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Casenotes: Tax Collection — Where One Codepositor in a Joint Bank Account Fails to Pay Federal Income Tax, the Internal Revenue Service May Levy on the Account without Notice to Innocent Codepositors, Provided the Delinquent Taxpayer Has an Absolute Right under State Law to Withdraw Funds from the Joint Account. *United States v. National Bank of Commerce*, 105 S. Ct. 2919 (1985)

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**TAX COLLECTION—WHERE ONE CODEPOSITOR IN A JOINT BANK ACCOUNT FAILS TO PAY FEDERAL INCOME TAX, THE INTERNAL REVENUE SERVICE MAY LEVY ON THE ACCOUNT WITHOUT NOTICE TO INNOCENT CODEPOSITORS, PROVIDED THE DELINQUENT TAXPAYER HAS AN ABSOLUTE RIGHT UNDER STATE LAW TO WITHDRAW FUNDS FROM THE JOINT ACCOUNT.** *United States v. National Bank of Commerce*, 105 S. Ct. 2919 (1985).

The Internal Revenue Service (IRS) assessed an Arkansas resident for federal income taxes, penalties, and interest.<sup>1</sup> The delinquent taxpayer shared a checking account and savings account with his wife and his mother at an Arkansas bank. The contract with the bank authorized all three to make withdrawals from either account. Pursuant to section 6331 of the Internal Revenue Code (Code), the IRS served a notice of levy on the bank demanding payment of the unpaid taxes.<sup>2</sup> The bank refused to comply with the levy because it could not identify which portion of deposited money belonged to the delinquent taxpayer and which to the other codepositors.<sup>3</sup> The United States brought an action seeking judgment against the bank under section 6332 of the Code for the amount of the assessment.<sup>4</sup>

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1. *United States v. National Bank of Commerce*, 105 S. Ct. 2919, 2922 (1985). The taxpayer was assessed a total amount of \$3,607.45. As a result of payments and credits, the amount owing was reduced to \$856.61. *Id.*

2. *Id.* at 2922. I.R.C. § 6331 (1982) provides:

**LEVY AND DISTRRAINT.**

(a) *Authority of Secretary*—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 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 § 6334) belonging to such person or on which there is a lien provided in this chapter for payment of such tax.

(b) *Seizure and Sale of Property* - The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (d)(3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary 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).

I.R.C. § 6331 (1982).

3. *National Bank*, 105 S. Ct. at 2922.

4. *Id.* The text of I.R.C. § 6332(a) (1982) provides in part:

**SURRENDER OF PROPERTY SUBJECT TO LEVY.**

(a) *Requirement* -[A]ny 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, surrender such property or rights (or discharge such obligation) to the Secretary, 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.

I.R.C. § 6332(a) (1982). A bank which refuses to comply with an IRS notice of levy and demand for payment may be subject to a penalty of 50% of the amount sought by the IRS. *See* I.R.C. § 6332(c)(2) (1982). In deciding whether to impose a penalty, lower courts have considered whether there exists a bona fide dispute to the

The United States District Court for the Eastern District of Arkansas granted the bank's motion to dismiss, holding that the IRS failed to meet minimum procedural due process requirements.<sup>5</sup> The court held that the IRS must identify and notify the codepositors, and provide them with an opportunity to be heard.<sup>6</sup> The United States Court of Appeals for the Eighth Circuit affirmed,<sup>7</sup> but not upon constitutional grounds. Relying on principles of statutory construction, the court held that before a levy is permitted the IRS must determine the actual value of the taxpayer's interest in the joint account to demonstrate that the bank is in possession of property belonging to the taxpayer.<sup>8</sup> The court ruled that the IRS could not prevail without negating or quantifying the claims of the codepositors.<sup>9</sup> On certiorari, a sharply divided Supreme Court reversed.<sup>10</sup> The majority recognized that the taxpayer's absolute right under state law to withdraw funds deposited in the joint accounts created "property or rights to property" within the meaning of section 6321 of the Code.<sup>11</sup> Consequently, the accounts in their entirety were subject to administrative levy.<sup>12</sup>

