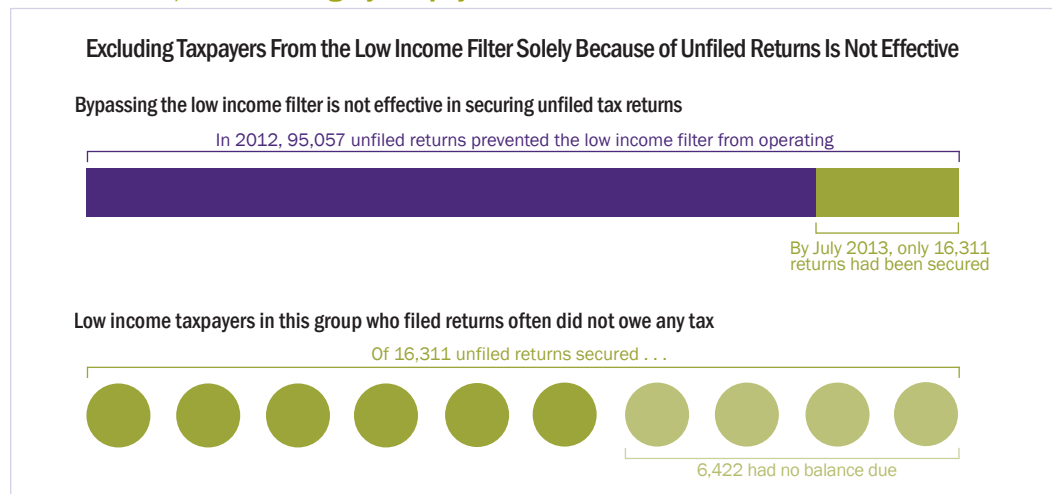
42 SB/SE Finance, Research and Strategy Project DEN0206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* Appx. A, Table 9 (May 2013).

43 The median income of taxpayers subject to levies on their SSA or RRB benefits was at most \$17,439 depending on the source the IRS used to measure it. SB/SE Finance, Research and Strategy Project DEN0206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* Appx. H, 3 Table H5 (May 2013). The study does not provide the range of these taxpayers' incomes.

44 Rather than posing to itself the question of whether it proceeded appropriately in automatically levying on these taxpayers who may have been living at or near the poverty level, the IRS appears to congratulate itself on the additional revenue it raised, noting that it collected an average of \$793 from each of the 66,926 taxpayers it levied and observing, "[t]he IRS could have lost \$53 million revenue if the NTA recommendation had been in place in CY 2011." SB/SE Finance, Research and Strategy Project DEN0206 *Federal Payment Levy Program (FPLP) and Low Income Taxpayers* 12 (May 2013). Moreover, as noted above, SB/SE overstated the number of accounts that had unfiled returns and consequently the "lost revenue" that could have resulted from adopting the National Taxpayer Advocate's recommendation.

45 We found that 52,857 low income taxpayers with 95,057 different unfiled returns received a levy in FY 2012. Individual Master File from IRS Compliance Data Warehouse.

46 Taxpayers filed 16,311 returns. Individual Master File from IRS Compliance Data Warehouse. The IRS filed an additional 4,566 substitutes for return but could have taken this action even without the FPLP levy.

FIGURE 1.7.2, Return Filing by Taxpayers Excluded from Low Income Filter

Of these 16,000 returns, over a third showed no balance due.⁴⁷ The total tax reported on the returns was \$30.8 million, of which 80 percent remained uncollected as of October 2013.⁴⁸ Thus, the insistence on securing returns resulted in returns actually being filed only about 20 percent of the time, and only 20 percent of the tax shown on those returns was collected by October of 2013.⁴⁹

Taxpayers in Economic Hardship Continue to Come to TAS and LITCs Because IRS Employees Persist in Conditioning Levy Release on Filing Delinquent Returns.

Directors of Low Income Taxpayer Clinics across the country have told TAS that about 75 percent of their levy release cases follow a similar fact pattern.⁵⁰ Typically, the taxpayer contacts the clinic because the IRS is levying on his or her wages, bank account, or Social Security payments. The taxpayer demonstrates that he or she is in economic hardship, so the LITC representative contacts the IRS and requests release of the levy. The IRS employee does not usually reject the assertion that the taxpayer is in economic hardship, but tells the clinic employee the IRS will not release the levy because the taxpayer has unfiled returns – that “until the returns are filed, I can’t help you.”⁵¹ Only if the clinic employee specifically cites the *Vinatieri* case, or the IRM requirements for CNC status, or otherwise insists that levy release and CNC status is appropriate does the IRS agree to release the levy without first receiving unfiled returns. TAS cases reflect the same fact pattern.⁵² As the LITC directors observed, an unassisted taxpayer would probably find these obstacles insurmountable.

