

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

TUNG DANG & HIEU PHAM DANG,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 21100-17 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	

**ORDER**

By Order dated March 20, 2018, the Court (among other things) granted respondent’s Motion To Remand, filed January 3, 2018, and remanded this case to respondent’s Appeals Office for consideration of petitioners’ request for a so-called substitution of assets, i.e., levy on an individual retirement account (IRA), as a collection alternative. The Court further directed that the administrative hearing pursuant to such remand take place no later than April 13, 2018, that the parties file separate reports with the Court no later than May 22, 2018, regarding the then-present status of this case, and that respondent file by such date a supplemental notice of determination.

Each party filed a Status Report on May 22, 2018. Respondent attached to his Status Report a copy of a Supplemental Notice Of Determination, dated May 17, 2018, by respondent’s San Diego, California Appeals Office. The Summary of Determination provides as follows:

Your request to levy your IRA to full pay your liabilities is an acceptable substitution of assets. Appeals, therefore, grants your request. However, if proceeds are not received within 60 (sixty) days, other assets may be levied in no particular order.

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The Attachment to the Supplemental Notice Of Determination, which Attachment was prepared by the Appeals settlement officer who conducted the supplemental hearing, includes the following two paragraphs:

[The assigned settlement officer] reviewed your supplied financial information. She determined that your current income and allowable living expenses show no evidence of financial hardship. She also determined that although you have two other non-retirement savings accounts (health and education), only your IRA had sufficient funds to pay your liabilities in full.

Therefore, your request to levy your IRA to full pay your liabilities is an acceptable substitution of assets. Appeals, therefore, grants your request. However, if proceeds are not received within 60 (sixty) days, other assets may be levied in no particular order.

Neither the Supplemental Notice Of Determination nor the Attachment thereto (nor, for that matter, respondent's May 22, 2018 Status Report) expresses any rationale for the 60-day proviso.

As discussed in the Court's aforementioned Order dated March 20, 2018, the present case is highly unusual in that petitioners wish to pay their outstanding liabilities in full and ask only that respondent levy on an IRA in order to spare them the 10-percent additional tax on early distributions from a qualified retirement plan. See I.R.C. sec. 72(t)(2)(A)(vii), exempting from such 10-percent additional tax a distribution made on account of a levy under I.R.C. section 6331. The original Appeals settlement officer did not consider petitioners' request, apparently being under the impression that respondent's Appeals Office "doesn't select levy sources" and that "levy sources selected by [respondent's] Collection [Division] is a discretionary matter for Collection." Respondent sought to correct this misimpression through the aforementioned Motion To Remand, pointing out that a taxpayer can request a "substitution of assets" as a collection alternative during a collection due process (CDP) hearing, meaning that a taxpayer's request that collection be made from a specific revenue source or asset is an acceptable "collection alternative" request and should be considered by Appeals. This recognition by respondent, coupled with petitioners' specific request that respondent levy on the IRA, led the Court to remand this case. And, as already mentioned, respondent promptly conducted a supplemental administrative

hearing on petitioners' request, which hearing culminated generally in the relief that petitioners sought.

However, petitioners' Status Report, filed May 22, 2018, includes the following paragraphs:

5. While the Supplemental Notice appears to grant Petitioners' request for the IRS to levy on Petitioner-husband's IRA, it is subject to a condition that is outside the control of Petitioners and clearly will not be met. The Supplemental Notice provides "if proceeds are not received within 60 (sixty) days, other assets may be levied in no particular order."

6. Issuance of the levy required for implementation of the Supplemental Notice is, subject to applicable legal restrictions, wholly within the control of Respondent.

7. Response to the levy is outside the control of Petitioners and depends on the actions of a third party, the IRA custodian.

The Court will not indulge in "conspiracy theories", as alluded to in petitioners' Status Report, nor will the Court presume bad faith on respondent's part. However, petitioners do have a point: respondent is the party who will levy on the IRA, and the IRA custodian is a third party who will respond to the levy. This lack of control by petitioners, combined with the absence of any rationale expressed for the aforementioned 60-day proviso, together with respondent's acknowledgment that levy on the IRA will fully satisfy petitioners' outstanding liabilities for the two years in issue, lead the Court to conclude that respondent's authority to proceed with the proposed levy should be limited to levying on the IRA in question. Further, given that petitioners' underlying liabilities are not in issue in this case and that petitioners desire to promptly pay in full their outstanding liabilities for the two years in issue through a levy by respondent on the IRA in question, the Court concludes that good cause exists not to suspend the levy on such IRA. See I.R.C. sec. 6330(e)(2).

Premises considered, it is hereby

ORDERED that, on the Court's own motion, respondent may proceed forthwith (and without regard to the aforementioned 60-day proviso) with the

proposed levy on, and only on, the IRA in question in order to collect petitioners' outstanding liabilities for the taxable (calendar) years 2008 and 2009. It is further

ORDERED that the parties shall, on or before Friday, July 13, 2018, file separate reports regarding the then-present status of this case. It is further

ORDERED that action on petitioners' Motion For Judgment On The Pleadings, filed February 5, 2018, is held in abeyance pending receipt of the parties' aforementioned status reports. The parties are advised that the Court would anticipate denying such motion in full if respondent proceeds forthwith to levy on the IRA in question such that petitioners' liabilities for the two years in issue are fully satisfied.

**(Signed) Robert N. Armen**  
**Special Trial Judge**

Dated: Washington, D.C.  
June 4, 2018