



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

5.17.5

MARCH 20, 2018

EFFECTIVE DATE

(03-20-2018)

PURPOSE

- (1) This transmits revised IRM 5.17.5, *Legal Reference Guide for Revenue Officers, Suits Against the United States*.

BACKGROUND

- (1) This section provides guidance on the principal types of judicial actions against the United States which revenue officers may encounter. This revision includes changes arising from the Tax Cuts and Jobs Act of 2017, which became law December 22, 2017.

MATERIAL CHANGES

- (1) Changes made, under Counsel direction to update IRM 5.17.5.17.9(1) and IRM 5.17.5.17.10(1) for the Tax Cuts and Jobs Act of 2017, which became law December 22, 2017.

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 5.17.5 dated January 6, 2017.

AUDIENCE

SB/SE Collection Employees

Kristen E. Bailey
Director, Collection Policy
Small Business/Self-Employed

5.17.5

Suits Against the United States

Table of Contents

5.17.5.1 Program Scope and Objectives

5.17.5.1.1 Background

5.17.5.1.2 Authority

5.17.5.1.3 Roles and Responsibilities

5.17.5.1.4 Program Management and Review

5.17.5.1.5 Program Controls

5.17.5.1.6 Terms and Acronyms

5.17.5.1.7 Related Resources

5.17.5.2 Doctrine of Sovereign Immunity

5.17.5.3 Government Consent to be Sued in Actions Affecting Property on which United States Claims a Lien - 28 USC § 2410

5.17.5.4 Jurisdiction for Civil Actions Against United States

5.17.5.5 Procedures Governing Civil Actions Against United States

5.17.5.6 Removal to Federal Court

5.17.5.7 Nature of Injunctive Relief

5.17.5.8 Prohibition of Suits to Restrain Assessment or Collection of Taxes

5.17.5.8.1 Anti-Injunction Act - IRC § 7421

5.17.5.8.2 Declaratory Judgments

5.17.5.8.3 Mandamus

5.17.5.9 Statutory Exceptions

5.17.5.10 Judicial Exceptions - Enochs and South Carolina Rules

5.17.5.11 Claims Founded on Contract

5.17.5.12 Claims Founded on Tort - Federal Tort Claims Act (FTCA)

5.17.5.12.1 Exception for Tax Related Claims

5.17.5.12.2 Exclusiveness of Remedy

5.17.5.13 Acting Within Scope of Office or Employment

5.17.5.14 Violations of Constitutional Rights - Bivens Actions

5.17.5.15 Civil Damages for Failure to Release Lien

5.17.5.16 Civil Damages for Certain Unauthorized Collection Actions

5.17.5.16.1 IRC § 7433 as Exclusive Remedy; Limitations

5.17.5.17 IRC § 7426 Suits against United States - General

5.17.5.17.1 Wrongful Levy

5.17.5.17.2 Injunction

5.17.5.17.3 Recovery of Property

5.17.5.17.4 Surplus Proceeds

-
- 5.17.5.17.5 Substituted Sale Proceeds - Certificate of Discharge
 - 5.17.5.17.6 Substitution of Value - Certificate of Discharge
 - 5.17.5.17.7 Damages in Actions for Wrongful Collection Brought by Persons Other Than Taxpayers
 - 5.17.5.17.8 Validity of Assessment
 - 5.17.5.17.9 Period of Limitation on Suit
 - 5.17.5.17.10 Administrative Claims
 - 5.17.5.18 Actions Affecting Property
 - 5.17.5.18.1 28 USC § 2410 Actions— Background
 - 5.17.5.18.2 Actions to Quiet Title
 - 5.17.5.18.3 Foreclosure Actions
 - 5.17.5.18.4 Partition Suits
 - 5.17.5.18.5 Condemnation Suits
 - 5.17.5.18.6 Interpleader Suits
 - 5.17.5.18.7 Removal of 28 USC § 2410 Proceeding to Federal Court
 - 5.17.5.18.8 Procedure and Responsibility
 - 5.17.5.18.9 Administrative Discharge of Property from Tax Lien During Pendency of Proceeding
 - 5.17.5.18.10 Purchase of Property by the United States
 - 5.17.5.18.11 Surplus Proceeds
 - 5.17.5.18.12 The Redemption Price
 - 5.17.5.18.13 Release of Right of Redemption
 - 5.17.5.19 Proceedings in which United States is not a Party - Background
 - 5.17.5.19.1 Judicial Foreclosures
 - 5.17.5.19.2 Nonjudicial Foreclosures of Non-Perishable Goods
 - 5.17.5.19.3 Nonjudicial Sales of Perishable Goods
 - 5.17.5.19.4 Right of Redemption after Nonjudicial Foreclosures
 - 5.17.5.19.5 Certificate of Redemption
 - 5.17.5.19.6 Release of Right of Redemption
 - 5.17.5.20 Award of Court Costs and Attorney's Fees Under IRC § 7430
 - 5.17.5.21 IRC § 7345 Right to Determine Whether Certification as a Seriously Delinquent Taxpayer is Erroneous

5.17.5.1
(01-06-2017)
Program Scope and Objectives

- (1) The federal government in certain circumstances waives its sovereign immunity from lawsuits. This IRM discusses those circumstances. See also IRM 5.17.5.2, *Doctrine of Sovereign Immunity*.
- (2) **Purpose:** This section reviews the principal types of judicial actions against the United States which revenue officers may encounter.
- (3) **Audience:** This IRM is used by Collection employees responding to suits against the government. Primarily Collection Advisory staff or Field Collection Revenue Officers use this IRM when assisting Counsel and the Department of Justice with defense actions related to these types of suits.
- (4) **Policy Owner:** Director, Collection Policy.
- (5) **Program Owner:** The program owner is Collection, an organization within the Small Business Self-Employed (SBSE) division.
- (6) **Primary Stakeholders:** The primary stakeholders are Chief Counsel and Department of Justice attorneys.
- (7) **Program Goals:** The Legal Reference Guide for Revenue Officers is intended to make available to revenue officers and other personnel engaged in collection efforts the fundamentals of legal knowledge needed in their daily activities.

5.17.5.1.1
(01-06-2017)
Background

- (1) The Legal Reference Guide for Revenue Officers has been established as a Handbook keyed to the Internal Revenue Manual, it is not the source of procedural instructions. Revenue officers and other Internal Revenue Service personnel must still look to the basic Internal Revenue Manual (IRM) provisions outside the Handbook for such instructions. While revenue officers are not expected to have the comprehensive knowledge of the law required of attorneys, it is hoped that they will gain a sufficient understanding from the material in the following sections to recognize the legal problems that might call for reference to Counsel for consideration.

5.17.5.1.2
(01-06-2017)
Authority

- (1) This IRM is a handbook containing the legal authorities for suits against the government. See also IRM 25.3.1.4, *Authorization for Filing Suits, Counterclaims or Third Party Complaints* for a discussion of the authority under IRC §7401
 - Specific policies related to collection work are located in IRM 1.2.14, *Policy Statements for Collecting Process Activities*.
 - Specific delegations of authority related to collection work are located in IRM 1.2.44, *Delegations of Authority for the Collecting Process*, IRM 1.2.52, *Delegations of Authority for Special Topics Activities*, and in *Collection Functional Delegation Authorities*.

5.17.5.1.3
(01-06-2017)
Roles and Responsibilities

- (1) IRM 5.17.1, *General Information* provides a list of the parties with an explanation of their role with suits.

5.17.5.1.4
(01-06-2017)
**Program Management
and Review**

- (1) **Program Reports:** Suits are individual to the case and are of a wide variety and scope. When it is appropriate the Collection employee will provide a case Narrative Report for Area Counsel and the Department of Justice identifying all pertinent facts so that appropriate legal action may be taken. Narrative Reports are discussed in IRM 5.17.12, *Investigations and Reports*.
- (2) **Program Effectiveness:** Whenever litigation involving collection matters is pending or the institution of affirmative legal action to effect collection is being considered, revenue officers will, in the main, be investigators of facts. They will be required to prepare reports concerning any facts ascertained. The lawyers charged with the responsibility of handling the cases must rely on those facts and reports when making case decisions.

5.17.5.1.5
(01-06-2017)
Program Controls

- (1) Collection Advisory maintains a copy of any suit documentation until the suit is closed. After case closure see Document 12990 *Records and Information Management Records Control Schedules*, under section *Internal Revenue Service Records Control Schedule (RCS) 28, Tax Administration Collection*, in:
 - *PART III - Administrative Records - All Collection Functions*, item number 38, *Litigation Files*, and in
 - *PART IV - Delinquent Accounts, Delinquent Returns, And Office Services Records*, item 45, *Suits to Foreclose Federal Tax Liens*, item 53, *Civil Suit Recommendation, Form 4477*, and in item 54 (a), *Special Procedures Function Case Files*.
- (2) Preserving electronically stored information is covered in:
 - IRM 25.3.1.7, *Preserving Electronically Stored Information In Litigation Cases*,
 - IRM 25.3.1.7.21, *References*, and
 - *Chief Counsel Notice CC-2012-017*.

5.17.5.1.6
(01-06-2017)
Terms and Acronyms

- (1) The table lists commonly used acronyms and their definitions:

CC	Chief Counsel
DOJ	Department of Justice
FTCA	Federal Tort Claims Act
Fed.R.Civ.P	Federal Rules of Civil Procedure
FRCP	Federal Rules of Civil Procedure
IRC	Internal Revenue Code
TCJA	Tax Cuts & Jobs Act
Treas. Reg	Treasury Regulation
USC	United States Code

5.17.5.1.7
(01-06-2017)

Related Resources

- (1) For procedural guidelines on responding to suits and claims for damages brought against the United States, see:
 - a. IRM 25.3.3, *Litigation and Judgments, Suits against the United States and claims for damages under IRC § 7433*
 - b. IRM 25.3.1, *Litigation and Judgments, General Guidelines*
 - c. IRM 5.17.12, *Legal Reference Guide for Revenue Officers, Investigation and Reports*.
- (2) For information regarding some of the general characteristics and procedures followed in instituting and carrying out a lawsuit for effecting or assisting in the collection of taxes, and some of the most common types of lawsuits commenced by the United States, see IRM 5.17.4, *Suits by the United States*.

5.17.5.2
(12-14-2007)

Doctrine of Sovereign Immunity

- (1) The traditional rule is that the government or sovereign cannot be sued without its consent. This doctrine prevented citizens from bringing actions against the government to redress wrongs allegedly committed against them by the government.
- (2) The government retains sovereign immunity in order to protect the Treasury and its discretionary governmental functions.
- (3) Waiver of sovereign immunity and consent to be sued can only be granted by an act of Congress. In giving its consent, Congress may impose such conditions and restrictions as it deems proper. Schillinger v. United States, 155 U.S. 163 (1894).
- (4) The discussion that follows will review principal statutory exceptions to the doctrine of sovereign immunity and the principal types of judicial actions involving the United States which revenue officers may encounter.

