



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

5.17.13

JUNE 6, 2023

EFFECTIVE DATE

(06-06-2023)

PURPOSE

- (1) This transmits revised IRM 5.17.13, *Legal Reference Guide for Revenue Officers, Insolvencies and Decedents' Estates*.

MATERIAL CHANGES

- (1) The following material changes have been made to IRM 5.17.13, *Insolvencies and Decedents' Estates*:

IRM Subsection	Material Change
5.17.13.1	Heading has been changed from <i>Section Overview</i> to <i>Program Scope and Objectives</i> . Added content and simplified language. Moved some content on roles and responsibilities to subsection 5.17.13.1.3.
5.17.13.1.1	Created subsection 5.17.13.1.1, <i>Background</i> .
5.17.13.1.2	Created subsection 5.17.13.1.2, <i>Authority</i> .
5.17.13.1.3	Created subsection 5.17.13.1.3, <i>Roles and Responsibilities</i> .
5.17.13.1.4	Created subsection 5.17.13.1.4, <i>Program Management and Review</i> .
5.17.13.1.5	Created subsection 5.17.13.1.5, <i>Program Controls</i> .
5.17.13.1.6	Created subsection 5.17.13.1.6, <i>Terms and Acronyms</i> .
5.17.13.1.7	Created subsection 5.17.13.1.7, <i>Related Resources</i> .
Throughout IRM	Minor updates throughout this IRM to update links, remove unnecessary underlines from material, fix grammar, and to eliminate § symbols.

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 5.17.13 dated July 9, 2012.

AUDIENCE

Small Business/Self Employed (SB/SE) Collection Employees

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5.17.13

Insolvencies and Decedents' Estates

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5.17.13.1
(06-06-2023)
Program Scope and Objectives

- (1) **Purpose:** This IRM section provides background information and procedures for Field Collection employees who are responsible for collecting tax liabilities in insolvent decedent estates and other non-bankruptcy insolvency proceedings. IRM 5.17.13.1 through IRM 5.17.13.8 discuss general principles, and IRM 5.17.13.9 through IRM 5.17.13.12 discuss specific types of insolvency proceedings.
- (2) **Audience:** The guidance in this IRM is for Field Collection revenue officers investigating accounts with insolvent decedent estates, receiverships, assignment for the benefit of creditors, and corporate dissolutions.
- (3) **Policy Owner:** Director, Small Business/Self-Employed Division (SB/SE), Headquarters, Collection Policy.
- (4) **Program Owner:** The owner of this IRM is Collection Policy, Global Strategic Compliance.
- (5) **Primary Stakeholders:** The primary stakeholder is SB/SE Field Collection. Other functions that are affected by, or have input to, these procedures include Chief Counsel and IRS Independent Office of Appeals.
- (6) **Program Goals:** There are several types of non-bankruptcy insolvency proceedings that revenue officers may encounter (See IRM 5.17.13.1.1). Revenue officers must have a good understanding of the Federal Priority Statute in order to ensure the government receives its appropriate interest in property, as well as the available remedies if that does not happen.

5.17.13.1.1
(06-06-2023)
Background

- (1) Examples of non-bankruptcy insolvency proceedings include insolvent decedent estates, receiverships, assignments for the benefit of creditors, and corporate dissolutions. These distinct proceedings have a significant similarity. In each one, a fiduciary takes control of property of a debtor or decedent. The fiduciary then has the duty of administering and distributing the property.
- (2) Non-bankruptcy insolvency proceedings are usually under the jurisdiction of state courts (except for federal receiverships).
- (3) In the case of an insolvency, the IRS may be entitled to payment of federal taxes ahead of other creditors under the Federal Priority Statute, *31 USC 3713(a), Priority of Government claims*. If a fiduciary pays other claimants ahead of the IRS in violation of the Federal Priority Statute, then the fiduciary might be personally liable under *31 USC 3713(b)*.

Note: The IRS may also be able to assert transferee liability against persons who receive property from insolvent estates. See IRM 5.17.14, *Fraudulent Transfers and Transferee and Other Third Party Liability*.

5.17.13.1.2
(06-06-2023)
Authority

- (1) Delegation orders that are specific to the Small Business/Self Employed Collection organization are in IRM 1.2.65.3, *SB/SE Functional Delegation Orders - Collection*.
- (2) The Federal Priority Statute is located in *31 USC 3713, Priority of Government claims*.
- (3) Internal Revenue Code and Treasury Regulations related to this IRM section include the following:

U.S. Code (USC) Section	Treasury Regulation Section	Treasury Regulation or USC Title
IRC 2501	26 CFR 25.2501-1	Imposition of Tax
IRC 2603	No regulation	Liability for Tax
IRC 2661	No regulation	Administration
IRC 6036	26 CFR 301.6036-1	Notice required of executor or of receiver or other like fiduciary
IRC 6321	26 CFR 301.6321-1	Lien for taxes
IRC 6323	26 CFR 20.6323-1	Validity and priority against certain persons
IRC 6325	26 CFR 20.6325-1	Release of lien or partial discharge of property; transfer certificates in nonresident estates
IRC 6331	26 CFR 301.6331-1	Levy and distraint
IRC 6334	26 CFR 301.6334-1	Property exempt from levy
IRC 6335	26 CFR 301.6335-1	Sale of seized property
IRC 6502	26 CFR 301.6502-1	Collection after assessment
IRC 6503	26 CFR 301.6503(b)-1	Suspension of running of period of limitation; assets of taxpayer in control or custody of court
IRC 6601	26 CFR 301.6601-1	Interest on underpayments
IRC 6871	26 CFR 301.6871(a)-1	Immediate assessment of claims for income, estate, and gift taxes in bankruptcy and receivership proceedings

U.S. Code (USC) Section	Treasury Regulation Section	Treasury Regulation or USC Title
IRC 6873	26 CFR 301.6873-1	Unpaid claims in bankruptcy or receivership proceedings
IRC 6901	26 CFR 301.6901-1	Procedure in the case of transferred assets
IRC 7402	No regulation	Jurisdiction of district courts
IRC 7403	26 CFR 301.7403-1	Action to enforce lien or to subject property to payment of tax