The United States Constitution provides the federal government with the authority to levy and collect taxes.<sup>13</sup> Pursuant to this general authority, the United States Congress enacted a statute in 1791 authorizing the seizure and sale of property owned by manufacturers of distilled spirits who failed to pay excise taxes.<sup>14</sup> Similar legislation permitted the seizure and sale of property whose owners failed to pay property tax<sup>15</sup>

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property such that the bank acted with good cause in refusing payment. See *United States v. Sterling Nat'l Bank & Trust Co. of N.Y.*, 494 F.2d 919 (2nd Cir. 1974); *United States v. Citizens & S. Nat'l Bank*, 538 F.2d 1101 (5th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). If a bank does comply with a notice of levy and demand for payment by the IRS, the bank is not liable to the depositors in the accounts. Compliance with IRS demands is an absolute defense from any action against the bank by the depositors. See *Sebel v. Lytton Sav. and Loan Ass'n*, 65-1 USTC ¶ 9343 (S.D. Cal. 1965).

5. *United States v. National Bank of Commerce*, 554 F. Supp. 110, 114-15 (E.D. Ark. 1982).

6. *Id.*

7. *United States v. National Bank of Commerce*, 726 F.2d 1292 (8th Cir. 1984).

8. *Id.* at 1293. The court acknowledged that the taxpayer could have withdrawn any amount he wished from the account and used it to pay his debts, including his unpaid taxes, but rejected the government's contention that the IRS stood in the shoes of the taxpayer and could act as he could with respect to the accounts. *Id.* at 1295-96.

9. *Id.*

10. *United States v. National Bank of Commerce*, 105 S. Ct. 2919 (1985) (5-4 decision).

11. *Id.* at 2926.

12. *Id.*

13. U.S. CONST. art. I, § 8 provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

14. 1 Stat. 199, 204 (1791). See also 3 Stat. 152, 154 (1814) (reenacting a similar statute).

15. 3 Stat. 164, 173 (1815).

and permitted the seizure and sale of goods from manufacturers who failed to pay tax upon those goods.<sup>16</sup> The present federal tax lien statute is codified in section 6321 of the Code and resembles the first federal tax lien statute<sup>17</sup> enacted by Congress in 1865,<sup>18</sup> which was amended in 1866.<sup>19</sup>

Under section 6321 of the Code, a tax lien arises in favor of the United States when a taxpayer fails to pay any tax owed to the federal government.<sup>20</sup> Although the lien attaches to all property or rights to property belonging to the taxpayer,<sup>21</sup> it does not contain an enforcement provision. The IRS must take affirmative action under one of two Code sections to collect the unpaid taxes.<sup>22</sup> Section 7403 authorizes the IRS to institute a lien foreclosure suit,<sup>23</sup> and section 6331 empowers the IRS to

16. 3 Stat. 180, 182 (1815).

17. I.R.C. § 6321 (1982). See Oppenheim, *Federal Tax Liens: Evolution and Conflict with State Liens*, 4 DUQ. L. REV. 495, 496 (1965-66).

18. 13 Stat. 469, 470 (1865). This statute was an amendment to a statute enacted in 1864. The 1864 statute provided for distraint of property, but did not impose a lien on the property. See 13 Stat. 223, 233 (1864). See generally Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905, 919-20 (1954) (indicating a reason for the enactment of the first tax lien: "The need for a lien to secure the Government's tax claims, irrespective of the taxpayer's solvency, became apparent as federal fiscal requirements expanded during the Civil War and tax collections were increasingly defeated by a transfer of the taxpayer's assets before institution of enforcement proceedings.").

19. 14 Stat. 98, 107 (1866). This statute was an amendment to both the statute in 1864 and its amendment in 1865. See *supra* note 18. It provided that if any person was liable to pay tax and, after notice refused:

[T]he amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person . . . and the collector, after demand, may levy, and by warrant may authorize a deputy collector to levy upon all property and rights to property belonging to such person . . . .