5.17.5.3
(01-06-2017)

Government Consent to be Sued in Actions Affecting Property on which United States Claims a Lien - 28 USC § 2410

- (1) With respect to real or personal property on which the United States claims a lien, the United States has consented to be sued in federal or state courts in suits to: quiet title; foreclose a mortgage or other lien; partition; or condemn. Also sovereign immunity has been waived as to interpleader suits or actions in the nature of interpleader with respect to real or personal property on which the United States has or claims a lien. 28 USC § 2410(a).
- (2) The complaint must set forth with particularity the lien or interest of the United States. 28 USC § 2410(b). In actions to foreclose a mortgage or other lien against property in which the United States has an interest, a judicial sale must be sought. 28 USC § 2410(c).
- (3) When the United States files a claim in a state court proceeding, counterclaims will not lie against the United States in that proceeding. See United States v. Shaw, 309 U.S. 495 (1940).
- (4) As discussed in IRM 5.17.4, *Suits by the United States* the United States may intervene in any civil action or suit to assert a federal tax lien on property which is the subject of such action or suit.

5.17.5.4
(08-01-2010)

**Jurisdiction for Civil
Actions Against United
States**

- (1) Jurisdiction is the authority of a court over the subject matter of the action, the parties to the action, and the kind and limits of the judgment rendered. Numerous statutes govern jurisdiction in civil, federal tax cases. Jurisdiction must be established under one of the following statutes in order for the court to entertain suit. In addition, IRC § 7421 deprives the court of jurisdiction regardless of these statutes.
- (2) IRC § 7421(a) prohibits any suit to restrain the assessment or collection of any tax except as provided in subsection (a). The Supreme Court has determined that IRC § 7421(a) applies unless the United States is incapable of winning under the most favorable view of the facts, the taxpayer does not have an adequate remedy at law, and Congress has not provided the aggrieved party with an alternative legal venue by which to contest the legality of a particular tax. Enochs v. Williams, 370 U.S. 1 (1962); South Carolina v. Regan, 465 U.S. 367 (1984).
- (3) 28 USC § 1331 - District courts have jurisdiction over federal question cases.
- (4) 28 USC § 1340 - District courts have original jurisdiction of any civil action arising under the internal revenue laws.
- (5) 28 USC § 1345 - District courts have original jurisdiction of all civil actions commenced by the United States, or by an authorized agency or officer.
- (6) 28 USC § 1346 - District courts, concurrent with the U.S. Court of Federal Claims, have original jurisdiction over the following actions commenced against the United States:
 - a. tax refund suits;
 - b. any other civil action against the United States not exceeding \$10,000, founded on federal law or regulations, or upon any express, or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort;
 - c. an action involving the right of setoff and counterclaim against the plaintiff; and
 - d. civil actions under:
 - IRC § 7426 (wrongful levies and erroneous liens, etc.);
 - IRC § 7429 (review of jeopardy levy or assessment procedures) [The United States Tax Court also has jurisdiction over these actions];
 - 28 USC § 2409(a) (action to quiet title where U.S. claims other than lien interest); and
 - tort suits for money damages.
- (7) 28 USC § 1361 - District courts have original jurisdiction over actions to compel an officer or an employee of the United States or any agency to perform a duty owed the plaintiff.
- (8) 28 USC § 1491 - Defines the jurisdiction of the U.S. Court of Federal Claims. In the U.S. Court of Federal Claims, there is no dollar limitation on any action.
- (9) 28 USC § 1503 - The U.S. Court of Federal Claims has jurisdiction over setoffs or counterclaims against the plaintiff.

- (10) 28 USC § 2463 - All property taken or detained under any revenue law shall not be repleviable [recoverable], but is deemed to be in the custody of the law and subject to the orders and decrees of the United States Courts having jurisdiction thereof.
- (11) 28 USC § 2409a - Applies where the United States claims an interest in property that is not a security interest. The provision is a consent to suit in a quiet title action.
- (12) 28 USC § 2410 - Applies to foreclosure, quiet title, partition, condemnation, and interpleader actions where the United States claims a lien interest. If the plaintiff complies with the specific requirements of section 2410, sovereign immunity of the United States is waived and jurisdiction over the United States is obtained. However, subject matter jurisdiction of the state or federal court must exist independently. See Wells v. Long, 162 F.2d 842 (9th Cir. 1947).
- (13) IRC § 7402 - Internal Revenue Code section 7402 is a general jurisdictional statute relating to the enforcement of internal revenue laws.

5.17.5.5
(08-01-2010)
**Procedures Governing
Civil Actions Against
United States**

- (1) The Federal Rules of Civil Procedure establish procedures for civil actions against the United States in federal district courts. Fed. R. Civ. P. 1. The action is commenced by filing a complaint with the court. Then, the clerk of court will issue a summons to the plaintiff or the plaintiff's attorney, who is responsible for prompt service of the summons and a copy of the complaint upon the United States. Fed. R. Civ. P. 3, 4.
 - a. Service must be made upon the United States by delivering a copy of the summons and the complaint to the U.S. Attorney for the district in which the action is brought, or to an Assistant United States Attorney or designated employee, and by sending a copy of the summons and the complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C. Fed. R. Civ. P. 4(i)(1).
 - b. Service must be made upon an officer or agency of the United States by serving the United States, as above, and by sending a copy of the summons and complaint to such officer or agency by registered or certified mail. Fed. R. Civ. P. 4(i)(2).
- (2) A civil action against the United States in the United States Court of Federal Claims is commenced by filing a complaint with the clerk of that court. Service of the summons and complaint on the United States must be made in accordance with Rule 4(i). See paragraph (1)(a), above.
- (3) 28 USC § 2410(b) establishes procedures for service of process on the United States in suits against the United States in state courts. These procedures are identical to those provided by the Federal Rules of Civil Procedure, cited above. Where the United States is not a party to a suit, and intervenes in such suit pursuant to IRC § 7424, 28 USC § 2410(b) is inapplicable.

5.17.5.6
(01-06-2017)
**Removal to Federal
Court**

- (1) A civil action or criminal prosecution commenced in a state court against the United States or any agency thereof or any officer of the United States acting within the scope of his/her authority (e.g., the collection of the revenue) may be removed to the United States district court. 28 USC § 1442(a)(1).
- (2) A state law tort action against a federal officer or employee acting within the scope of his or her employment may be removed to the United States district

court upon certification of the U.S. Attorney for the district in which the state action was brought that the officer or employee acted within the scope of his or her employment. 28 USC § 2679(d); see IRM 5.17.5.12, *Claims Founded on Tort - Federal Tort Claims Act (FTCA)* below, for a discussion of tort suits.

- (3) The United States has consented to be named a party in certain state court actions affecting property in which it has a lien or interest. 28 USC § 2410. But this waiver of immunity is granted on condition that the United States has an unqualified option to remove the action to a federal district court. 28 USC § 1444.
- (4) Where the United States intervenes in a state court action to assert a federal tax lien on property which is the subject of such action, the removal provision of 28 USC § 1444 is also available. IRC § 7424.

5.17.5.7
(08-01-2010)
Nature of Injunctive Relief

- (1) An injunction is a court order prohibiting the defendant from doing an act or compelling the defendant to perform an act. See Fed. R. Civ. P. 65. An injunction suit against the Service typically seeks to prevent collection activity.
- (2) An injunction under Fed.R.Civ.P. 65 is an equitable remedy which may be granted only where the plaintiff establishes that he or she is entitled to equitable relief, i.e. that:
 - a. what the defendant is doing or is about to do, is causing, or will cause, irreparable injury to the plaintiff;
 - b. money damages will not compensate for the invasion of plaintiff's rights, i.e., there is no adequate remedy in a court of law; and
 - c. the plaintiff has an indisputable right which has been clearly invaded by the defendant.

5.17.5.8
(12-14-2007)
Prohibition of Suits to Restrain Assessment or Collection of Taxes

- (1) Outside of a few limited and narrow exceptions, a suit brought to restrain the assessment or collection of taxes is strictly prohibited by law.

5.17.5.8.1
(01-06-2017)
Anti-Injunction Act - IRC § 7421

- (1) The Anti-Injunction Act contains a broad prohibition on suits to restrain the assessment or collection of taxes. IRC § 7421(a) provides as a general rule that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed." This rule also applies to the liability of transferees or fiduciaries. IRC § 7421(b).
- (2) IRC § 7421 is based on the general rule of equity that where a person has an adequate remedy at law, he or she may not seek equitable relief by way of injunction against the assessment or collection of taxes. The remedy is to pay the tax assessed (or a divisible portion thereof for the Trust Fund Recovery Penalty) and file a refund suit in federal district court or the United States Court of Federal Claims, or, in the case of income, estate or gift tax, to litigate the merits of the tax in the United States Tax Court.
- (3) See IRM 5.17.5.9, *Statutory Exceptions* for a discussion of statutory exceptions to the prohibition against suits to restrain assessment or collection of tax.

5.17.5.8.2
(12-14-2007)

Declaratory Judgments

- (1) A declaratory judgment is a request for a court to declare the rights of parties, without ordering anything to be done.
- (2) Under the Declaratory Judgment Act, 28 USC § 2201, federal tax questions are exempt from the jurisdiction of the district courts to render declaratory judgments. In Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), rev'd on other grounds, 426 U.S. 26 (1976), the court held that a party whose tax liability was not directly in dispute could maintain a declaratory judgment action where there was no adequate remedy at law and where a judgment would not have the effect of restraining assessment or collection of taxes. In In re Frey, 98-2 USTC ¶ 50,638 (M.D. Fla. 1998), the court dismissed plaintiff's wife's request for a judgment under section 2201, declaring that the wife was not a nominee of her husband. The court cited the exemption of tax disputes from section 2201. See also Rodriguez v. United States, 629 F. Supp. 333 (N.D. Ill. 1986).

5.17.5.8.3
(12-14-2007)

Mandamus

- (1) District courts have original jurisdiction to compel an officer or employee of the United States or any of its agencies to perform a duty owed the plaintiff. However, relief in the nature of mandamus is not available:
 - to compel the performance of a discretionary (as opposed to a ministerial) act or the manner in which a discretionary act is to be performed. Stern v. South Chester Tube Co., 390 U.S. 606 (1968); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); or
 - when the plaintiff has an adequate remedy at law. United States, ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937).
- (2) In In re 1900 M Restaurant Assoc., Inc., 319 B.R. 302 (D.D.C. 2005), the debtor sought a court order compelling the Service to consider an administrative offer in compromise. The court determined that the Service's decision not to process the debtor's offer-in-compromise, pursuant to Service policy of returning as nonprocessable any offer-in-compromise submitted by bankrupt taxpayer, and of requiring tax repayment issues to be resolved as part of plan confirmation process, was one committed to the discretion of the Secretary of the Treasury, and was not reviewable on prayer for relief in the nature of mandamus.