5.17.13.1.3
(06-06-2023)
Roles and Responsibilities

- (1) Field Collection employees are responsible for investigating and collecting on assigned collection cases. In a collection investigation, Field Collection employees may encounter an insolvent decedent estate, an assignment for the benefit of creditors, a receivership, or a corporate dissolution.
- (2) Director, Field Collection, is the executive responsible for all Field Collection programs.
- (3) Director, Collection Policy, is the executive responsible for the policies and procedures followed by Field Collection employees.
- (4) Field Collection Area Directors, Territory Managers, and Group Managers are responsible for ensuring Field Collection employees comply with these procedures.
- (5) Field Collection revenue officers are responsible for following the procedures in this IRM.
- (6) Field Collection CEASO employees and Counsel provide advice and may review some of the Field Collection revenue officer collection activities.

5.17.13.1.4
(06-06-2023)
Program Management and Review

- (1) IRM 1.4.50, *Collection Group Manager, Territory Manager and Area Director Operational Aid*, addresses responsibilities of managers for Field Collection case work.
- (2) IRM 1.4.53, *Advisory and Property Appraisal and Liquidation Specialist Group Manager Operational Aid*, addresses responsibilities for Civil Enforcement Advice and Support Operations (CEASO) group managers.
- (3) National quality and program reviews are conducted to ensure that program delivery and case actions are in accordance with procedural requirements. See IRM 5.13.1, *Embedded Quality Collection Field Organizations Administrative Guidelines*.

5.17.13.1.5
(06-06-2023)

Program Controls

- (1) The Integrated Collection System (ICS) is used to control tax accounts on a decedent's tax liability and to document case work.
- (2) The ENTITY Case Management System generates reports to assist in managing assigned inventory on ICS. See IRM 5.3.1, *ENTITY Case Management System (ENTITY)*, for information on Field Collection Case Assignment and Workload Management.
- (3) Caseworkers and managers utilize the Automated Insolvency System (AIS) for case management, assignment, and documentation of non-bankruptcy insolvency cases. See IRM 5.9.3.2, *Automated Insolvency System (AIS)*. Also, see IRM 5.9.12, *Insolvency Automated Processes*, for information on reports for non-bankruptcy insolvency cases.

5.17.13.1.6
(06-06-2023)

Terms and Acronyms

- (1) The term *insolvency proceedings* in this IRM is not referring to bankruptcy cases. The Bankruptcy Code (Title 11 of the United States Code (USC)) governs bankruptcy cases, which are addressed in IRM 5.17.8, *General Provisions of Bankruptcy*, IRM 5.17.9, *Chapter 7 Bankruptcy (Liquidation)*, IRM 5.17.10, *Chapter 11 Bankruptcy (Reorganization)*, IRM 5.17.11, *Chapter 13 Bankruptcy (Individuals with Regular Income)* and *Chapter 12 Bankruptcy (Family Farmers or Fisherman with Regular Income)*, and IRM 5.9, *Bankruptcy and Other Insolvencies*.
- (2) The following table includes common acronyms used in insolvent decedent and non-bankruptcy insolvency proceedings:

Acronym	Definition
CEASO	Civil Enforcement Advice and Support Operations
CFR	Code of Federal Regulations
CSED	Collection Statute Expiration Date
DOJ	Department of Justice
DLN	Document Locator Number
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
NFTL	Notice of Federal Tax Lien
SB/SE	Small Business Self Employed

5.17.13.1.7
(06-06-2023)

Related Resources

- (1) Related resources include the following:

IRM Section	IRM Title
IRM 5.1.19	Collection Statute Expiration
IRM 5.5.2	Probate Proceedings

IRM Section	IRM Title
IRM 5.9.20	Non-Bankruptcy Insolvencies
IRM 5.10	Seizure and Sale
IRM 5.11	Notice of Levy
IRM 5.12	Federal Tax Liens
IRM 5.17.2	Federal Tax Liens
IRM 5.17.4	Suits by the United States
IRM 5.17.14	Fraudulent Transfers and Transferee and Other Third-Party Liability

5.17.13.2
(07-09-2012)
**Priority of Government
Claims Under 31 USC
3713(a), the Federal
Priority Statute**

- (1) Under 31 USC 3713(a)(1)(A), the Federal Priority Statute, the Federal Government is entitled to have its claims paid first when a person indebted to the government is insolvent and:
 - a. a debtor without enough property to pay all debts makes a voluntary assignment of property,
 - b. property of an absent debtor is attached, or
 - c. an "act of bankruptcy is committed."

Note: "Act of bankruptcy", defined below in IRM 5.17.13.2.3, *Act of Bankruptcy*, does not refer to cases brought under Title 11 (the Bankruptcy Code). The Federal Priority Statute does not apply to cases under Title 11. In bankruptcy cases, the priorities in the bankruptcy laws apply rather than the Federal Priority Statute.

- (2) 31 USC 3713(a)(1)(B) of the Federal Priority Statute covers decedents' estates. The Federal Government is entitled to have its claims paid first if the estate of the deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor. This means, among other things, that the government is entitled to be paid before the heirs receive an inheritance.
- (3) Pursuant to the Federal Priority Statute, the general rule is that in an insolvency proceeding or a decedent's estate case, the fiduciary must pay a federal claim before other claims.

5.17.13.2.1
(07-09-2012)
Insolvency

- (1) "Insolvent" under 31 USC 3713(a) refers to "balance sheet" insolvency. This occurs when the debtor's liabilities exceed the debtor's assets. See *Lakeshore Apartments, Inc. v. United States*, 351 F.2d 349 (9th Cir.1965); *United States v. Golden Acres*, 684 F.Supp. 96 (D.Del. 1988); *United States v. Blumenfield*, 128 B.R. 918 (E.D. Pa. 1991).
- (2) The inability or failure to pay debts as they become due does not, by itself, constitute insolvency under 31 USC 3713(a). See *United States v. Oklahoma*, 261 U.S. 253 (1923). For example, the debtor might have far more assets than liabilities, but may not be able to liquidate the assets to pay off the debts on time.