14 Stat. at 107.

20. I.R.C. § 6321 (1982). The statute provides:

**LIEN FOR TAXES.**

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, tangible or intangible, belonging to such person.

I.R.C. § 6321 (1982). See also Oppenheim *supra* note 17, at 496 ("[B]efore a federal tax lien arises, three conditions must be fulfilled. There must be an assessment, a demand, and a neglect or refusal to pay tax.").

21. *Id.*

22. *United States v. Rodgers*, 461 U.S. 677, 682 (1983).

23. I.R.C. § 7403 (1982) provides in part:

**ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.**

(a) *Filing* - In any case where there has been a refusal or neglect to pay any tax or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the

employ an administrative levy.<sup>24</sup> Both procedures ensure the prompt and certain enforcement of the tax laws,<sup>25</sup> but differ in their treatment of third parties who have a joint interest in the delinquent taxpayer's property.<sup>26</sup>

Under the lien foreclosure suit, the court is authorized to seize and sell a delinquent taxpayer's property to satisfy a tax debt.<sup>27</sup> All persons with an interest in the seized property must be made parties to the suit.<sup>28</sup> The court is empowered to determine the merits of the claims of all parties involved, order the sale of such property, and provide for the proper distribution of the proceeds of the sale.<sup>29</sup> The lien foreclosure suit protects third parties with an interest in the property from an unsuspected lien on the property by the IRS. The lien foreclosure action also benefits the IRS by providing the highest return possible on the forced sale of seized property.<sup>30</sup>

Under the administrative levy, the IRS may seize and sell a delinquent taxpayer's property to satisfy a tax debt.<sup>31</sup> The IRS must notify the delinquent taxpayer of the tax liability and demand payment.<sup>32</sup> Ten days after notification, the IRS can levy all property owned by the taxpayer whether or not that property is owned jointly with a third party.<sup>33</sup> If the property is in the possession of a third party, then the third party

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United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties* - All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and decree* - The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States.

I.R.C. § 7403 (1982).

24. For the text of I.R.C. § 6331 (1982), see *supra* note 2. There are a number of exemptions listed in § 6334 of the Code which describe property upon which a levy cannot attach. These exemptions are basically necessities, which include clothing, books, personal effects, unemployment benefits, undelivered mail, pensions, workmen's compensation, and child support payments. I.R.C. § 6334 (1982).

25. *Rodgers*, 461 U.S. at 683.

26. A third method of collecting unpaid taxes available to the IRS is a common law creditor action which gives the IRS the rights of a judgment creditor. This note does not discuss the rights of the federal government as an ordinary judgment creditor.

27. I.R.C. § 7403(c) (1982). See *supra* note 23.

28. I.R.C. § 7403(b) (1982).

29. I.R.C. § 7403(c) (1982).

30. *Rodgers*, 461 U.S. at 699.

31. I.R.C. § 6331(b) (1982).

32. I.R.C. § 6331(d)(1) (1982).

33. I.R.C. §§ 6331(a), 6332(a) (1982). See *supra* notes 2 and 4.

must surrender the property to the IRS upon demand.<sup>34</sup> In contrast to the lien foreclosure suit, the administrative levy does not require judicial intervention,<sup>35</sup> nor does it require notice to anyone with an interest in the property other than the delinquent taxpayer. Although the administrative levy provides the IRS with a quick and inexpensive device for collecting federal taxes,<sup>36</sup> it leaves third parties with an interest in the levied property with the burden of protecting their ownership interests in post-seizure actions.<sup>37</sup>

Before the IRS can avail itself of either the lien foreclosure suit or the administrative levy, there must be a federal tax lien upon the taxpayer's property.<sup>38</sup> A lien may only attach to property owned by the taxpayer.<sup>39</sup> Thus, regardless of the remedy pursued by the IRS, the threshold question is whether and to what extent the taxpayer has property or rights to property.