5.17.5.9
(12-14-2007)

Statutory Exceptions

- (1) Exceptions to the prohibition of suits to restrain assessment or collection of tax.
 - a. IRC § 6015(e) prescribes restrictions applicable to the collection of an assessment where the taxpayer has filed a petition to the Tax Court for relief from joint and several liability on a joint return.
 - b. IRC § 6213(a) prescribes restrictions on the assessment of a deficiency. Assessment and collection may be enjoined if attempted prior to the issuance of a notice of deficiency or prior to 90 days after the issuance of a notice of deficiency, including any time that a case is pending in the Tax Court or on appeal. See Philadelphia & Reading Co. v. Beck, 676 F.2d 1159 (7th Cir. 1982). In addition, the Secretary shall have no right to determine any additional deficiency of certain taxes for the same taxable year if the taxpayer filed a petition with the Tax Court within the time prescribed in IRC § 6213(a).

- c. IRC § 6225(b) provides that any action which violates the restriction on assessment and collection of partnership level items prior to the completion of the partnership level proceedings may be enjoined in the proper court, including the Tax Court.
- d. IRC § 6246(b) provides that any action which violates the restriction on making adjustments to partnership items prior to the close of the 90th day after the day on which a notice of a partnership adjustment was mailed to the partnership may be enjoined in the proper court, including the Tax Court.
- e. IRC § 6330(e)(1) provides that the Tax Court has jurisdiction to enjoin a levy or a proceeding if a taxpayer has filed an appeal of a collection due process notice of determination with regard to the unpaid tax or the levy to which the determination relates.
- f. IRC § 6331(i) provides that generally there shall be no levy during the pendency of proceedings for refund of divisible tax.
- g. IRC § 6672(c) provides that injunctions can be issued against collection activity where the taxpayer pays a portion of the tax, files a claim for refund, and furnishes a suitable bond.
- h. IRC § 6694(c) provides that injunctions can be issued against collection activity where an income tax return preparer pays 15% of the IRC § 6694(a) penalty and files a claim for refund within 30 days of notice and demand of such penalty.
- i. IRC § 7426(a) and (b)(1) provide that a wrongful levy or sale may be enjoined.
- j. IRC § 7429(b) provides that, where appropriate, injunctions may be issued against jeopardy and termination assessments.
- k. IRC § 7436 provides restrictions on assessment and collection during proceedings for determination of employment status.

Note: Under the statutory exceptions, generally the taxpayer must still show entitlement to equitable relief, i.e., irreparable harm and lack of an adequate remedy at law, in addition to a violation of the Internal Revenue Code, in order to obtain an injunction. However, under the IRC § 6213 exception discussed above, the Service no longer insists that taxpayers show irreparable injury as long as they establish that the Service violated the statute. See Robinson v. United States, 920 F.2d 1157 (3rd Cir. 1990); but see Cool Fuel, Inc. v. Connett, 685 F.2d 309 (9th Cir. 1982).

(2) Exceptions to the prohibition of suits for declaratory judgments:

- a. IRC § 7428 provides that the district court of the United States for the District of Columbia, the United States Court of Federal Claims, and the Tax Court may render declaratory judgments concerning charitable organizations seeking an exemption under IRC § 501(c)(3) and/or seeking to avoid private foundation status.
- b. IRC §§ 7476 and 7478 authorize the Tax Court to render declaratory judgments on the qualification of retirement plans and the status of certain governmental obligations, respectively. Declaratory judgment suits under IRC §§ 7428, 7476, and 7478 may only be brought by persons affected by the Service's decision and not by third parties.
- c. IRC § 7479 authorizes the Tax Court to render a declaratory judgment on an actual controversy involving a determination by the IRS or failure to make a determination that an estate may make an IRC § 6166 election or whether the extension of time for payment under an IRC § 6166 payment extension has ceased to apply.

- d. Probate Proceedings - when the government has a claim against the estate.
 - The IRS may file claims in state court probate and insolvency cases instituted by other parties. Counsel becomes involved if a dispute arises.
 - Consider priority of the federal tax lien vis-a-vis competing creditors. See IRM 5.17.13, *Insolvencies and Decedents' Estates*, for further discussion.

5.17.5.10
(12-14-2007)
**Judicial Exceptions -
Enochs and South
Carolina Rules**

- (1) In addition to the statutory exceptions contained in IRC § 7421, the courts have added certain exceptions to the Anti-Injunction Act. In Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, rehearing denied, 370 U.S. 965 (1962), the Supreme Court established a two-pronged test for the issuance of an injunction:
 - a. the United States must be incapable of prevailing under the most favorable view of the facts, i.e. the illegality of the tax must be absolutely clear on its face; and
 - b. special circumstances must exist indicating that the taxpayer does not have an adequate remedy at law, with the result that the taxpayer will suffer irreparable injury; a showing of mere hardship is insufficient.

See also Bob Jones University v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United" Inc., 416 U.S. 752 (1974). Mere allegations that the tax is arbitrary, excessive, capricious, or without a factual foundation question the merits of the tax and must be determined in a suit for refund or in the Tax Court.

- (2) In South Carolina v. Regan, 465 U.S. 367 (1984), the Supreme Court reaffirmed the strict judicial exception to the Anti-Injunction Act enunciated in Enochs and the principle that, for a taxpayer, a refund action is generally an adequate remedy to challenge a disputed tax liability. However, the Court set forth another exception to the Act: "the Act ... bar[s] a suit only in situations in which Congress ha[s] provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." Id. at 373.

5.17.5.11
(12-14-2007)
**Claims Founded on
Contract**

- (1) 28 USC §1491 confers jurisdiction on the United States Court of Federal Claims to render judgment against the United States on claims founded, among others, on an express or implied contract with the United States.
- (2) Similarly, 28 USC § 1346 grants federal district courts concurrent jurisdiction over such actions provided the amount of the claim does not exceed \$10,000.00.
- (3) Suits on claims not based on contract, or based on unauthorized contracts, are not within the consent statutes. If the action in fact is based on tort, the prohibition against suit cannot be avoided by framing the action as one in contract.

5.17.5.12
(01-06-2017)
**Claims Founded on Tort
- Federal Tort Claims Act
(FTCA)**

- (1) A tort, broadly speaking, is a civil wrong, other than breach of contract, for which the law provides a remedy in the form of an action for damages.
- (2) In 1946, Congress passed what is popularly known as the Federal Tort Claims Act (28 USC § 2671, et seq.) and simultaneously amended 28 USC § 1346 giving district courts (not the Court of Federal Claims) jurisdiction over civil actions against the United States "for money damages ... for injury or loss of

property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 USC § 1346(b)(1).

- (3) The Act provides that any judgment, with limited exceptions, in an action obtained against the United States shall constitute a complete bar to any action by the claimant against the employee by reason of the same subject matter. 26 USC § 2676. See also the Supreme Court ruling in Simmons v. Himmelreich and United States v. Smith.
- (4) The Government cannot, by way of indemnity, recover from the employee any amount for which the Government is held liable under the Act. United States v. Gilman, 347 U.S. 507 (1954).

5.17.5.12.1
(01-06-2017)
**Exception for Tax
Related Claims**

- (1) The Federal Tort Claims Act does not apply to “[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” 28 USC § 2680(c).

5.17.5.12.2
(01-06-2017)
**Exclusiveness of
Remedy**

- (1) 28 USC § 2679 provides that the remedy against the United States under the Federal Tort Claims Act for injury or loss of property, or personal injury or death arising from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his or her office or employment is exclusive. Thus, any other action for money damages arising out of or relating to the same subject matter against the employee is precluded with the exception of claims based on constitutional violations discussed in IRM 5.17.5.14, *Violations of Constitutional Rights - “Bivens” Actions* below. This rule does not apply to negligent or wrongful acts during the collection of any tax. 28 USC § 2680(c). The exclusive remedy for wrongful acts by IRS employees during the collection of federal taxes is IRC § 7433, discussed in IRM 5.17.5.16, *Civil Damages for Certain Unauthorized Collection Actions* below.
- (2) Filing an administrative claim with the appropriate agency is a prerequisite to the institution of a suit against the United States for damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his or her office or employment. 28 USC § 2675. Heads of administrative agencies or their delegates may settle any claim for money damages not in excess of \$25,000. 28 USC § 2672.
- (3) The Attorney General is authorized to defend any civil action or proceeding brought in any court against any employee of the Government, or his or her estate, for any such damage or injury. 28 USC § 2679(c). Any Internal Revenue Service employee against whom such an action or proceeding is brought must immediately advise the General Legal Services function in the field, if a field employee, or the General Legal Services Division of the Office of Chief Counsel, if a National Office employee, of the details by telephone or facsimile transmission. In addition, he or she must immediately forward all process and pleadings served upon him or her, or a true copy thereof, to Area Counsel or, in the case of National Office Employees, to the Associate Chief

Counsel, General Legal Services, CC:GLS. The employee sued must thereafter render any assistance and give any additional information requested by the United States Attorney.

5.17.5.13
(12-14-2007)
**Acting Within Scope of
Office or Employment**

- (1) Officers of the United States Government are afforded, in most cases, immunity from liability in civil suits arising from actions taken in the performance of official duties. See Barr v. Matteo, 360 U.S. 564 (1959). The doctrine of official immunity extends to the executive branch of Government, including heads of departments as well as lower ranking executive officers or employees, including Assistant United States Attorneys, agents of the Federal Bureau of Investigation, and agents of the Internal Revenue Service. See, e.g., Scherer v. Brennan, 379 F.2d 609 (7th Cir.), cert. denied, 389 U.S. 1021 (1967); O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958).
- (2) Official immunity is grounded on principles of public policy that persons occupying important positions should speak and act freely and fearlessly in the discharge of their official functions.
- (3) Official immunity applies only when the officer or employee of the Government is acting within the scope of his or her authority. In order for one to be acting "within the scope of authority," it is not necessary that the acts be prescribed by statute, or even that they be specifically directed or requested by a superior officer. It is sufficient if the acts are done by an officer in relation to matters committed by law to his or her control or supervision, that the acts are connected with general matters committed by law to his or her control or supervision, or that the officer is operating within the outer perimeter of his or her line of authority. See Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977).
- (4) Officials and employees of the United States are liable in their own right, in criminal and civil actions instituted in federal or state courts, for their actions done outside of the scope of the duties of their office or employment.