- (3) The relevant time for testing insolvency is at the time of distribution of assets. Thus, although an estate might not be insolvent at the commencement of a proceeding, the federal priority will arise if the estate is insolvent when assets are later distributed. See *Schwartz v. Commissioner*, 560 F.2d 311 (8th Cir. 1977); *Hatch v. Morosco Holding Co.*, 61 F.2d 944 (2d Cir. 1932).

5.17.13.2.2
(07-09-2012)

Transfer of Assets

- (1) 31 USC 3713(a)(1)(A)(i) applies when the debtor's property is transferred to a fiduciary in a legal proceeding brought to liquidate the insolvent debtor's property and pay the debtor's debts. See *United States v. Oklahoma*, 261 U.S. 253 (1923); *Bramwell v. United States Fidelity and Guaranty Co.*, 269 U.S. 483 (1926). 31 USC 3713(a)(1)(A)(i) applies to the following proceedings:
- General assignments for the benefit of creditors (a debtor transfers all property to an assignee.)
 - General receiverships (a receiver takes control of all of the debtor's assets.)
 - Liquidations of insolvent corporations, either judicial (fiduciary appointed by a court) or non-judicial (officers of the corporation act as the fiduciaries.)
- (2) 31 USC 3713(a)(1)(A)(ii) applies when the absent debtor's property is administered for all of the debtor's creditors. See *United States v. Clover Spinning Mills Co.*, 373 F.2d 274 (4th Cir. 1966). The term "attachment" in this section "is not the familiar attachment made at the instance of and for the benefit of one creditor, ...but to a form which was in use in some states when the federal statute was enacted in the late 18th century, by which the absconder's property was sequestered and administered for the benefit of all" the creditors. See *William T. Plumb*, Federal Tax Liens, 195, n. 23 (1981).

5.17.13.2.3
(07-09-2012)

Act of Bankruptcy

- (1) 31 USC 3713(a)(1)(A)(iii) applies when an act of bankruptcy is committed. In defining "act of bankruptcy," courts look to the definition in the Bankruptcy Act of 1898, (11 U.S.C. 21a) (repealed 1978), even though the Bankruptcy Reform Act of 1978 (Bankruptcy Code) generally superseded the Bankruptcy Code and the concept of "acts of bankruptcy" is not used in the Bankruptcy Code. The Bankruptcy Act of 1898 stated that: Acts of bankruptcy by a person shall consist of that person having:
- concealed, removed, or permitted to be concealed or removed any part of their property, with intent to hinder, delay, or defraud their creditors, or made or suffered a transfer of any of their property, fraudulent under the provisions of section 67 or 70 of this Act; or
 - made or suffered a preferential transfer, as defined in subdivision a of section 60 of this Act; or
 - suffered or permitted, while insolvent, any creditor to obtain a lien upon any of their property through legal proceedings or dstraint and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; or
 - made a general assignment for the benefit of creditors; or
 - while insolvent or unable to pay debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of their property; or
 - admitted in writing an inability to pay debts and a willingness to be adjudged as bankrupt.

- (2) Under the definition, an act of bankruptcy may arise even when there has been no transfer of property to a fiduciary, and multiple acts of bankruptcy may exist in one transfer. In *United States v. Golden Acres, Inc.*, 684 F.Supp. 96 (D. Del. 1988), an insolvent corporation owing a debt to the United States paid \$466,760.54 to its sole officers and directors. In doing so, it committed three independent acts of bankruptcy: it made a preferential transfer of assets to its sole officers and directors; it conveyed property with the intent to hinder, delay, or defraud any creditor, which was a fraudulent conveyance; and it conveyed property without receiving fair consideration, which also was a fraudulent conveyance. The district court imposed liability on the payees/officers under 31 USC 3713(b) because they were representatives of Golden Acres and were "liable to the extent of the payment for unpaid claims of the government."
- (3) In a lawsuit asserting an act of bankruptcy, care must be taken to ensure that all of the elements for a particular act of bankruptcy are proven. For example, in *Jonathan's Landing, Inc. v. Townsend*, 960 F.2d 1538 (11th Cir. 1992), the district court granted the government's motion for summary judgment, which asserted that the third act of bankruptcy applied to the debtor: the debtor suffered or permitted, while insolvent, any creditor to obtain a lien upon any of their property through legal proceedings or distraint. The Eleventh Circuit reversed the district court, reasoning that summary judgment should not have been granted because the government had failed to prove that the taxpayer-debtor had been insolvent prior to committing an act of bankruptcy.
- (4) A 31 USC 3713 claim against the debtor-taxpayer does not preclude the government from also asserting claims under other sections of the Internal Revenue Code, such as IRC 7501 and IRC 6672. In *Jonathan's Landing*, 960 F.2d at 1546 n.40, the Eleventh Circuit was "puzzled" as to the government's failure to assert additional claims against the debtor under IRC 7501 and 6672.

5.17.13.2.4
(07-09-2012)
Debt Due the United States

- (1) For the purposes of the Federal Insolvency Statute, taxes are "debts" due the United States. See *United States v. Estate of Romani*, 523 U.S. 517, 525 n.8 (1998); *Massachusetts v. United States*, 333 U.S. 611, 625-625(1947).
 - a. Taxes are "debts" even if they are unassessed. It is sufficient if the tax liability has accrued. See *Viles v. Commissioner*, 233 F.2d 376 (6th Cir. 1956); see *Estate of Frost v. Commissioner*, T.C. Memo. 1993-94.
 - b. The Federal Priority Statute applies not only to tax liabilities incurred before the proceeding, but also to tax liabilities incurred after the proceeding commences (i.e., taxes incurred by a receiver in operating a business). See IRM 5.17.13.6(9), below.