In *United States v. Bess*,<sup>40</sup> the United States Supreme Court considered whether the IRS could impose an administrative levy upon the proceeds of life insurance policies.<sup>41</sup> The Court held that the IRS could not attach the proceeds of the insurance policies, but that it could recover the cash surrender value of the policies.<sup>42</sup> The Court stated that the Code does not create property rights, but merely attaches federally defined consequences to property rights created by state law.<sup>43</sup> Under state law the taxpayer in *Bess* had no right to the proceeds of the policies, but he could have compelled payment of the cash surrender value of the policies.<sup>44</sup> The Court concluded that the taxpayer's right to the cash surrender value of the policies constituted property or rights to property which was subject to seizure under an administrative levy.<sup>45</sup> The beneficiary argued that the IRS could not levy even on the cash surrender value of the policy because the proceeds of the policy were beyond the reach of a creditor's lien under state law.<sup>46</sup> The Court rejected this argument, holding that state law cannot prevent the operation of a federal tax lien once a property right is determined.<sup>47</sup> The Court also noted that property not expressly exempted from the operation of a federal tax lien by the Code<sup>48</sup>

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34. I.R.C. § 6332(a) (1982). See *supra* note 4.

35. *Rodgers*, 461 U.S. at 682-83.

36. *Id.* at 699.

37. I.R.C. §§ 6343, 7426 (1982). See *infra* note 68.

38. I.R.C. §§ 6331(a), 7403(a) (1982).

39. I.R.C. § 6321 (1982).

40. 357 U.S. 51 (1958).

41. *United States v. Bess*, 357 U.S. 51, 52 (1958). The estate reduced the indebtedness to approximately \$9,000. *Id.*

42. *Id.* at 55-57.

43. *Id.* at 55.

44. *Id.* at 56.

45. *Id.*

46. *Id.*

47. *Id.* at 56-57.

48. *Id.* at 57. For a list of exempted property, see *supra* note 24.

could not be judicially exempted.<sup>49</sup>

Two years later, in *Aquilino v. United States*,<sup>50</sup> the Court articulated the respective roles of state and federal law. The Court emphasized that in cases involving federal tax liens the first issue is whether the taxpayer has property or rights to property upon which a lien can attach.<sup>51</sup> This issue is determined according to state law because of the "legitimate and traditional interest which the state has in creating and defining the property interests of its citizens."<sup>52</sup> Once a property interest is found, the Court stated that state law is no longer applicable. The application of federal law to property interests created by state law ensures "a uniform administration of the federal revenue statutes."<sup>53</sup>

Neither *Bess* nor *Aquilino* determined whether a federal tax lien could attach to jointly held property to satisfy the tax debt of one of the joint owners. In *Babb v. Schmidt*,<sup>54</sup> the Ninth Circuit upheld the use of an administrative levy upon joint bank accounts belonging to a husband and a wife to satisfy the tax obligations of the husband.<sup>55</sup> The Third Circuit earlier had reached a contrary result in *Raffaele v. Granger*.<sup>56</sup> In *Raffaele*, the court focused not on whether the codepositor had the right to withdraw the full amount of the bank accounts, but rather on whether, under state law, the accounts which are owned jointly by a husband and wife are considered to be held in tenancy by the entireties and therefore

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49. *Id.* See also *United States v. Mitchell*, 403 U.S. 190, 205 (1971) (stating in regard to the language of the exception provision of § 6334: "This language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law.").

50. 363 U.S. 509 (1960).

51. *Aquilino v. United States*, 363 U.S. 509, 512 (1960).

52. *Id.* at 514.

53. *Id.* The Court considered whether an IRS administrative tax levy on the property interest of a general contractor in a construction contract had priority over a mechanic's lien against the contract filed by subcontractor. *Id.* at 510-22. The subcontractor argued that under New York law the amount due to the general contractor from the owner constituted "trust funds" in the hands of the general contractor for the benefit of subcontractors, laborers, and materialmen and that the general contractor thus had no property rights in the fund to which the IRS's levy could attach. The trial court entered a judgment in favor of the IRS and the Court of Appeals of New York affirmed. The United States Supreme Court vacated the judgment because the Court of Appeals of New York had not determined clearly what property or rights to property the general contractor had in the fund under state law. *Id.* at 515-16. The Court remanded the case to the Court of Appeals of New York for a determination of the nature of property interests of the general contractor in the fund. *Id.* at 513-14.