5.17.5.14
(01-06-2017)
**Violations of
Constitutional Rights -
Bivens Actions**

- (1) Under the Supreme Court's holding in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), federal officials acting in the performance of their official duties are subject to personal liability for any violations of constitutional rights of which a reasonable official in a similar situation would be aware.
- (2) Bivens remedies are available only where there is a constitutional violation and the victim has no other remedy. Davis v. Passman, 442 U.S. 228 (1979). Moreover, where Congress has created specific remedies or when a court-created remedy would interfere with the effective function of government, courts are reluctant to create damages remedies for violations of constitutional rights. Schweicker v. Chilicky, 487 U.S. 412 (1988). The Internal Revenue Code, including IRC § 7433, provides an extensive scheme to challenge the assessment and collection of taxes, and this statutory scheme adequately protects a taxpayer's rights to due process. See Stonecipher v. Bray, 653 F.2d 398, 401 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982). See IRM 5.17.5.16, *Civil Damages for Certain Unauthorized Collection Actions* below, for a discussion of IRC § 7433.
- (3) When Bivens suits are filed against Internal Revenue Service or other government employees, the Department of Justice provides representation of employees who were acting within the scope of their employment if it is in the interest of the United States to do so. 28 CFR § 50.15(a). The Service may

pay judgments rendered against IRS employees by reason of anything done in the due performance of their duties. IRC § 7423(2).

5.17.5.15
(12-14-2007)
**Civil Damages for
Failure to Release Lien**

- (1) IRC § 7432 provides that taxpayers may sue the United States for damages if any officer or employee of the Service knowingly or by reason of negligence fails to release a lien under IRC § 6325 on property of the taxpayer.
- (2) The taxpayer must exhaust administrative remedies before recovering damages under IRC § 7432.
- (3) The amount of damages recoverable is limited to the actual, direct economic damages sustained by the taxpayer that the taxpayer would not have sustained but for the actions of the Service, plus the costs of the taxpayer's action.
- (4) The taxpayer has a duty to mitigate damages, and any award will be reduced by the amount of damages that the taxpayer reasonably could have mitigated.
- (5) An action under IRC § 7432 may be brought without regard to the amount in controversy, but must be brought within two years after the action accrues, i.e., within two years of when the taxpayer has had a reasonable opportunity to discover all the elements of a possible cause of action.

5.17.5.16
(12-14-2007)
**Civil Damages for
Certain Unauthorized
Collection Actions**

- (1) IRC § 7433(a) provides that taxpayers may sue the United States if, in connection with the collection of any federal tax, a Service officer or employee recklessly or intentionally, or by reason of negligence, disregards any provision of the Internal Revenue Code or implementing regulations.
- (2) The amount of damages that may be awarded is limited to the lesser of
 - a. \$1,000,000 if the damages were caused by reckless or intentional disregard (or \$100,000 in the case of negligence), or
 - b. the sum of the actual, direct economic damages sustained by the taxpayer as a proximate result of the actions of the Service officer or employee and the costs of the action.
- (3) Prior to filing a complaint under IRC § 7433, the taxpayer must have exhausted all administrative remedies provided by the IRS. Treas. Reg. § 301.7433-1 provides that a taxpayer's administrative remedies are deemed to be exhausted on the earlier of the date that a decision is rendered by the IRS on an administrative claim for damages filed in accordance with the manner and form set forth in the regulations, or the date six months after the date that an administrative claim is filed in accordance with the manner and form set forth in the regulations.
- (4) Under Treas. Reg. § 7433-2(a), if in connection with the collection of a federal tax, an IRS officer or employee violates Bankruptcy Code § 362 (relating to the bankruptcy automatic stay) or Bankruptcy Code § 524 (relating to the effect of bankruptcy discharges), then the taxpayer may file a petition for damages in bankruptcy court. The total amount of damages recoverable is the lesser of \$1,000,000 or the sum of (i) actual, direct economic damages sustained as a proximate result of the willful actions of the IRS; and (ii) costs of the action.
- (5) Actions under IRC § 7433 must be brought within two years after the date the right of action accrues. The right of action accrues when the taxpayer knows or should have known sufficient facts to be apprised that he has a claims.

5.17.5.16.1
(12-14-2007)

**IRC § 7433 as Exclusive
Remedy; Limitations**

- (1) IRC § 7433(a) states explicitly that, except as provided in IRC § 7432 (see IRM 5.17.5.15, *Civil Damages for Failure to Release Lien*, above), it is the “exclusive remedy” for damages for alleged improper actions in connection with the collection of any federal tax.
- (2) Despite the exclusivity provision in IRC § 7433, the United States has been sued for civil damages under IRC § 7431(a) (providing cause of action for unauthorized disclosure of return information) for unauthorized disclosures of return information occurring in the context of collection activities. See Rorex v. Traynor, 771 F.2d 383 (8th Cir. 1985); cf. Flippo v. United States, 670 F. Supp. 638 (W.D.N.C. 1987). The Service’s position is that IRC § 7431 was never intended to redress defective collection activities, and that IRC § 7433 provides the exclusive remedy for alleged damages resulting from alleged improper collection activities. See Shwarz v. United States, 234 F.3d 428, 432-433 (9th Cir. 2000).
- (3) IRC § 7433 applies to wrongful collection activity; it does not apply to activity stemming from the assessment or determination of taxes. See Ivory v. United States, 96-1 USTC ¶ 50,078 (S.D. Ohio 1996); see also Morse v. United States, 96-1 USTC ¶ 50,216 (E.D.N.Y. 1996).

5.17.5.17
(01-06-2017)

**IRC § 7426 Suits against
United States - General**

- (1) IRC § 7426 permits four types of suits against the United States:
 - a. for wrongful levy;
 - b. for surplus proceeds resulting from distraint sales;
 - c. for substituted sale proceeds where property has been sold pursuant to an agreement described in IRC § 6325(b)(3); and
 - d. for a determination of whether the value of the interest of the United States (if any) is less than the value determined by the IRS, provided that a certificate of discharge has been previously issued pursuant to IRC § 6325(b)(4).
- (2) 28 USC § 1346(e) confers original jurisdiction in the federal district courts over any civil action against the United States provided for in IRC § 7426. These actions can be brought only in the judicial district where the property levied upon is situated at the time of levy. 28 USC § 1402(c). Where no levy has been made (such as in agreements for the substitution of sale proceeds or for valuation of the United States’ lien interest), the action must be brought where the event giving rise to the lawsuit occurred.
- (3) The only actions under IRC § 7426 that a person against whom tax is assessed can bring are actions for substituted sale proceeds and for a valuation of the United States’ interest in property for which a certificate of discharge has been issued. The other actions authorized by IRC § 7426 can be brought only by a person other than a taxpayer.
- (4) No action may be maintained against any revenue officer or any other officer or employee of the United States (or former officer or employee) or his or her personal representative with respect to any acts for which an action could be maintained under IRC § 7426. IRC § 7426(d). If an IRC § 7426 action is brought against a revenue officer (or one of the aforementioned individuals), then the pleadings may be amended to substitute the United States as a party-defendant for such individual, as of the time such action was commenced, upon proper service of process on the United States. IRC § 7426(e).

- (5) The remedies provided by IRC § 7426 are the exclusive means of redress for actions which may be brought under this section. Accordingly, an action that may be brought under IRC § 7426 cannot be maintained under 28 USC § 2410(a)(1) (described in IRM 5.17.5.18.1, *28 USC § 2410 Actions— Background* below). See *Winebrenner v. United States*, 924 F.2d 851 (9th Cir. 1991), overruled on other grounds by *United States v. Williams*, 514 U.S. 527 (1995).

5.17.5.17.1
(12-14-2007)
Wrongful Levy

- (1) A person other than the taxpayer who claims the Service wrongfully levied upon property he or she has an interest in or lien on, to satisfy the tax liability of another, may bring suit against the United States in federal district court. IRC § 7426(a)(1). See Rev. Rul. 2005-49 and Rev. Rul. 2005-50.
- (2) In *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007), the Supreme Court in an unanimous opinion held that IRC § 7426(a)(1) provides the exclusive remedy for third-party wrongful levy claims. Third parties with such claims cannot bring refund actions under 28 USC § 1346(a)(1).
- (3) For the purposes of IRC § 7426, a levy is considered wrongful against a third person if:
- the levy is made upon property exempt from levy under IRC § 6334;
 - the levy is upon property in which the taxpayer had no interest at the time the lien arose or thereafter;
 - the levy is upon property with respect to which the third party is a purchaser against whom the lien is invalid under IRC § 6323 or IRC § 6324(a)(2) or (b); or
 - the levy or sale pursuant to levy will or does effectively destroy, or otherwise irreparably injure, the third party's interest in the property which is senior to the federal tax lien.

Treas. Reg. § 301.7426-1(b).

- (4) A levy may irreparably injure or destroy a senior lien even though legal rights to enforce the senior lien interest survive the levy. Such irreparable injury may occur, for example, where the Service seizes money in accounts subject to the senior lien and nothing is left for the senior lienholder to pursue. Another example is where the Service sells seized personal property to numerous purchasers, which the senior lienholder cannot realistically pursue to satisfy its claim. Treas. Reg. § 301.7426-1(b).
- (5) A person against whom the tax is assessed for which the levy was made cannot bring a wrongful levy suit under IRC § 7426 .
- (6) A wrongful levy action may be brought without regard to whether the property has been surrendered to or sold by the Government. However, it may not be brought prior to the time the Government has in fact levied upon the property.
- (7) There is no requirement that administrative claim remedies be exhausted before a wrongful levy suit can be brought unless recovery of damages is sought as well.

5.17.5.17.2
(12-14-2007)
Injunction

- (1) The granting of injunctive relief is available only in wrongful levy actions brought under IRC § 7426(a)(1), and then only after the property has in fact been levied upon by the United States. Thus, a court may enjoin the Government from proceeding with enforcement of the levy if the court determines that:
 - a. the levy or a sale of property pursuant to the levy would irreparably injure the rights of a third party in such property; and
 - b. the rights of such third party in the property are superior to the rights of the United States.
- (2) A third party is considered to have a superior interest if:
 - a. the taxpayer had no interest in the property at the time the lien arose or thereafter (such as where the third party is held not to be a nominee of the taxpayer or the taxpayer does not have a current vested right in a retirement plan);
 - b. the third party purchaser has priority under IRC § 6323 or IRC § 6324(a)(2) or (b) ; or
 - c. the third party is a senior lienholder (such as a mortgagor).
- (3) If the court's determination is in favor of the third party, usually the injunction is either made permanent where the Government does not have possession of the property, or is continued until the levy is released and the specific property is returned to the person.

5.17.5.17.3
(12-14-2007)
Recovery of Property

- (1) In addition to injunctive relief, there are three alternative types of relief which a court may grant to a third party if the court determines the levy is wrongful. IRC § 7426(b)(2). The court may:
 - a. order the return of specific property levied upon;
 - b. grant a judgment for the amount of money levied upon; or
 - c. grant a judgment for an amount not exceeding the greater of the amount received by the Service from the sale (which, in the case of property purchased by the Service, is the greater of the minimum bid or the amount received upon resale) or the fair market value of the property immediately before the levy.