5.17.13.3
(07-09-2012)
Exception for Certain Interests That Would Have Priority Under the Federal Tax Lien Act; *United States v. Estate of Romani*

- (1) The Federal Priority Statute does not apply if, before the insolvency proceeding begins, another person has obtained an interest in the property that would prevail over the federal tax lien under IRC 6323. See *United States v. Estate of Romani*, 523 U.S. 517 (1998).
 - a. If the interest of a creditor prevails over the federal tax lien under IRC 6323 then the federal claim does not have priority over the creditor's interest.
 - b. Under IRC 6323(a), the following creditors prevail unless the IRS has filed a Notice of Federal Tax Lien: (a) purchasers, (b) holders of security interests, (c) mechanic's lienors, and (d) judgment lien creditors.

Generally, creditors meeting the requirements in IRC 6323(a), (b), (c), or (d), will have a higher priority claim than the IRS if the creditor's interest arises prior to the insolvency proceeding and prior to the filing of the Notice of Federal Tax Lien. See "Note" below.

- c. In *Estate of Romani*, the Supreme Court held that a judgment lien creditor who recorded its liens on real property before the IRS filed its Notices of Federal Tax Lien prevailed over the IRS's tax claims in an insolvent decedent's estate case.
- d. The general rule is that if the creditor would prevail against the IRS under IRC 6323 outside of an insolvency, it will also prevail against the IRS in the insolvency.
- e. Under *Estate of Romani*, many priority disputes in insolvency proceedings will be resolved by determining lien priorities under IRC 6323.

Note: The *Romani* case applies only where the government is relying on a claim for which a lien arose under IRC 6321 and the competing interest is one identified in 6323. In *Law Offices of Jonathan A. Stein v. Cadle Company*, 250 F.3d 716 (9th Cir. 2001), the IRS levied the compensation of the president and CEO of an insolvent company. The company ignored the levy and continued to pay the president. The government then sued the company to enforce the levy and obtained a judgement under IRC 6332(d). A third party also obtained a judgement against the company. The company then received a damages award to which the IRS and the third party both claimed priority. In the ensuing interpleader proceeding, the government claimed priority under 31 USC 3713. The third party claimed priority by virtue of a judgement lien under IRC 6323. The district court held for the government under 31 USC 3713, and the appellate court affirmed, finding that under *Romani*, the judgement lien would have priority if the United States were relying on claim for which a tax lien arose under IRC 6321. However, in this case, the IRS did not have a federal tax lien claim against the company, so IRC 6323 did not apply. The government won because 31 USC 3713 gave its claim priority over the third party's judgement lien.

- (2) If a competing interest does not have priority over a tax claim under IRC 6323, the *Romani* exception would not apply.
 - a. For example, the priority of a federal tax lien against a state tax lien is not governed by IRC 6323. Instead, the Federal Priority Statute applies, and the federal tax claim has priority over a state tax claim for distribution from an insolvent estate. This is true even if outside of insolvency the state claim would prevail because it was choate before the federal lien arose. See *Straus v. United States*, 196 F.3d 862 (7th Cir. 1999).
 - b. Persons such as heirs and devisees who receive distributions from decedents' estates generally do not have priority interests under IRC 6323(a). Therefore, their interests are generally subject to the federal priority.

5.17.13.4 (07-09-2012) Other Exceptions

- (1) In *United States v. Fabe*, 508 U.S. 491 (1993), the Supreme Court held that the federal priority yields if it interferes with the McCarran-Ferguson Act (15 USC 1011 et seq.). The McCarran-Ferguson Act provides that no federal law can supersede any state law regulating the insurance business. In *Fabe*, the Federal Priority Statute did not trump state law that subordinated federal tax claims to insurance claims of policyholders in the liquidation of an insolvent insurance company.

- (2) The IRS may, in limited circumstances, cede priority for purposes of funding claims for family allowances, funeral expenses, or administrative expenses, even though debts to the government technically have priority over these claims.

Note: The Federal Priority Statute does not apply in bankruptcy cases (i.e., bankruptcy petitions filed under Title 11).

5.17.13.5
(07-09-2012)
**Administrative Expenses
and Family Allowances**

- (1) Although the Federal Priority Statute, *31 USC 3713*, does not provide for any exceptions to the government's priority, courts have held that certain classes of claims can be paid before the tax debt. These excepted classes include administrative expenses, funeral expenses, and homestead or family allowances.
- (2) Administrative expenses are expenses incurred for the general welfare of creditors. Administrative expenses include:
 - court costs
 - reasonable compensation for the fiduciary and fiduciary's attorney
 - expenses incurred to collect and preserve assets
- (3) Administrative expenses must be examined to determine if the expense is reasonable and necessary to the administration of the estate. For more information, see IRM 5.5.2.6, *Administrative Expenses*. See also IRM 5.5.2.6.1.1, *Necessary Administrative Expenses*, for factors to consider when determining what expenses should be allowed as necessary administrative expenses. For example, reasonable and necessary expenses should not be permitted ahead of a tax lien if such expenses are already covered by an insurance policy, trust or other similar benefit that covers such costs. See IRM 5.5.2.7, *Insurance Policies*.
- (4) Generally, state statutes provide limits on the amounts allowed for payment of reasonable administrative expenses. Some state law guidelines are based on the size of the estate, other provisions allow a set percentage to be paid as an allowable expense. Some expenses can be negotiated to a certain extent by the estate administrator, others, such as court filing fees, are not negotiable. State standards should be considered, but are not controlling, when determining whether administrative expenses are reasonable. See IRM 5.5.2.6.1, *Reasonable Administrative Expenses*. Information regarding a particular state's laws may be found in the *State Law Guides* link on the My SB/SE Counsel website.
- (5) The family allowance is **not** considered an administrative expense of the estate. In limited circumstances, the IRS can exercise discretion to allow payment ahead of a tax lien. Consideration needs to be given to circumstances such as whether there are minor children who do not have another parent to support them. For example, if the surviving parent has sufficient income, trust distributions or life insurance proceeds to support minor or incapacitated children, this payment would not be allowed ahead of the tax lien.