54. 496 F.2d 957 (9th Cir. 1974).

55. *Id.* at 959. The court did not focus on whether the husband had any property or rights to property in the accounts under state law, but rather on whether the wife's property could be used to satisfy the husband's debts under state law.

Other cases have held that a joint bank account may be levied to satisfy taxes owed by one codepositor. See, e.g., *Riollano v. District Director of Internal Revenue*, 197 F. Supp. 318 (S.D.N.Y. 1961); *United States v. Third Nat'l Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953); *United States v. Equitable Trust Co.*, 49 A.F.T.R.2d ¶ 82-484 (D. Md. 1981).

56. 196 F.2d 620 (3rd Cir. 1952).

not subject to creditors' claims.<sup>57</sup> The court determined that, under Pennsylvania law, a joint bank account was a "single personality" which was not subject to attachment by creditors of one of the codepositors.<sup>58</sup> Expressing concern that the IRS was attempting to take property belonging to one person to satisfy the tax obligation of another,<sup>59</sup> the court held that a tax levy upon a joint bank account was not permitted.<sup>60</sup> Similar concern for the rights of nondelinquent codepositors led the Eighth Circuit to deny the IRS the right to levy the joint accounts in *United States v. National Bank of Commerce*.<sup>61</sup>

On appeal the United States Supreme Court reversed the lower courts.<sup>62</sup> Consistent with *Bess* and *Aquilino*, the Court found that the taxpayer's absolute right under state law to withdraw funds from the accounts created property or rights to property in the entire account.<sup>63</sup> The Court held that upon the tax default of one codepositor,<sup>64</sup> the joint accounts were subject to federal tax lien provisions without proof that the delinquent taxpayer had complete ownership of the accounts.<sup>65</sup> The Court also held that the IRS was not required to provide notice of the tax lien to the codepositors because under the administrative levy there is no

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57. *Raffaele v. Granger*, 196 F.2d 620, 622 (3rd Cir. 1952). The court's focus in *Raffaele* was misplaced. The issue was not whether the property was subject to creditors' claims under state law, but rather whether the taxpayer had property or rights to property in the bank account. Because the taxpayer did have the right to withdraw money from this account, he had a right to property in the account under state law. Once it is determined that the taxpayer has a property right under state law, state law consequences become irrelevant and federal law controls as to tax consequences. The property should have been subject to the federal tax lien. See *supra* notes 43-53 and accompanying text.

58. *Raffaele*, 196 F.2d at 622.

59. *Id.* at 623. Even courts which have allowed the use of a federal tax lien upon jointly held property have demonstrated concern for the rights of the nondelinquent codepositor. These courts have gone to great lengths to justify the lien instead of simply determining whether the delinquent taxpayer had property or rights to property in the property seized. See, e.g., *United States v. Millikin*, 62-2 U.S. Tax Cas. (CCH) ¶ 9641 (M.D.N.C. 1962) (After determining that the husband was the sole source of the funds used to purchase the bonds, the court held that United States savings bonds owned jointly by a husband, wife, and their daughter were subject to levy to satisfy the husband's tax debts.).

60. 196 F.2d at 622-23.

61. 726 F.2d 1292 (8th Cir. 1984).

62. *United States v. National Bank of Commerce*, 105 S. Ct. 2919, 2927 (1985).

63. *Id.* at 2926.

64. *Id.* at 2927, 2931. The right of the codepositor-taxpayer to withdraw the full amount in the joint accounts was based on the taxpayer's contract with the bank and on an Arkansas statute. *Id.* at 2926. Under Arkansas law, a bank account is not subject to creditor's liens. *Id.* at 2925-26. As in *Bess* and *Aquilino*, however, state law exemptions are inoperable once the court determines that the taxpayer has property or rights to property in the accounts. *Id.* at 2927-28. Thus, the Court in *National Bank* indicated that the lower courts had applied state law inappropriately. *Id.* at 2927. Once state law defines the nature of the interest which the taxpayer has in the property, federal law dictates the tax consequences to the state law right. *Id.* at 2928.

