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Subject: **Tax Court Affirms IRS Levy on IRA for Unpaid Income Tax**

Major References: [*Swanton v. Comm'r, T.C. Memo 2010-140*](#)

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In Swanton v. Comm'r, T.C. Memo, 2010-140, the Tax Court ruled that the value of IRA assets seized by the Internal Revenue Service for unpaid tax liabilities is includible in the income of the asset owner (i.e., taxpayer and IRA holder) in the year of the levy.

The Tax Court's holding in *Swanton* is a reminder that assets of IRAs and qualified plans are subject to levy for unpaid taxes and that when such assets are so seized, the participant/IRA owner must include their value in his gross income for income tax purposes in the year of the levy. In *Swanton*, the taxpayers were found to be responsible persons regarding the failure of their defunct business to remit withheld employment tax to the Treasury. As a result they were liable for the trust fund recovery penalties associated with that failure. The Revenue Service then seized almost \$290K from the IRA of one of the taxpayers in order to collect that penalty.

The taxpayer did not challenge the IRS' right to levy his IRA assets. Generally, IRAs do not have the ERISA § 204 and Revenue Code § 401(a)(13) anti-alienation protections provided to participants in qualified plans. Additionally, notwithstanding the general anti-alienation rules that apply to qualified plans, the Service can levy IRA assets and qualified plan assets in order to satisfy unpaid tax liabilities.

However, the taxpayer did dispute whether he was required to include the value of the seized assets in gross income. The Tax Court ruled that the seized assets are treated as though they were distributed to the taxpayer. The Court looked to § 72 to determine the tax effect of the seizure of the IRA assets, since

that section governs the taxation of IRA distributions. Because the taxpayer offered no proof that any of the contributions made to the IRA were nondeductible, the full value of the seized assets was includible in income in the year of the levy. The Court noted that the payment of Federal taxes by way of a levy is an involuntary assignment of income and may be included in gross income in the year of levy pursuant to the doctrine of constructive receipt.

Although the seized asset value was includible in the taxpayer's income under § 72, the Court held that he was not subject to the § 72(t)(2)(A)(vii) 10% early withdrawal penalty. The Court stated that such penalty, despite argument to the contrary by the Revenue Service, does not apply to distributions resulting from a levy in payment of theretofore unpaid taxes.

Any AALU member who wishes to obtain a copy of *Swanton v. Comm'r* may do so through the following means: (1) use hyperlink above next to "Major References," (2) log onto the AALU website at www.aalu.org and enter the *Member Portal* with your last name and birth date and select *Current Washington Report* for linkage to source material or (3) email Anthony Raglani at raglani@aalu.org and include a reference to this *Washington Report*.

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