Note: A federal tax lien, arising before death, continues on the property to which it attached and therefore is prior to funeral costs, the surviving spouse's exempt property allowance (widow's allowance) and any support allowances (for the surviving spouse and minor children during administration of the estate). Consult with Area Counsel if you have any questions regarding the allowance and payment of such expenses ahead of IRS claims.

- (6) Fees paid to the fiduciary or the fiduciary's attorney may be deemed unreasonable if:
 - the fees are excessive in amount, or
 - they are incurred in support of unreasonable activity, e.g., positions that are frivolous or without substantial merit,
 - or they have been estimated or not incurred.
- (7) Reasonable attorney fees are those incurred for preserving or marshalling estate assets. See IRM 5.5.2.6.1.1(1), *Necessary Administrative Expenses*. In proceedings other than probate proceedings, such as receiverships or corporate dissolutions, the government may also argue that "reasonable" fees are limited to fees that benefit the government as the priority claimant (e.g., fees incurred to sell receivership assets or to pursue claims against third parties).
- (8) The expenses of a decedent's last illness are a debt of the decedent and not entitled to priority under 31 USC 3713. See Rev. Rul. 80-112, 1980-1 C.B. 306.
- (9) Taxes incurred by the estate during its administration should be paid as an administrative expense of the estate. See IRM 5.5.2.6.1.1.1, *Claiming Taxes as an Administrative Expense*. It is less clear whether administrative taxes, taxes incurred during a receivership, are entitled to priority by virtue of the Federal Priority Statute or by virtue of being "administrative" expenses. Consult local Area Counsel if a question involving the priority of administrative taxes arises.

5.17.13.6
(07-09-2012)

Filing the Proof of Claim

- (1) The IRS may file a proof of claim to collect any tax liability from the assets in a judicial insolvency proceeding. See IRM 5.9.20, *Non-Bankruptcy Insolvencies*, for procedures for filing claims in certain types of non-bankruptcy insolvency proceedings. See IRM 5.5.4.6, *Proof of Claim Procedures*, for procedures for filing proofs of claim in decedent cases.

Note: To share in distribution from the probate estate, you must file a timely claim against the estate, because most probate courts will not consider payment of a debt unless a timely claim is submitted.

- (2) The time for filing a claim will generally be specified either by state law or by notice from the court. State statutes of limitation, including those fixing a time for filing proofs of claim in a decedent's estate or other proceeding, do not apply to the United States. See *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Bushlow*, 832 F. Supp. 574 (E.D.N.Y. 1993); see also *Bresson v. Commissioner*, 213 F.3d 1173 (9th Cir. 2000), affirming 111 T.C. 172 (1998).

Note: The IRS should file a proof of claim within the time specified by state law to avoid litigation and ensure that taxes will be considered in distribution of estate assets. See IRM 5.5.4.7, *Comply with Bar Date*.

- (3) Once the United States files a proof of claim in a judicial proceeding, such as a probate or receivership proceeding, the court arguably has jurisdiction to determine the merits of the tax liability. It is generally not in the IRS's interests for a state court to rule on the merits of a tax liability.

Note: Time is of the essence when seeking to remove any dispute regarding the merits of a federal tax assessment to federal district court. Generally, a notice of removal must be filed within thirty days of receipt by the IRS of the initial pleading raising such an issue. See IRM 5.5.2.10(4)(i), *Referral to Area Counsel for Judicial Action*, and IRM 25.3.3.3, *Removal of Action from State Court*. It is essential that disputes regarding the merits of a tax assessment be litigated in federal district courts whenever possible.

- (4) There are several advantages to the IRS timely filing a proof of claim, including the following:
 - a. It provides notice of the tax liability to the fiduciary. Notice is a prerequisite needed to establish personal liability under 31 USC 3713(b).
 - b. It entitles the IRS to payment from the estate.
 - c. It avoids the necessity of tracing assets to collect taxes by levy or through transferee liability.
 - d. The IRS will receive notices of hearings and other matters in the proceeding.
- (5) The disadvantage of filing a proof of claim is the possibility that the state court may adjudicate the merits of the claim. When it is determined that filing a proof of claim will be disadvantageous to the Service, the following alternatives to filing a claim may be taken:
 - a. The government can give notice to the fiduciary of the tax liability by sending Form 10492, *Notice of Federal Taxes Due*, and rely on the fiduciary's personal liability under 31 USC 3713(b) to encourage them to pay the claim. See IRM 5.17.13.8 below.
 - b. The United States may bring a suit to reduce the tax assessments to judgement in federal district court. To the extent that the federal court enters a final order before a state court does, the state court will be bound by the federal court's order.
 - c. The IRS may be able to assert transferee liability against the recipient of assets from an insolvent estate. See IRM 5.17.14, *Fraudulent Transfers and Transferee and Other Third Party Liability*.
- (6) Prepetition and post-petition interest and penalties are covered by the federal priority under 31 USC 3713(a). See Rev Rul 87-99, 1987-2 C.B. 291 (the IRS maintains that the statute gives priority to post-petition interest if the IRS has a lien, and its claim is oversecured. Oversecured means the value of the property securing the IRS's claim exceeds the underlying tax liability).

Note: Some courts, however, have limited interest on debts incurred before the insolvency to the interest that accrued up to the commencement date of the proceeding. See *Lapadula & Villani, Inc. v. United States*, 563 F. Supp. 782, 785 n.7 (D. N.Y. 1983) citing *United States v. Sullivan*, 254 F. Supp. 254 (D. R.I. 1966) (analogizing the Federal Priority Statute to a bankruptcy proceeding). See also IRM 5.5.4.8, **Claiming Penalty and Interest** for information on claiming penalties and interest in decedent cases.