IRC § 7426(b)(2).

- (2) The court can order the property wrongfully levied upon to be returned only where the property is identifiable and still in the Government's possession. Such property includes money, where identifiable, such as a coin collection. Otherwise, the relief granted is limited to the amount of the money.
- (3) If a third party recovers a money judgment, then the United States must pay interest, at the overpayment rate established under IRC § 6621, from the date the Government received the money wrongfully levied upon to the date of payment of such judgment. Money wrongfully levied upon is "received" at the time the Government acquired possession of such money. Similarly, where the property has been sold, the United States must pay interest, at the overpayment rate established under IRC § 6621, from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment. IRC § 7426(g).

5.17.5.17.4
(12-14-2007)

Surplus Proceeds

- (1) If surplus proceeds have been realized from the sale of property by the United States pursuant to a levy, any person (other than the taxpayer) may bring an action against the United States in district court based on his claim that he:
 - a. has an interest in or lien upon such property junior to the lien or interest of the United States; and
 - b. is legally entitled to all or part of such surplus proceeds.

IRC § 7426(a)(2).

- (2) "Surplus proceeds" are those in excess of the amount necessary to satisfy the tax liability giving rise to the levy plus the expenses of the levy sale.
- (3) If the district court determines that the interest or lien of any party (other than the taxpayer) to an action under IRC § 7426 was transferred to the proceeds of a sale of such property, the court may grant a judgment against the United States in an amount equal to all or any part of the amount of the surplus proceeds of such sale. IRC § 7426(b)(3). A third party whose rights are junior to those of the United States in property sold pursuant to levy may recover all or any part of the surplus sale proceeds to which he or she is legally entitled if the third party's interest or lien was transferred to the proceeds of sale.

5.17.5.17.5
(12-14-2007)

**Substituted Sale
Proceeds - Certificate of
Discharge**

- (1) A certificate of discharge may be issued where property subject to a tax lien is sold and, under an agreement with the Service, the proceeds from the sale are held as a fund subject to the liens and claims of the United States in the same manner, and with the same priority, as the liens and claims on the discharged property. IRC § 6325(b)(3).
- (2) Claimants to the property may bring an action against the United States in a district court where they are unable to resolve a dispute among competing lienholders, including the United States, concerning their rights to specific property sold pursuant to the agreement with the Service. IRC § 7426(a)(3). Unlike wrongful levy actions and actions for surplus proceeds which may be instituted by any person other than the taxpayer, any person including the taxpayer may bring an action under this provision whether or not such person is a party to the agreement described in IRC § 6325(b)(3). Treas. Reg. 301.7426-1(a)(3). A voluntary payment, however, by a third party to clear a tax lien from property is not an agreement sufficient to invoke district court jurisdiction under IRC § 7426(a)(3). See Denham v. United States, 811 F. Supp. 497 (C.D. Cal. 1992); Ticor Title Insurance Co. v. United States, 1988 WL 383576 (C.D. Cal.1988).
- (3) If the court determines that a party has an interest in or a lien on an amount held as a fund pursuant to an agreement providing for the proceeds of sale of property to be substituted for the property, the court may grant a judgment in an amount not in excess of the substituted sale proceeds. IRC § 7426(b)(4). The court may enter such judgments as are appropriate to distribute the fund to the parties legally entitled thereto.

5.17.5.17.6
(08-01-2010)

**Substitution of Value -
Certificate of Discharge**

- (1) At the request of the owner (including the taxpayer) of any property subject to any lien, the Service must issue a certificate of discharge of such property if such owner:

- a. deposits with the Service an amount of money equal to the value of the interest of the United States in the property; or
- b. furnishes a bond acceptable to the Service in a like amount.

IRC § 6325(b)(4).

- (2) If the property owner believes the Service has overvalued the United States' interest in the property, he or she may, within 120 days after the certificate is issued, bring a civil action against the United States in a district court to have the court determine whether the value of the United States' interest in the property is less than the value determined by the Service. IRC § 7426(a)(4).
- (3) If the court finds that the Service's valuation of the interest of the United States in the property exceeds the actual value of such interest, the court must grant a judgment ordering a refund of the amount deposited, and a release of the bond, to the extent that the aggregate of the amounts thereof exceeds the value determined by the court. IRC § 7426(b)(5). The plaintiff is entitled to interest at the overpayment rate established under IRC § 6621 from the date the Service received the deposited amount to the date the judgment is paid. IRC § 7426(g).

5.17.5.17.7
(01-06-2017)
**Damages in Actions for
Wrongful Collection
Brought by Persons
Other Than Taxpayers**

- (1) Persons other than taxpayers who are harmed by the reckless, intentional or negligent actions of IRS officers or employees in disregard of the Internal Revenue Code may collect damages against the United States in connection with any of the four causes of action authorized by IRC § 7426. (Taxpayers, themselves, may recover such damages under IRC § 7433). These persons are bound, in all respects, to all requirements of IRC § 7433, discussed in IRM 5.17.5.16, *IRC § 7433 as Exclusive Remedy; Limitations* above, including the requirement that they first exhaust their administrative remedies. These administrative claims are filed with the Advisory Group Manager for the area where the taxpayer resides. See Pub 4235 .
- (2) The amount of damages recoverable by persons other than taxpayers is an amount equal to the lesser of \$1 million (\$100,000 in the case of negligent disregard) or the sum of the actual direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the Service officer or employee, plus the costs of the action. IRC § 7426(h).

5.17.5.17.8
(12-14-2007)
Validity of Assessment

- (1) For purposes of adjudication under IRC § 7426 , the assessment of tax upon which the interest or lien of the United States is based is conclusively presumed to be valid. IRC § 7426(c). The merits of the tax liability cannot be contested unless the United States requests the foreclosure of its tax lien in such action pursuant to IRC § 7403.

5.17.5.17.9
(03-20-2018)
**Period of Limitation on
Suit**

- (1) **General period for IRC § 7426(a)(1)-(3).** A suit under IRC § 7426 must be commenced within a statutory time period that runs from the date of the levy or from the date of an agreement under IRC § 6325(b)(3) (relating to substitution of proceeds of sale), giving rise to the suit. IRC § 6532(c)(1); Treas. Reg. § 301.6532-3(a).

- a. **Statutory time period.** Section 11071(b)(1) of P.L. 115-97 (referred to as the Tax Cuts & Jobs Act or TCJA) changed a 9-month period to 2-years for both levies and agreements.
- b. **Effective Date:**

- **In general.** TCJA § 11071(c)(1) provides the change applies to levies made after the date of the enactment; CC may propose a technical correction to clarify that the general effective date provision applies to agreements as well.

- **Special effective date.** TCJA § 11071(c)(2) provides a special effective date for a change made by TCJA § 11071(a) for making administrative requests for money levied or received from a tax sale [under IRC 6343(b)] under which the 2-year period applies if the levy was made on or after March 23, 2017. CC may request a technical correction to address whether the special effective date applies to suits based on a levy (and possibility to suits based on agreement).

- (2) **Special period for levy action.** However, if a written request for the return of property is made under IRC § 6343(b) within the above time frame, the statutory time is extended a period of 12 months from the date of filing the request or 6 months from the date of disallowance, whichever is shorter. IRC § 6532(c)(2). A written request for the return of property which is considered inadequate under Treas. Reg. § 301.6343-2(c) does not extend the statutory time period. To be considered adequate, a written request must include:
 - a. the name and address of the person submitting the request;
 - b. a detailed description of the property levied upon;
 - c. a description of the claimant's basis for claiming an interest in the property levied upon;
 - d. the name and address of the taxpayer, the originating Internal Revenue office, and the date of the levy, as shown on the notice of levy form, or, in lieu thereof, a statement of reasons why such information cannot be furnished. Treas. Reg. § 301.6343-2(b).
- (3) **Period for IRC § 7426(a)(4).** A suit under IRC § 7426(a)(4), with respect to the determination of value of the United States' tax lien interest in real or personal property, must be commenced within 120 days after the day on which the certificate of discharge is issued.

5.17.5.17.10
(03-20-2018)

Administrative Claims

- (1) The provisions of IRC § 7422(a) (relating to prohibition of suit prior to filing claim for refund) do not apply to actions under IRC § 7426. IRC § 7426(f). Therefore, it is unnecessary for a person to file an administrative claim for refund before instituting an action under IRC § 7426. An administrative claim, in the form of a written request, may be filed seeking the recovery of property wrongfully levied upon, under IRC § 6343(b) (relating to return of property), although the filing of such claim is not a prerequisite to the commencement of an action under IRC § 7426(a)(1). (The request, however, will extend the limitations period for filing an action for a period of 12 months from the date of filing the request or six months after the disallowance of the request, whichever is shorter. IRC § 6532(c)(2).) Similarly, the filing of an administrative application under IRC § 6342(b) (relating to surplus proceeds), seeking a distribution of surplus proceeds resulting from the sale of property pursuant to levy, is not a prerequisite to the commencement of an action under IRC § 7426(a)(2).

- (2) As discussed in IRM 5.17.5.17.7, *Damages in Actions for Wrongful Collection Brought by Persons Other Than Taxpayers* above, an administrative claim must be made with the Service before civil damages may be awarded under IRC § 7426(h).

5.17.5.18
(08-01-2010)
**Actions Affecting
Property**

- (1) 2409a Actions.
- Under 28 USC § 2409a, the United States may be named a party defendant in a civil action to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.
 - Section 2409a is a consent statute.
 - Section 2409a requires that the United States have a present interest in the property. The statute does not apply if the Government bid in the property at a tax sale and resold it prior to the suit. See Curtis v. United States, 77-1 USTC ¶ 9138 (M.D. Tenn. 1976).

5.17.5.18.1
(08-01-2010)
**28 USC § 2410 Actions—
Background**

- (1) Under 28 USC § 2410(a), the United States may be named as a party in any civil action or suit in any federal district court, or in any State court having jurisdiction of the subject matter, in the following actions with respect to real or personal property on which the United States claims a mortgage or other lien, including a federal tax lien:
- to quiet title;
 - to foreclose a mortgage or lien;
 - to partition;
 - to condemn; and
 - of interpleader or in the nature of interpleader.
- (2) 28 USC § 2410 is a consent statute only; it does not confer authority upon any court to foreclose a lien, quiet title to property, partition or condemn property, or to entertain an interpleader suit. There must be a basis for jurisdiction independent of 28 USC § 2410. See Wells v. Long, 162 F.2d 842 (9th Cir. 1947); Shaw v. United States, 331 F.2d 493 (9th Cir. 1964); Simmons v. United States, 280 S.E.2d 463 (N.A. App. 1981). In other words, the court in which the suit is brought must have authority to conduct the type of proceeding instituted. If, for example, a court does not have authority to foreclose a mortgage, 28 USC § 2410 cannot be cited as a basis for jurisdiction over the United States, even though the property is encumbered by a tax lien.
- (3) If the United States no longer has a lien or mortgage on the subject property, then it cannot be joined as a party under 28 USC § 2410. See United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980).