65. *Id.* at 2927.

requirement of notice to the innocent codepositor.<sup>66</sup>

The Court addressed the lower courts' concern for the third parties who share in the ownership of joint accounts and whose interest might be affected by a tax lien.<sup>67</sup> The Court noted that Congress has provided remedies for third parties seeking to protect their property interests.<sup>68</sup> The Court deferred to the congressional scheme, stating that Congress had balanced the government's interest in the prompt collection of taxes against the claimant's interest in the property.<sup>69</sup> Congress reconciled these interests by permitting the IRS to levy on the property immediately, leaving disputes over ownership to be resolved in post-seizure ad-

66. *Id.* at 2926. The Court noted that a bank's only two possible defenses for refusal to comply with a demand for payment by the IRS are that the property is subject to prior judicial attachment or that the bank is not in possession of the property subject to the tax lien. *Id.* at 2925.

67. *Id.* at 2928.

68. *Id.* at 2928. One remedy is to seek an administrative review within nine months of the date of the notice of levy. I.R.C. § 6343(b) (1982). See also Treas. Reg. § 301.6343-1(b)(2) (1984). I.R.C. § 6343(b) (1982) provides:

Authority to release levy and return property

(a) *Release of Levy* — It shall be lawful for the Secretary, under regulations prescribed by the Secretary, to release the levy upon all or part of the property or rights to property levied upon where the Secretary determines that such action will facilitate the collection of the liability, but such release shall not operate to prevent any subsequent levy.

(b) *Return of Property* — If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return—

- (1) the specific property levied upon,
- (2) an amount of money equal to the amount of money levied upon, or
- (3) an amount of money equal to the amount of money received by the United States from the sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months of the date of such levy . . . .

(c) Interest shall be allowed and paid at an annual rate established under section 6621 . . . .

I.R.C. § 6343(b) (1982). A second remedy is that a party claiming an interest in property may bring a civil action against the United States to have the property returned. I.R.C. § 7426 (1982). This section reads in part:

Civil actions by persons other than taxpayers

(a) *Actions permitted-*

- (1) *Wrongful levy* - If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to other such property which has been surrendered to or sold by the Secretary . . . .

I.R.C. § 7426 (1982).

69. *National Bank*, 105 S. Ct. at 2929.

ministrative or judicial proceedings.<sup>70</sup> Finally, the Court reasoned that if the IRS were required to notify third parties and include them in collection proceedings, there would be no practical distinction between the administrative levy and the lien foreclosure suit.<sup>71</sup>

In a dissenting opinion, Justice Powell, joined by three other justices, argued that both prior decisions and the rights of third parties compelled a decision against the IRS.<sup>72</sup> In comparing the lien foreclosure suit and the administrative levy, the dissent urged that only the lien foreclosure suit permitted the IRS to seize property in which a delinquent taxpayer had a partial interest.<sup>73</sup> In contrast, the administrative levy could be employed only where the taxpayer had full ownership of the property levied.<sup>74</sup> The dissent concluded that the levy in this case was improper because the IRS did not demonstrate that the bank held property "completely" belonging to the delinquent taxpayer.<sup>75</sup>

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70. *Id.*

71. *Id.* at 2931. The Court noted that such a rule could eliminate the use of the administrative levy altogether. *Id.* The Supreme Court did not address the constitutional issues concerning notice to third parties, but noted that the parties were free to address this issue on remand. *Id.* at 2929 n.12. On remand, the Court of Appeals for the Eighth Circuit refused to enforce the levy against the bank, and remanded the case to the district court to resolve the issue of notice. *United States v. National Bank of Commerce*, 772 F.2d 438 (8th Cir. 1985). On remand, the case was dismissed as moot because the tax debt had been paid. *United States v. National Bank of Commerce*, 775 F.2d 1050 (8th Cir. 1985). Therefore, whether notice must be given to nondelinquent codepositors of joint bank accounts is unresolved.