5.17.13.7
(07-09-2012)

**Personal Liability of the
Fiduciary Under 31 USC
3713(b)**

- (1) 31 USC 3713(b) imposes personal liability on a fiduciary or representative of an insolvent person or estate if the fiduciary:
 - a. has knowledge of the federal tax debt, and
 - b. pays other debts before paying the priority tax claims.
- (2) Personal liability is limited to the value of the assets that the fiduciary distributes in violation of federal priority. 31 USC 3713(b) states: "A representative of a person or an estate (except a trustee under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government."
- (3) Examples of the types of fiduciaries include executors, administrators, and personal representatives of insolvent estates; receivers; assignees; and officers of insolvent corporations. See IRC 7701 (a)(6). The common characteristic of persons liable under 31 USC 3713(b) is that they are given possession and control of assets of debtors and are charged with the payment of debtor's obligations consistent with the creditors' rights and priorities. See *King v. United States*, 379 U.S. 329(1964); *United States v. Whitney*, 654 F.2d 607 (9th Cir. 1981); *United States v. Crocker*, 313 F.2d 946, 949 (9th Cir. 1963) (holding the fact that a receiver is appointed by the court does not make the receiver immune from liability).
- (4) Fiduciaries generally are charged with:
 - a. gathering the debtor's or decedent's assets,
 - b. administering the assets, including liquidating the assets as appropriate,
 - c. paying creditors, and
 - d. distributing any remaining assets back to the debtor, heirs, or beneficiaries.

Note: 31 USC 3713(b), like 31 USC 3713(a), does not apply to bankruptcy trustees in cases arising under Title 11 (the Bankruptcy Code).
- (5) Personal liability under 31 USC 3713(b) only applies if the fiduciary uses estate assets to pay a debt in violation of federal priority under 31 USC 3713(a).
 - a. Personal liability only arises if the estate is insolvent.
 - b. There is no personal liability if debts are paid ahead of federal claims if such debts have priority over the United States under IRC 6323.
- (6) Knowledge of the federal claim is a requirement of personal liability. See *United States v. Coppola*, 85 F. 3d at 1020-21 (2nd Cir. 1996); *Want v. Commissioner*, 280 F.2d 777 (2d Cir. 1960); *Leigh v. Commissioner*, 72 T.C. 1105 (1979). The government must show that the fiduciary had actual knowledge of such facts as would put a reasonably prudent person on notice as to the existence of the tax debt before making the challenged distribution or payment. See *United States v. Coppola*, 85 F. 3d at 1020-21 (2d Cir. 1996); *Bank of the West v. Comm'r*, 93 T.C. 462 (1989). Thus, it is important to give notice of the tax debt to the fiduciary before any assets are distributed.
- (7) If a successor administrator is appointed, notice of taxes due should be sent to the new administrator to make them aware of the outstanding tax liability. If notice was sent to the prior administrator, send a copy of that notice to the successor administrator.

- (8) Personal liability under 31 USC 3713(b) is the “muscle” behind the federal priority under 31 USC 3713(a). Under 31 USC 3713(b), the fiduciary must first pay known priority debts of the United States or risk personal liability.

5.17.13.8
(07-09-2012)
Asserting Personal Liability Against a Fiduciary

- (1) The IRS can assert personal liability against a fiduciary by either:
 - a. Filing a suit under IRC 7402(a) against the fiduciary in a federal district court, or
 - b. Issuing a notice of fiduciary liability to the fiduciary under IRC 6901(a)(1)(B). The notice gives the fiduciary the right to challenge the determination in the United States Tax Court.
- (2) Generally, the statute of limitations for filing suit against a fiduciary under 31 USC 3713(b) is the same as the statute of limitations for collecting the underlying tax assessment. See *United States v. Motsinger*, 123 F.2d 585 (4th Cir. 1941). Some cases suggest that it may be possible to successfully assert a longer statute of limitations for filing suit under 31 USC 3713(b) against a fiduciary. See *U.S. v. Moriarty*, 8 F.3d 329 (6th Cir. 1993). Consult Area Counsel if the CSED is close or has expired and a fiduciary may be liable.
- (3) The statute of limitations for issuing a notice of fiduciary liability to the fiduciary is the later of one year after the fiduciary liability arises or the expiration of the statute of limitations for collecting the underlying tax liability. See IRC 6901(c)(3).
- (4) The government may be able to bring an action on the bond that fiduciaries are often required to post to serve as a fiduciary. The government may also seek removal of the fiduciary for misconduct.
- (5) A fiduciary's defenses to liability under 31 USC 3713(b) include:
 - a. The fiduciary had no knowledge of the federal tax debt.
 - b. The estate was solvent when the distribution was made.
 - c. The statute of limitations on collection of the underlying tax and for asserting liability under IRC 6901 has expired.
 - d. The distributions made by the fiduciary were for claims over which the United States did not have priority.

5.17.13.9
(10-16-2007)
Decedents' Estates

- (1) A decedent's estate, or probate proceeding, is governed by state law. The purpose of the proceeding is to gather and distribute the decedent's assets.
 - a. The assets administered in the probate proceeding are part of the decedent's estate. These consist of assets that the decedent owned prior to the decedent's death.
 - b. A personal representative or administrator is appointed by the probate court to administer the assets of the estate. The personal representative's duties include a) gathering the assets of the deceased; b) paying the administrative expenses, taxes and other debts of the deceased; c) distributing the remaining assets as specified in the will or state law.
 - c. The decedent may have executed (signed) a will or died intestate (without a will). If the decedent has executed a will, the executor named in the will is appointed as personal representative. If the named executor is deceased or declines to act (and the will does not name a successor who is willing to serve as executor), or if no will has been executed, then the court will appoint an administrator as personal representative.