5.17.5.18.2
(01-06-2017)
Actions to Quiet Title

- (1) The United States may be named a party to a suit to quiet title to real or personal property on which the United States has a mortgage or other lien, including a federal tax lien. 28 USC § 2410(a)(1). An action to quiet title is a proceeding instituted by persons claiming some interest or title in the property and seeking to remove a cloud from their title.
- (2) A judgment or decree in quiet title actions discharges a federal tax lien from the subject property to the extent provided by the local law applicable to similar matters. 28 USC § 2410(c). It is not necessary for the person bringing a quiet title action to request a judicial sale to discharge the Government's interest

from the property. See IRM 5.17.4.15, *Action to Quiet Title* for a discussion of the Government's right to bring an action to quiet title to property that it has acquired through the enforcement of a federal tax lien.

- (3) A taxpayer may bring a quiet title action under 28 USC § 2410(a)(1) against the United States to challenge the procedural validity of a federal tax lien and sale, but may not contest the merits of the underlying tax assessment in the proceeding. See James v. United States, 970 F.2d 750 (10th Cir. 1992); Hughes v. United States, 953 F.2d 531 (9th Cir. 1992); McCarty v. United States, 929 F.2d 1085 (5th Cir. 1991); Pollack v. United States, 819 F.2d 144 (6th Cir. 1987); Aqua Bar & Lounge, Inc. v. United States, 539 F.2d 935 (3d Cir. 1976). In other words, section 2410 waives sovereign immunity with respect to procedural violations arising from assessment, levy, seizure, or sale, but not with respect to the amount of tax liability assessed.

5.17.5.18.3
(01-06-2017)

Foreclosure Actions

- (1) If the United States has a mortgage or other lien on real or personal property, it may be joined as a party in a proceeding to foreclose that interest, but only if a judicial sale is being sought. 28 USC § 2410(c).
- (2) When the foreclosure action involves an encumbrance senior to a federal tax lien, the judicial sale discharges the federal tax lien to the extent it would discharge any other junior lien under the local law of the place where the court is situated. 28 USC § 2410(c). If the foreclosure involves real property, the rights of the United States in such instances are protected by providing a period of time in which the United States may redeem the property. If the foreclosure action involves an encumbrance junior to the federal tax lien, the sale will not disturb the federal tax lien, unless the United States agrees to the sale of the property free and clear of its liens. In that event, the proceeds are distributed according to the priorities of the parties' interests.
- (3) The effect on a federal tax lien of judicial proceedings to which the United States is not a party and in cases involving nonjudicial sales of property, is discussed below in IRM 5.17.5.19, *Proceedings in which United States is not a Party - Background*.

5.17.5.18.4
(12-14-2007)

Partition Suits

- (1) The United States may be named a party to a partition suit where it has a mortgage or lien on the subject property. 28 USC § 2410(a)(3).
- (2) A partition suit is a judicial proceeding:
 - a. brought by a person owning real or personal property with another as joint heirs, joint tenants or tenants in common, without regard to the wishes of the other co-owners;
 - b. to have the co-owners' undivided interests in the whole divided into separate interests in portions of the property; and
 - c. to which all persons having an interest in the property, including the United States by virtue of its federal tax lien, must be joined as necessary parties and given notice of the proceeding (under most statutes). After a hearing, the court will determine the interests of the co-owners and will enter an order determining the mode of partition.
- (3) As a general rule, a partition purchaser takes subject to liens and outstanding interests unless the decree of court provides for the sale free and clear of such encumbrances. The issue whether the interests of third parties, including the United States, may be satisfied out of the property partitioned, or must be

satisfied from the proceeds of sale of the property, is governed by local law. Since the law varies according to jurisdiction, the question should be referred to Area Counsel for determination.

- (4) A voluntary partition may be accomplished by any method which the parties deem best, such as by deed, written agreement or sale of the property and division of the proceeds, unless there is a statute to the contrary.

5.17.5.18.5
(12-14-2007)
Condemnation Suits

- (1) The United States, pursuant to 28 USC § 2410(a)(4), may be added as a party to a condemnation suit, where it has a mortgage or lien on the property being condemned.
- (2) A condemnation suit is:
 - a. a judicial proceeding brought by the United States Government, or the individual states and territories;
 - b. to take real or personal private property for public use through the exercise of the power of eminent domain;
 - c. for which the owner of the condemned property is entitled to just compensation; and
 - d. to which all persons having an interest in the property, including the United States, must be joined as parties and given notice of the proceeding. While condemnation procedures vary from state to state, most statutes require an administrative declaration of taking before a condemnation proceeding may be instituted.
- (3) A condemnation action is an appropriation of land or personal property for public purposes. The condemnation award stands in the place of the land or personal property, and the rights of all persons, including the United States, may be treated as though transferred to the award.

5.17.5.18.6
(08-01-2010)
Interpleader Suits

- (1) The United States may be joined as a party to interpleader suits and suits in the nature of interpleader. 28 USC § 2410(a)(5).
- (2) A person may bring an interpleader suit if:
 - a. the person is in possession of (or obligated with respect to) property or rights to property of a delinquent taxpayer in which the person has no interest;
 - b. a number of claims are asserted against the property; and
 - c. the person cannot determine to whom the property or rights to property should be distributed.
- (3) A person in these circumstances institutes an interpleader suit to avoid subjecting himself or herself to possible multiple liability by mistakenly surrendering the property to one other than the claimant legally entitled to the property. The person institutes the suit by naming all such claimants as defendants, and surrenders the property to the court for distribution in accordance with its determination of the rights of the various claimants. Such person is referred to as the interpleader.
- (4) A person cannot join the United States under 28 USC § 2410(a)(5) if the only claimants to the property are the taxpayer and the United States. Rosenheck v. United States, 79 A.F.T.R.2d ¶ 97-2715 (N.D. Okla. 1997); Queen City Savings & Loan Assoc. v. Sanders, 46 A.F.T.R.2d ¶ 80-5715 (W.D. Wash. 1980). In

that instance, there is only one claimant to the property because the United States stands in the shoes of the taxpayer.

- (5) "Suits in the nature of interpleader" are actions where the plaintiff is claiming some interest in the fund deposited as contrasted to a pure interpleader action where the plaintiff asserts no claim to the fund deposited.

5.17.5.18.7
(01-06-2017)

Removal of 28 USC § 2410 Proceeding to Federal Court

- (1) Most cases in which the United States is named a party under 28 USC § 2410 are brought in state courts.
- (2) 28 USC § 1444 authorizes removal of actions covered by section 2410 to a federal district court. The Chief Counsel Directives Manual (CCDM) provides that, in general, Area Counsel attorneys should recommend to the Department of Justice to have cases removed to a federal district court. See IRM 34.5.6.6, *Removal to Federal Court*. Immediately consult with Area Counsel whenever any questions arise as to whether the Government's interests will be best protected by having the case removed from state court.

5.17.5.18.8
(01-06-2017)

Procedure and Responsibility

- (1) The Department of Justice has primary responsibility for protecting the Government's interest in cases in which the United States is joined as a party, regardless of the court involved. In tax cases, it cannot adequately protect the Government's interest without the aid and assistance of the Service. This requires both the assistance of the Area Counsel's office in certain cases and the Area Director's office in all cases.
- (2) Any pleading (whether or not designated as a complaint) that seeks to join the United States because of a federal tax lien must include the name and address of the delinquent taxpayer, and if a notice of federal tax lien has been filed, the date and place such notice was filed as well as the Service office that filed it. 28 USC § 2410(b). These requirements must be met with respect to each filed notice of tax lien. The pleading must be served personally on the office of the U.S. Attorney for the district in which the suit is pending and on the Attorney General, in Washington, D.C., by registered or certified mail. An answer or other pleading must be filed by the United States within 60 days after service. 28 USC § 2410(b).
- (3) The U.S. Attorney should contact the office of the Area Director responsible for collection of the account under which the lien arose and forward a copy of the summons and complaint to that office. Depending upon local procedures, the U.S. Attorney may also send a copy of the summons and complaint to Area Counsel. The U.S. Attorney will request information concerning the assessment, the property involved, and the claims of all lienholders.
 - a. This information is necessary for the United States to prepare and file an answer or other pleading within 60 days after service or other further time as the court may allow.
 - b. The answer must contain the Government's position, including any defenses, and in some cases may request foreclosure of the tax lien.
 - c. A copy of the Service's reply to the U.S. Attorney, together with copies of all information furnished to him or her, may be sent to Area Counsel for purposes of review in cases involving disputed issues, so Area Counsel can advise the U.S. Attorney of the Service's litigating position on the issues involved.

- d. In cases where the records of the Service disclose no outstanding tax lien, the Service will advise the U.S. Attorney to file a disclaimer on behalf of the United States.

- (4) A copy of a complaint involving an interpleader action must be forwarded to Area Counsel. The Area Director's office should immediately investigate the claims of all competing claimants and provide this information to Area Counsel. The information should be specific and include tax data in addition to claimant information. In interpleader cases, Area Counsel is required to prepare a defense letter to the Department of Justice, Tax Division. See Chief Counsel Directives Manual (CCDM), IRM 34.5.6.2, *Referral of 28 U.S.C. § 2410 Cases to Field Counsel* for a general discussion of Counsel procedures in section 2410 actions, and IRM 34.5.6.7.1, *Specific Procedures for Handling Interpleader Suits* for specific procedures relating to interpleader suits.

5.17.5.18.9
(12-14-2007)
**Administrative
Discharge of Property
from Tax Lien During
Pendency of Proceeding**

- (1) If the United States receives an application for administrative discharge of the property from the federal tax lien during the pendency of a proceeding to which the United States has been joined as a party, it will be submitted to the Area Director by the U.S. Attorney. The U.S. Attorney will be consulted and provide instructions if such application is received directly by the Internal Revenue Service.
- (2) As a general rule, applications for discharge of property from the tax lien made without consideration after the commencement of a proceeding in which the United States has been named will be rejected. This is because the Service has established procedures whereby a mortgage holder bringing a foreclosure action can be assured an administrative discharge of a federal tax lien after the completion of the action, if:
 - a. there is no value to the tax lien interest; and
 - b. the action does not name the United States as a party to the foreclosure proceeding.