The statutory post-seizure remedies may satisfy due process. The Court has stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In *Phillips v. Commissioner*, 283 U.S. 589 (1931), the Court demonstrated that remedies which are available after the seizure of property can comport with due process mandates. In *Phillips*, the government assessed taxes and penalties against the shareholders in a dissolved corporation and utilized administrative proceedings to collect the taxes. *Id.* at 595. The Court noted that where property rights alone are involved, postponement of the judicial inquiry does not deny due process if the opportunity for the ultimate judicial determination of the liability is adequate. *Id.* at 596-97. *National Bank* implies that the post-seizure remedies are adequate. See *supra* notes 67-70 and accompanying text. Although *National Bank* and *Phillips* indicate that the post-seizure remedies available to third parties may be sufficient to meet due process requirements neither address the issue of notice, and the facts in *Phillips* did not involve third parties.

72. *National Bank*, 105 S. Ct. at 2932 (Powell, J., dissenting).

73. *Id.* at 2933.

74. *Id.*

75. *Id.* at 2935. The majority rejected this contention by asserting that the word "completely" is not part of the statute. *Id.* at 2929-30 n.14. Further, the majority stated that "collection provisions plainly contemplate that a taxpayer's interest in the property may be less than full ownership. The tax lien attaches not only to 'property', but also to 'rights to property'." *Id.* at 2929-30.

The dissent relied upon *Mansfield v. Excelsior Refining Co.*, 135 U.S. 326 (1890), and *United States v. Rodgers*, 461 U.S. 677 (1983), to support the proposition that only property completely belonging to a delinquent taxpayer may be subject to an administrative levy. *National Bank*, 105 S. Ct. at 2932-35 (Powell, J., dissenting). These cases were distinguished by the majority. *Id.* at 2930 n.15.

Like the majority, the dissent looked to state law to determine the nature of the delinquent taxpayer's interests in the property seized. The dissent found that under state law the taxpayer legally could not possess the funds of others,<sup>76</sup> and that the right to withdraw all of the funds from the accounts was not sufficient alone as a basis for allowing an administrative levy.<sup>77</sup> The dissent reasoned that the majority's holding permits the IRS to levy on a joint account even though it knew that under state law the funds in the joint account did not belong to the delinquent taxpayer.<sup>78</sup>

*National Bank* supports the legitimate interest of the government in the enforcement of its tax laws. It is also consistent with the Court's prior decisions in *Bess*<sup>79</sup> and *Aquilino*.<sup>80</sup> The Court in *National Bank*, however, failed to carefully consider the adverse impact on the nondelinquent codepositor of a joint bank account.<sup>81</sup> The Court stated that the administrative levy, unlike a lien foreclosure suit, does not implicate the rights of third parties.<sup>82</sup> This conclusion assumes that third parties will bring post-seizure actions. The innocent codepositor may not bring a post-seizure action, however, for two reasons. First, the innocent codepositor may not know that the joint account has been seized because there is no notice requirement to third parties under an administrative levy.<sup>83</sup> Second, even if he were made aware of the levy, the innocent codepositor may not pursue a post-seizure remedy because the loss incurred might be less than the anticipated expense of the remedy. Therefore, the majority's contention that third party rights are not implicated

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*Mansfield* involved the use of a levy in which the court held that the government may not levy upon a leasehold interest and then sell a fee interest. *Id.* at 2934 (Powell, J., dissenting). The majority asserted that this case stood for the proposition that the government cannot sell a totally different interest than it levied upon. *Id.* at 2931 n.15. *Rodgers* did not involve the use of the administrative levy, but rather the lien foreclosure suit. *Id.* at 2930. Nevertheless, the Court contrasted the two remedies and stated that the administrative levy does not require notice and hearing to third parties because their rights are not intended to be implicated. *Compare id.* at 2934 (Powell, J., dissenting) with *Rodgers*, 461 U.S. at 696. The majority stated that the decision in *National Bank* is consistent with *Rodgers* because the administrative levy does not determine any rights to the property. It functions to protect the government's interests so that rights to the property may be determined in a post-seizure proceeding. *National Bank*, 105 S. Ct. at 2930.