- d. Some assets are not subject to probate administration including a) property held jointly with the right of survivorship; b) proceeds from life insurance policies; and c) property transferred to a trust during the decedent's life. Such assets may transfer at death directly to the survivor without going through probate. In such a case, these assets will not be within the custody of the court.
 - e. The probate proceeding may be court supervised or may be an informal proceeding not requiring court supervision. If the proceeding is court supervised, the personal representative must obtain court approval to take many actions such as distributing assets.
- (2) Usually, the IRS will assert a tax claim against an estate by filing a proof of claim in any judicially supervised probate proceeding. This is because the decedent's probate estate is under the jurisdiction of the state court. Notice of the tax liability should be given to the personal representative to ensure that the representative will be subject to 31 USC 3713(b) personal liability.
- (3) State laws typically direct that the fiduciary must distribute estate assets in the following order of priority:
- a. costs and expenses of administration (including homestead and family allowances)
 - b. reasonable funeral expenses
 - c. debts and taxes with preference under federal law
 - d. expenses of the decedent's last illness
 - e. debts and taxes with preference under state law
 - f. all other claims
- (4) However, insofar as state priority laws conflict with the federal priority, the federal priority controls.

5.17.13.9.1
(07-09-2012)
**Administrative
Collection**

- (1) A statutory lien that arises against property of a taxpayer before a taxpayer's death continues to attach to the property after the taxpayer's death. See *United States v. Bess*, 357 U.S. 51 (1958).
- (2) Collection by levy: As a general rule, when property to which the federal tax lien attaches passes into the control or custody of the court, collection by levy is not used because it would interfere with the court's processes. See *United States v. Silverman*, 621 F.2d 961 (9th Cir. 1980) (Collection is prohibited while the assets are in custody of the court.) Where the proceeding has progressed so far that levy would not interfere or where the court grants permission to levy, levy may proceed. See Treas. Reg. 301.6331-1(a)(3). Consult Counsel before taking any enforced collection action after the claim is filed or notice and demand is made if estate assets are under the control of the court. But, if there are non-probate or other assets not subject to the court's jurisdiction or under the control or custody of the court, then the IRS may levy on those assets.
- (3) Property will not be in the custody of the court if:
- a. There is no judicial probate proceeding (e.g., there is an informal non-judicial proceeding, or no proceeding at all); or
 - b. The property is not part of the probate estate (i.e., non-probate/exempt assets).

- (4) Persons who receive distributions from a decedent's estate, such as heirs and devisees, generally do not fall within any of the priority categories of IRC 6323. The IRS may collect from such distributed property without the filing of a Notice of Federal Tax Lien (NFTL) if the assets are not under the custody of the court.
- (5) If a statutory lien arises after the death of the decedent, it may attach to property in the decedent's estate as of the assessment date. Some property may pass outside of the probate estate; for example, life insurance and property held by joint tenancy. Because a determination of rights to property is dependent upon state law, contact Area Counsel to determine if the federal tax lien will attach to probate property.
- (6) The period of limitations for collection is suspended under IRC 6503(b) while a decedent's assets are under the control or custody of a court and for 6 months thereafter. Collection from the non-probate assets and the assets of the surviving spouse on joint liabilities with the decedent will have the normal 10-year statute for collection. The probate action will extend the collection statute for the decedent's liabilities only with respect to the probate assets in control of the court and then only if the probate assets are substantial in value relative to the entire estate. See *United States v. Silverman*, 621 F.2d 961, 967 (9th Cir. 1980).

5.17.13.9.2
(07-09-2012)
The Probate Court

- (1) State courts have jurisdiction over a decedents' estate. Usually, state statutes designate a particular court to supervise the administration of estates. These courts are often known as probate courts. A decedent's estate is generally administered in the probate court of the county in which the decedent resided at the time of death.
- (2) Specific procedures for the probate court vary depending on the law of each state.

Note: Many of the *State Law Guides* on the My SB/SE Counsel website include a discussion of applicable state law regarding probate proceedings.

- (3) Generally, the first step in the judicial probate of a will is to file the will with the probate court. After a party proves a will to be genuine, the court will issue letters of administration to an executor. The executor then has the duty of gathering together and inventorying the estate assets, paying the debts of the decedent, and making distributions of the assets.
- (4) If there is no will, a party may file a petition with the probate court to request that the court appoint an administrator. The court will issue letters of administration and charge an administrator to perform the same tasks as the executor.
- (5) Both the executor and the administrator are known as personal representatives. The personal representative may be required to post a bond before appointment to act for the estate.
- (6) Creditors, including the IRS, can file claims against the estate. The personal representative will approve or disapprove each claim. If the fiduciary disapproves the claim, then the creditor may argue the case before the probate court. The creditor may also appeal an adverse decision to a state appellate

court. After all disputes are settled, the personal representative distributes the assets. Heirs and devisees get any remaining assets after creditor's claims are satisfied.

5.17.13.9.3
(07-09-2012)
**Fiduciary Liability of
Personal
Representatives**

- (1) 31 USC 3713(a) priority applies to a decedent's estate when the assets of the estate in the custody of the executor or administrator are not enough to pay all debts of the decedent.
- (2) Assets of the estate do not include certain property passing outside of probate, such as jointly held property. However, the estate does include any claims the executor has against holders of property that can be used to pay the tax liability. For example, under IRC 2206 and 2207, the executor has the right to compel contributions toward the estate tax from life insurance recipients and property subject to a power of appointment.
- (3) If the 31 USC 3713(a) priority applies, then the personal representative can be liable under 31 USC 3713(b) for distributions that violate federal priority.

5.17.13.10
(07-09-2012)
Receiverships

- (1) A receivership usually has one of two purposes:
 - a. A receivership can be a secondary proceeding brought to protect property until a primary legal proceeding is completed. For example, a mortgagee in a mortgage foreclosure suit may ask for the appointment of a receiver to take custody of the specific property subject to the mortgage, such as a hotel or other commercial property that is producing income. The receiver must collect the rents and operate the property during the foreclosure proceeding. This might preserve the value of the property pending the foreclosure sale.
 - b. A receiver can also be appointed to liquidate all of the debtor's assets and to pay the debtor's debts. A receivership is an alternative to an assignment for the benefit of creditors and a bankruptcy proceeding.
- (2) A receivership can be a:
 - a. general receivership in which the receiver takes control of all assets of the debtor, or
 - b. a limited receivership in which specific assets are in the custody of the receiver. Ordinarily, a limited receivership is for the benefit of specific creditors (e.g., a mortgage foreclosure).
- (3) A receivership, especially a limited receivership, does not always involve an insolvent debtor.
- (4) Generally, an interested party may initiate a receivership by filing a motion that seeks to have a receiver appointed by the court. An interested party might want to begin a receivership proceeding to:
 - a. conserve, preserve, protect or administer property that is involved in a legal action,
 - b. prevent fraud or loss of property from fraud,
 - c. prevent mismanagement of property, or
 - d. replace an irresponsible or insolvent assignee where claims are jeopardized in an assignment for benefit of creditors.
- (5) Creditors might want to initiate a receivership if a debtor is on the border between successful business operations and failure. The creditors might hope