5.17.5.18.10
(12-14-2007)
**Purchase of Property by
the United States**

- (1) In any suit where a debt owing the United States is due (and when a federal tax lien is involved the amount is always due), the United States may sue to foreclose its own lien and seek a judicial sale of the real or personal property. 28 USC § 2410(c); IRC § 7403. When the federal tax lien is the primary lien, the United States is authorized to bid at the sale an amount equal to its claim plus the expense of sale. 28 USC § 2410(c); IRC § 7403.

5.17.5.18.11
(12-14-2007)
Surplus Proceeds

- (1) If real or personal property is sold in a 28 USC § 2410 action to satisfy a lien senior to a federal tax lien, and surplus proceeds are available, the United States may seek its share of the proceeds. The United States will receive proceeds according to the tax lien's priority with respect to the property sold, for application to the taxpayer's liabilities.
- (2) The redemption period gives the Service time to investigate and determine whether it would be to the advantage of the United States to redeem the property. The principal consideration in such an investigation is whether the value of the property sold in the foreclosure proceeding is substantially in excess of the amount required to effect the redemption.

- (3) When the United States redeems real property from a judicial sale pursuant to 28 USC § 2410(c), a junior lienholder may redeem the property from the United States if permitted under the local law where the property is situated.

5.17.5.18.12
(01-06-2017)

The Redemption Price

- (1) 28 USC § 2410(d) provides a uniform method for determining the amount to be paid by the United States when it redeems real property, whether the redemption is made under the authority of 28 USC § 2410(c) or IRC § 7425(d)(1) (relating to real property sold at nonjudicial sales).
- (2) The redemption price cannot be greater than the amount paid by the purchaser at the judicial or nonjudicial sale, plus interest at the statutory rate of 6% from the date of sale to the redemption date, plus the excess, if any, of any expenses incurred after the foreclosure sale in maintaining the property over the income from the property during this period. Where the property is not rented out, but is used by the purchaser, the income includes the reasonable rental value of the property. 28 USC § 2410(d).
- (3) IRC § 7810 established a revolving fund not to exceed \$10,000,000 under the control of the Treasury Department which is available without fiscal year limitation for all expenses necessary for the redemption by the Government of real property as provided in IRC § 7425(d) and 28 USC § 2410(c). The revolving fund generally has less than this amount on hand at any given time. Contact Collection Advisory to determine the exact amount available for redemption.
- (4) The revolving fund is reimbursed from proceeds of subsequent sales of redeemed real property in an amount equal to the amount expended to make such redemption. See IRM 5.12.5.5, *Federal Tax Lien Revolving Fund* and IRM 5.12.5.5.1, *Advances from the Revolving Fund*, for procedures relating to the revolving fund.
- (5) By exercising its power of redemption, the United States can purchase property sold at distress prices and resell the property at a profit. Any profit from the sale of redeemed property subject to a tax lien is applied to reduce the liability of the taxpayer whose assessment gave rise to the lien. Surplus proceeds (within the meaning of IRC § 6342(b)) resulting from any sale under IRC § 7506 of real property redeemed by the United States, are not paid into the general Treasury but are placed in a deposit fund account provided for by IRC § 7809, so that they may be paid to parties legally entitled to them.

5.17.5.18.13
(12-14-2007)

Release of Right of Redemption

- (1) In cases where a federal tax lien is discharged and the Government does not exercise its right to redeem under 28 USC § 2410(c), the right will cloud the title to the property for 120 days or, if greater, the period allowable for redemption under applicable local law. When title is clouded, resale by the purchaser is difficult, if not almost impossible, and also usually deters a purchaser from making any improvements until he or she is sure that his or her right to the property is complete. For this reason, purchasers frequently ask the Government to release its redemption right.
- (2) A person desiring a release of the Government's right of redemption after a foreclosure suit should submit his or her application to the U.S. Attorney in the jurisdiction where the foreclosure action was held. The U.S. Attorneys have been delegated limited authority to accept or reject applications.
- (3) Upon receipt of an application, the U.S. Attorney will forward it to the Area Director for valuation of the redemption right. The valuation will usually require

a determination of the fair market value of the property, the value of senior encumbrances, the amount required to redeem, etc. The Area Director will forward his or her valuation to the Area Counsel, who analyzes the entire case in the light of the legal factors involved. Area Counsel will transmit its recommendation to the U.S. Attorney or to the Tax Division in Washington, whichever is appropriate.

- (4) The Department of Justice generally will not release a right of redemption, even where the right is valueless, without some consideration being paid.

5.17.5.19
(12-14-2007)
**Proceedings in which
United States is not a
Party - Background**

- (1) The preceding section dealt with judicial proceedings in which the United States is joined as a party, and discussed the rules for the discharge of federal tax liens on real and personal property involved in such proceedings. IRC § 7425 supplements 28 USC § 2410(a) by providing uniform federal rules for determining the effect on a federal tax lien of judicial proceedings to which the United States is not a party, and in cases of nonjudicial sales of property.

5.17.5.19.1
(12-14-2007)
Judicial Foreclosures

- (1) If the United States is not a party under 28 USC § 2410 to formal judicial proceedings, the effect of a judgment, or a judicial sale pursuant to such a judgment, depends upon whether a notice of federal tax lien was filed before the action was commenced.
 - a. If a notice of federal tax lien is on file in the place provided by law for such filing at the time the action or suit is commenced, the tax lien, and its priority relative to other liens, is not disturbed by the judgment or judicial sale.
 - b. If a notice of federal tax lien is not on file before such action is commenced, or (as in the case of special federal estate and gift tax liens) the law makes no provision for such filing, a judgment or judicial sale discharges a federal tax lien to the extent provided by the local law where the property subject to the lien is situated. Treas. Reg. § 301.7425-1(c).
- (2) For example, if a notice of federal tax lien is not on file on the date a foreclosure action of a first mortgage is brought, and if local law provides that junior liens on real property will be discharged by a judicial sale pursuant to a judgment in a foreclosure action, then a federal tax lien on the property will be discharged by the judicial sale. The result is the same whether the lien arose before or after the date of commencement of the foreclosure action or whether notice of lien was filed at any time after the commencement of the foreclosure action.
- (3) If the United States has not been joined in a judicial proceeding in which the judicial sale discharges the federal tax lien from the subject property, then the United States may intervene in the suit pursuant to IRC § 7424, and:
 - a. make a claim against the surplus proceeds of the sale, prior to their distribution by the court, according to the tax lien's priority with respect to the property sold, for application to the taxpayer's liabilities (Treas. Reg. § 301.7425-1(c)(4)); or
 - b. exercise its right to redeem the real property under 28 USC § 2410(c) within 120 days after the sale or, if longer, the redemption period under local law. If the United States' application to intervene is denied, then the judicial sale does not discharge the tax lien. IRC § 7424.

- (4) The United States has no right of redemption (except as provided by local law) where real property is sold in a judicial proceeding to which it has not been named as a party and it has not intervened pursuant to IRC § 7424.

5.17.5.19.2
(01-06-2017)

**Nonjudicial Foreclosures
of Non-Perishable
Goods**

- (1) A nonjudicial foreclosure on real or personal property is a sale made pursuant to:
- an instrument creating a lien on the property sold;
 - a confession of judgment on the obligation secured by an instrument creating a lien on the property sold; or
 - a statutory lien on the property sold. IRC § 7425(b). This includes, for example, the divestment of the taxpayer's interest in the real or personal property by operation of law, by public or private sale, or by termination under provisions in a land sales contract or a conditional sales contract. IRC § 7425(c)(4); Treas. Reg. § 301.7425-2(a).
- (2) A nonjudicial sale, pursuant to a lien senior to a federal tax lien or title derived from the enforcement of a tax lien, will discharge the tax lien or divest the title to the extent provided by local law with respect to junior liens if the notice of lien was filed, or the title was recorded, in the place dictated by local law, more than 30 days before the sale, and the Area Director was given timely and adequate notice of the sale.
- (3) In situations where a notice of federal tax lien has not been filed or has been filed less than 31 days before the sale, a notice of sale is not required. In these situations, the sale shall have the same effect with respect to the discharge of the federal tax lien/NFTL as provided by local law with respect to junior liens. This is the same result as where the United States does not have a tax lien on file and it is not joined as a party to a 28 USC § 2410 proceeding.
- (4) The notice of sale must be given in writing, by registered or certified mail or by personal service, not less than 25 days prior to the sale, to the IRS official, office and address specified in IRS Publication 786, "Instructions for Preparing a Notice of Nonjudicial Sale of Property and Application for Consent to Sale." See Treas. Reg. § 301.7425-3. According to Publication 786, the notice should be addressed to the Advisory Group Manager for the area in which the notice of federal tax lien was filed. The requirements for the adequacy of such notice are set forth in Treas. Reg. § 301.7425-3(d), and these requirements must be satisfied with respect to each notice of tax lien filed, and with respect to each recorded title. This notice requirement gives the Government an opportunity to review its position and determine the appropriate action, such as purchasing the property, without placing an undue burden on a foreclosing creditor since he or she need only check the record for federal tax liens or title on the date the action is commenced. See IRM 5.17.5.19.3, *Nonjudicial Sales of Perishable Goods* regarding nonjudicial sales of perishable goods.
- (5) Where the United States is not given proper notice of the sale, although notice of lien was duly filed, or the title was duly recorded, more than 30 days before the sale, the sale does not disturb the lien or title of the United States. Treas. Reg. § 301.7425-2(a). This rule does not apply in any case in which, prior to the date of sale, the Area Director consents to the sale of the property free of the lien or title, even though the United States did not receive proper notice of the sale. IRC § 7425(c)(2).

- (6) If the nonjudicial sale is pursuant to a lien junior to the federal tax lien or the United States' title, then the sale does not discharge the tax lien or divest the title, regardless of whether notice is given to the Area Director. In such instances, the United States may enforce the lien against the real or personal property by administrative or judicial proceedings or may take any appropriate action with respect to its title.

5.17.5.19.3
(08-01-2010)
**Nonjudicial Sales of
Perishable Goods**

- (1) If the property is perishable, or is liable to become greatly reduced in value by retaining, or cannot be kept without great expense, the 25-day notice rule is not applicable and the property may be sold free of the tax lien or title as long as notice is given at any time prior to the sale. IRC § 7425(c)(3); Treas. Reg. § 301.7425-3(c)(1). The proceeds of the sale (exclusive of costs) must be held at least 30 days after the sale date as a fund subject to the claim of the United States with the same priority as the claim had with respect to the property sold. IRC § 7425(c)(3); Treas. Reg. § 301.7425-3(c)(1).
- (2) A seller becomes personally liable to the United States for the value of its claim in the proceeds if:
 - a. he or she fails to hold the proceeds for the 30-day period; and
 - b. the IRS asserts a claim to the proceeds within the 30-day period. Treas. Reg. § 301.7425-3(c)(1).
- (3) In any event, even if the proceeds of such sale are not so held by the seller, but all the other provisions relating to the sale of perishable goods are satisfied, the buyer of the property at the sale takes the property free of the federal tax lien or title. Treas. Reg. § 301.7425-3(c)(1).
- (4) The term "perishable goods" is defined as tangible personal property which, in the reasonable view of the seller, is liable to perish or become greatly reduced in price or value by retaining or cannot be kept without great expense. Treas. Reg. § 301.7425-3(c)(2). These goods are the same as those the Internal Revenue Service is authorized to sell pursuant to IRC § 6336 (relating to sale of perishable goods) and IRC § 6863(b)(3)(B)(ii) (relating to exceptions to stay of sale of seized property pending Tax Court decision).