76. *National Bank*, 105 S. Ct. at 2933 (Powell, J., dissenting).

77. *Id.* at 2935.

78. *Id.* at 2937-38 nn.9-10. The dissent also stated that the administrative levy could hardly be characterized as provisional because the burden to bring postseizure actions is on third parties. *Id.* at 2938-39.

Another area of concern raised by the dissent was that the majority's holding will be applicable to other forms of joint property. *Id.* at 2939. However, this concern was dispelled because the majority expressly stated that the holding is limited to joint bank accounts. *Id.* at 2927, n.10.

79. 357 U.S. 51 (1958). See *supra* notes 40-49 and accompanying text.

80. 363 U.S. 509 (1960). See *supra* notes 50-53 and accompanying text.

81. *National Bank*, 105 S. Ct. at 2928-29.

82. *Id.* at 2930 (quoting *United States v. Rodgers*, 461 U.S. 677, 696 (1983)).

83. *Id.* at 2930.

is inaccurate insofar as it ignores the potential adverse effect to innocent third parties.

The Court stated that third parties are not joined in administrative levy proceedings, as they are in lien foreclosure suits, because joining third parties in an administrative levy proceeding would be uneconomical.<sup>84</sup> This conclusion suggests that the administrative levy should be used for the collection of small sums of unpaid taxes and the lien foreclosure suit for larger amounts. The Code does not limit the use of the administrative levy to disputes involving relatively small monetary amounts.<sup>85</sup> If the Court, or Congress, were to specify a maximum dollar amount for administrative levy proceedings, innocent third parties would be protected from the danger of a government levy on large property interests in actions where third parties would not be joined automatically.

Maryland law is similar to Arkansas law in that a person who is a party to a joint bank account may withdraw all of the funds in that account.<sup>86</sup> Therefore, a joint bank account in Maryland constitutes property or rights to property upon which a federal tax lien may attach. As in *National Bank*, a joint bank account in Maryland may be seized by the IRS without notification to an innocent codepositor.

*National Bank* affirms the importance of providing the IRS with an effective, prompt, and stringent means of tax collection.<sup>87</sup> The Court's holding that a bank account may be levied upon, even when jointly held, is consistent with the scheme of the Internal Revenue Code to promote the efficient collection of taxes. Although the government's compelling interest in collecting taxes may be paramount to the rights of innocent third parties who hold property jointly with delinquent taxpayers, greater protection should be afforded such third parties to avoid potentially harsh results.

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84. *Id.* at 2931.

85. In *Rodgers*, the IRS used a lien foreclosure suit for the collection of taxes owed in the amount of \$900,000.00. In *National Bank*, the IRS used an administrative levy for the collection of \$856.61. Although these cases indicate that the lien foreclosure suit is used for large dollar amounts, it is unclear where the cutoff is. For example, in *United States v. Sterling Nat'l Bank & Trust Co. of N.Y.*, 494 F.2d 919 (2d Cir. 1974), the IRS used an administrative levy to seek collection of taxes owed in the amount of \$15,531.25.

86. See *Haneke v. United States*, 404 F. Supp. 98, 108 (D. Md. 1975); *Scott v. Bowman*, 253 Md. 55, 58, 251 A.2d 598, 599 (1969); *Sody v. Sody*, 32 Md. App. 644, 652-53, 363 A.2d 568, 573-74 (1976); *United States v. Equitable Trust Co.*, 49 A.F.T.R.2d ¶¶ 82-428, 82-725 (D. Md. 1982). See also MD. FIN. INST. CODE ANN. § 5-303 (1980) ("If a deposit in a banking institution is made in the names of two or more persons and is payable to any one of them . . . [t]he money in the account may be withdrawn by any person named on the account . . .").

87. "[T]axes are the life blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935).