47 Taxpayers filed 16,311 returns, 6,422 of which (39 percent) showed no balance due. Individual Return Transaction file, IRS Compliance Data Warehouse.

48 Of the \$30.8 million total tax shown on the returns, \$24.6 million remained uncollected as of October 2013. Accounts Receivable Dollar Inventory, IRS Compliance Data Warehouse.

49 Only 17.2 percent (16,311) of the 95,057 returns were secured and 79.9 percent of the \$30.8 million of total taxes was still due.

50 August 7, 2013 conference call with directors of nine LITCs in nine different states.

51 As discussed below, the IRS is not required to obtain documentation of the economic hardship before releasing a levy when the assessed amount is below a certain amount and other conditions are present. See IRM 5.11.2.2.1.4 (Aug. 24, 2010), cross referencing IRM 5.16.1.2.9(3) (May 22, 2012).

52 See, e.g., TAMIS cases 5511491, 5503338, and 5379810.

The IRS Can Determine from its Own and Third-Party Databases Whether a Taxpayer is Likely in Economic Hardship Before it Issues a Levy.

The Treasury regulation pertaining to levy release contemplates a taxpayer acting in good faith when requesting a levy release, and providing documentation to support the claim that the levy is causing economic hardship.⁵³ As discussed above, the IRS identified a proxy for establishing economic hardship within the meaning of IRC § 6343 for one class of taxpayers (those subject to levies on their Social Security payments), and adopted the FPLP low income filter to avoid levying on those taxpayers in the first place. This approach reduces the burden on taxpayers and on the IRS by obviating the need for taxpayers to request the release and substantiate the hardship the IRS already presumes, and for the IRS to release the levies.

Most importantly, the IRS in these cases acts in violation of the law, thereby subjecting itself to potential suit for negligent or reckless collection action.

The IRS could systemically exclude accounts from levies other than FPLP levies (such as wage and bank levies), if not based on a proxy, then on actual data that shows the taxpayer is in economic hardship. Revenue officers are already authorized to release a levy or place an account into CNC status *solely* on the basis of information on returns and in databases (both internal to the IRS and those maintained by third parties) that contain financial information about the taxpayer.⁵⁴ As an alternative to simply expanding the existing FPLP filter to include taxpayers who have unfiled returns, the IRS could develop a computer program that identifies taxpayers who, based on IRS records and other databases, are likely in economic hardship. It could deploy the program annually, and adjust it as necessary to identify taxpayers who, if levied, would be entitled to immediate levy release; conversely, annual review would identify taxpayers whose financial circumstances have improved to the point that collection action might be warranted. The National Taxpayer Advocate and TAS Research intend to explore the viability of this approach in the coming calendar year.

CONCLUSION

When taxpayers in demonstrated economic hardship contact the IRS to request levy release, the IRS continues to insist on securing unfiled returns as a condition to releasing the levy, a violation of IRC § 6343(a)(1)(D). Even sustaining a *proposed* levy under these circumstances is unlawful, according to the holding in *Vinatieri*. In addition to failing to appropriately deal with taxpayers when they contact the IRS, the IRS does not consistently ascertain *before levying* whether a taxpayer is likely facing economic hardship, even though information in its own and third-party databases permit it to make this determination. On the contrary, the IRS purposely excludes from a pre-levy filter some taxpayers it would otherwise presume to be in economic hardship solely because they have unfiled returns.

⁵³ See Treas. Reg. 301.6343-1.

⁵⁴ IRM 5.16.1.2.9(3) (May 22, 2012) provides that where the assessed amount is below a certain amount and other conditions are present, a collection information statement (CIS) is not required. IRM 5.11.2.2.1.4 (Aug. 24, 2010), pertaining to levy release, provides, “[w]hen the taxpayer cannot pay, assuming the levy is released, a CIS is required unless the exceptions listed in IRM 5.16.1.2.9(3), *Hardship*, (CNC exceptions) are met.”

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Establish quality review procedures that measure whether employees identified and considered the possibility that a taxpayer was in economic hardship before levying.
2. Establish quality review procedures that measure whether, in cases in which the employee identified economic hardship, the employee adhered to the *Vinatieri* decision by placing the account in Currently Not Collectible status rather than levying.
3. Develop and publish IRM guidelines for how collection employees, on the basis of information in IRS and third-party databases, should consider the possibility a taxpayer is in economic hardship before issuing a levy.
4. Adjust the FPLP low income filter to include accounts with unfiled returns.
5. Inform collection employees of procedural changes described above by issuing a separate alert and a memorandum.
6. Update training materials and job aids to reflect the *Vinatieri* decision and the 2013 changes to IRM 5.19 and 5.11.