5.17.5.19.4
(01-06-2017)
**Right of Redemption
after Nonjudicial
Foreclosures**

- (1) The United States may redeem real (not personal) property sold in nonjudicial proceedings where the sales were to satisfy a lien senior to a federal tax lien or to a title obtained as a result of the enforcement of a tax lien. IRC § 7425(d)(1). This right of redemption exists even where the Area Director has given his or her consent prior to the sale. Treas. Reg. § 301.7425-4(a)(1). The period of time for redemption in these cases is 120 days from the date of sale or the period allowable for redemption under local law, whichever is longer. IRC § 7425(d)(1). Thus, the United States will always have the right to redeem real property sold at such sales, whether or not other lienors have similar rights under local law.

Note: The date the property is considered sold and the date the redemption period begins under local law varies among jurisdictions. Consult Area Counsel to determine factors applicable in specific locations.

- (2) The amount to be paid by the United States where it exercises its right of redemption is the amount prescribed in 28 USC § 2410(d) (discussed in IRM 5.17.5.18.12, *The Redemption Price* above). IRC § 7425(d)(2); Treas. Reg. §

301.7425-4(b). As a result, the amount to be paid by the United States is uniform in all cases, regardless of whether the United States redeems the real property from a purchaser at a judicial sale to which the United States was a party or a purchaser at a nonjudicial sale.

5.17.5.19.5
(12-14-2007)
Certificate of Redemption

- (1) After the United States has exercised its right of redemption under IRC § 7425(d), the Service will apply to the officer designated by local law, if any, for the documents necessary to provide evidence of redemption. If no such officer has been designated by local law, or if the officer so designated fails to issue the necessary documents, the Service is authorized to issue a certificate of redemption for the property redeemed by the United States.
- (2) The documents issued by the local officer or the certificate of redemption executed by the Service must be recorded in the proper registry of deeds in order to record title to the redeemed property. If the state in which the real property redeemed is situated has not by law designated an office in which the Service-issued certificate of redemption may be recorded, the certificate must be filed in the office of the clerk of the federal district court for the judicial district in which the redeemed property is situated.
- (3) A certificate of redemption properly executed constitutes prima facie evidence of the regularity of the redemption. When the certificate is recorded, it transfers to the United States all the rights, title, and interest in and to the redeemed property acquired by the purchaser from whom the United States redeems the property. IRC § 7425(d)(3); Treas. Reg. § 301.7425-4(c).

5.17.5.19.6
(12-14-2007)
Release of Right of Redemption

- (1) If a federal tax lien is discharged or title divested by a nonjudicial sale under IRC § 7425 and the Service does not exercise its right to redeem, the right to redeem clouds title to the property. In many cases the Service is asked to release its right of redemption. The information required in an application for the release of the right of redemption is set forth in Rev. Proc. 68-10, 1968-1 C.B. 758. The Area Director will review the application to determine if the release has any value, and if so, how much the applicant should pay for the release. No processing charge is made for the release of a valueless right of redemption regardless of the fact that the value of a release has an intangible value to the applicant. Treas. Reg. § 301.7425-4(c)(4).

5.17.5.20
(01-06-2017)
Award of Court Costs and Attorney's Fees Under IRC § 7430

- (1) With respect to any administrative or court proceeding involving the determination, collection, or refund of any tax, interest or penalty, brought by or against the United States, a court of the United States (including the Tax Court) generally may award reasonable litigation and administrative costs to the prevailing party. IRC § 7430(a). The court may not award administrative costs with respect to collection actions, except for damage actions under IRC § 7433 for the willful violation of section 362 or section 524 of the Bankruptcy Code.

Note: Claims for administrative cost awards under IRC § 7430 are considered by Appeals if the substantive issues or IRC § 7430 cost issues are not and have never been before any court of the United States with jurisdiction over these issues. See IRM 8.7.15.1.11, *Appeals Involvement in IRC 7430 Cases*. For information regarding other types of administrative claims that may be brought by taxpayers, such as claims for damages for unauthorized collection under IRC § 7433, see applicable IRM provisions, above, and IRM 25.3.3.8, *Pre-Litigation Claim Requirements*.

(2) Prevailing Party

- In order to be a prevailing party, the party must substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented. IRC § 7430(c)(4)(A).
- Exception to prevailing party—A party shall not be considered a prevailing party if the United States establishes that its position is substantially justified.
- The position of the United States shall be presumed to be not substantially justified if the IRS did not follow its applicable published guidance in the administrative proceeding. Published guidance means regulations, revenue rulings, revenue procedures, information releases, notices and announcements, as well as any private letter ruling, technical advice memorandum, and determination letter that is issued to a taxpayer.
- For purposes of determining whether the United States' position is substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.
- Qualified Offers. An award of fees and costs may be available if, after a taxpayer has a right to administrative review in the IRS Appeals Office, the taxpayer makes a "qualified" offer that the IRS rejects and, then, the IRS obtains a judgment in the case that is equal to or less than the taxpayer's offer, without regard to interest. In this instance, the taxpayer is treated as the prevailing party. The provisions, however, do not apply to judgments issued pursuant to a settlement or in a proceeding in which the amount of the tax liability is not at issue, such as a declaratory judgment or summons enforcement proceeding. See IRC § 7430(g) .

(3) Position of the United States

- "Position of the United States" means the position taken by the United States in the underlying judicial proceeding, and
- the position taken in administrative proceedings as of the earlier of the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service or the date of the notice of deficiency.

(4) Exhaustion of Administrative Remedies

- Reasonable litigation costs shall not be awarded unless the prevailing party has exhausted the administrative remedies available to it within the Internal Revenue Service.

(5) Net Worth Requirements

- Only individuals whose net worth does not exceed \$2,000,000 and corporations whose net worth does not exceed \$7,000,000 are eligible for an award of fees and costs.

(6) Cap on Hourly Fee

- In 1998, Congress capped the hourly fees recoverable under this section at \$125 per hour and indexed the cap to the rate of inflation.
- The difficulty of the issues raised and the lack of available tax attorneys may justify raising the cap on the hourly rate.
- Reasonable attorney's fees may be awarded to persons who represent a prevailing party on a pro bono basis or for a nominal fee.

5.17.5.21
(01-06-2017)

IRC § 7345 Right to Determine Whether Certification as a Seriously Delinquent Taxpayer is Erroneous

- (1) IRC § 7345, *Revocation or denial of passport in case of certain tax delinquencies* requires the delegated Internal Revenue Service official to notify the State Department that an individual is certified as owing a seriously delinquent tax debt. The State Department generally will not issue or renew a passport to an individual after receiving the certification from the Internal Revenue Service.
- (2) Upon receiving notice from the delegated Internal Revenue Service official that a current passport holder's tax debt is certified as seriously delinquent, the State Department may revoke the passport currently held by the individual.
- (3) **Judicial review of certification:** After the delegated Internal Revenue Service official notifies an individual under IRC §7345 (d) contemporaneously with the Department of State that they have been certified as a seriously delinquent taxpayer, the taxpayer may bring a civil action under IRC §7345 (e) against the United States in a district court of the United States or against the IRS in the Tax Court to determine whether the certification was erroneous or whether the Internal Revenue Service has failed to reverse the certification. If the court determines that the certification was erroneous or should have been reversed, then the court may order the delegated Internal Revenue Service official to notify the Secretary of State that such certification is reversed.
- (4) **Seriously Delinquent Tax Debt Defined:** as any unpaid legally enforceable assessed federal tax debt greater than \$50,000 (including penalties and interest), where additionally:

- A Notice of Federal Tax Lien (NFTL) has been filed and any IRC § 6320 administrative rights have lapsed or been exhausted;
- or**
- A Levy has been made pursuant to IRC § 6331.

Note: The monetary amount being deemed seriously delinquent will be indexed for inflation.

(5) **Exceptions to the Certification Definition Include:**

- The debt is being paid in a timely manner pursuant to an IRC § 6159 Installment Agreement;
- The debt is being paid in a timely manner pursuant to an IRM 5.8.2.3.1, *Determining Processability* pending or an accepted IRC § 7122 Offer in Compromise or settlement agreement with the Department of Justice; but does not include IRM 5.8.4.20, *Offer Submitted to Solely Delay Collection*.
- Collection is suspended with respect to a hearing that is pending or has been requested pursuant to IRC § 6330;
- Collection is suspended with respect to an election made pursuant to IRC § 6015(b) or (c); or
- Collection is suspended with respect to relief being requested pursuant to IRC § 6015(f).

- (6) **Discretionary Exclusions:** There are additional discretionary exclusions where the Service has determined that it will not certify seriously delinquent tax debt. See IRM 5.1.12.27, *Passport Revocation or Denial in Case of Certain Tax Debts*.

- (7) **Certification Reversal:** A certification can be reversed if it is found to be erroneous, the debt becomes fully satisfied, or the debt ceases to be seriously

delinquent. Full satisfaction of the debt includes debt that is legally unenforceable. Qualification for a tax debt ceasing to be seriously delinquent is meeting one of the exceptions to certification, including the exceptions identified in paragraph five or discretionary exclusions referenced in paragraph six.

- (8) **Notification of Certification Reversal:** The notice is sent contemporaneously to both the State Department and the taxpayer timed as follows:
- a. **Full satisfaction of debt:** The notice is sent no later than the date required for issuing the certificate of release of lien under IRC 6325(a).
 - b. **Innocent spouse relief:** The notice is sent no later than 30 days after the election or request.
 - c. **Installment agreement or offer-in-compromise:** The notice is sent no later than 30 days after the installment agreement is entered into or the Offer accepted.
 - d. **Erroneous certification:** The notice is sent as soon as practicable after such finding.
- (9) For more information on procedural guidelines for this topic see the references identified below:
- a. The overall certification process under IRC § 7345 see IRM 5.1.12.27, *Passport Revocation or Denial in Case of Certain Tax Debts*; or
 - b. Processing suits under IRC § 7345 see IRM 25.3.3.7.5, *IRC § 7345 Right to Determine Whether Certification as a Seriously Delinquent Taxpayer is Erroneous*.