that a receiver will be able to operate profitably to make the business solvent. In such a case, the receiver will take charge of the property of the debtor and manage it for a period of time. The goal is to earn an amount sufficient to pay the creditors. If this cannot be done, the receiver may, with court permission, liquidate as much of the property as is necessary to pay the debts. The receiver can then distribute the proceeds to the creditors and return the balance, if any, to the debtor.

- (6) A majority of receivership actions arise in the state courts because the basis for federal district court jurisdiction is limited.
- (7) The United States can request the federal district court to appoint a receiver as part of a federal tax lien foreclosure action. See IRC 7403(d). The United States should seek such a receivership if it believes that it is necessary for the collection, preservation, or orderly liquidation of property it wants to foreclose upon. See *Training Publication 73747-102, Civil Suit Narrative Writing for Revenue Officers*, and Knowledge Management for additional information.

5.17.13.10.1
(10-16-2007)
Receiver

- (1) State statutes generally provide the purposes and conditions necessary to appoint a receiver. The party seeking the receivership must show the court that a receivership is necessary. Generally, there is no absolute right to the appointment of a receiver. Instead, the decision rests in the sound judicial discretion of the court. The court may also appoint a receiver on its own motion.
- (2) The receiver is usually an independent party without an interest in the case. The receiver must impartially protect the property or interests of the parties to the suit. A party in interest may be appointed receiver because of the nature of the property or special knowledge of the business. Generally, a court will allow a party in interest to serve as a receiver only if all of the parties to the suit agree.
- (3) The receiver is a fiduciary who can be personally liable under 31 USC 3713(b) for violating the Federal Priority Statute in 31 USC 3713(a). However, government claims might not have top priority in many receiverships because:
 - a. there is no insolvency,
 - b. there was no "act of bankruptcy" (e.g., the receivership is a limited receivership), or
 - c. other creditors have priority pursuant to IRC 6323.

5.17.13.10.2
(07-09-2012)
**Assessment and
Collection in
Receiverships**

- (1) Pursuant to IRC 6036 a receiver in a receivership proceeding (and similar fiduciaries, including assignees for the benefit of creditors) who is in control of all or substantially all of the assets of a debtor must give notice of the appointment to the Area Director within 10 days of the receiver's appointment. See Treas. Reg. 301.6036-1.
- (2) Under IRC 6871(a), assessments for income, estate tax, and gift tax may be made immediately after the appointment of a receiver in any receivership proceeding before any federal or state court. See Treas. Reg. 301.6871(a)-1. In these instances, the IRS does not issue a notice of deficiency, and the taxpayer is deprived of access to Tax Court. See Treas. Reg. 301.6871(b)-1(a).
 - a. The IRS may advise the receiver if it makes an immediate assessment pursuant to IRC 6871(a). See Treas. Reg. 301.6871(b)-1(c).

- b. Even if the IRS has issued a notice of deficiency, the taxpayer is prohibited from filing a Tax Court petition after the appointment of the receiver. See IRC 6871(c)(1); *Levine v. Commissioner*, T.C. Memo. 1987-564 (1987). However, the Tax Court will have jurisdiction if the debtor files the petition before the receivership begins.
 - c. IRC 6871(a) applies to any judicially supervised liquidation proceeding in which a fiduciary is appointed with the powers of a receiver. See *Williams v. Commissioner*, 44 T.C. 673 (1965) (IRC 6871 applied to assignment for the benefit of creditors under supervision of court).
- (3) The IRS may file a proof of claim in the receivership proceeding to collect from the assets in the custody of the court. The IRS may not engage in administrative collection from assets in the custody of the court. Accordingly, the period of limitations for collection is suspended under IRC 6503(b) if all or substantially all of the taxpayer's assets are in the control or custody of the court.

Note: Formal intervention rather than merely filing a claim will give the United States standing as a party to the proceeding to challenge court orders. Usually, the United States intervenes only in federal court receiverships.

- (4) The receiver takes property subject to prior tax liens. The 6321 lien is not valid against the creditors listed in IRC 6323(a), unless a NFTL was filed before the creditor took an interest in the property. Receivers are not on the IRC 6323(a) list, so the tax lien encumbers the property in the receiver's hands. One or more of the 6323(a) creditors may have an interest in the property when the receiver takes it, however, and that interest will have priority over the 6321 lien if the interest predates the filing of the NFTL.
- (5) Unlike bankruptcy cases, receivership proceedings do not provide a discharge. The IRS may collect any tax claim that remains unpaid once the proceeding ends. See IRC 6873.

5.17.13.11
(10-16-2007)

Assignments for the Benefit of Creditors

- (1) An assignment for the benefit of creditors is a state law proceeding in which the debtor voluntarily transfers their property to another party (the assignee) in trust. The assignee then uses or sells the property to pay the debtor's debts.
- (2) The assignment can be a general assignment of all or substantially all of the debtor's property or a partial assignment of only some of the debtor's property.
- (3) Most assignments are under the jurisdiction of a state court. If the court supervises the assignment, then the proceeding may essentially be a receivership. In this case, the same rules applicable to receiverships may apply. For example, the IRS may immediately assess under IRC 6871. Also, the IRS may not levy. Accordingly, the statute suspends the collection period of limitations while the property of a general assignment is under the control or custody of the court. See IRC 6503(b).
- (4) Under most state laws, a valid assignment for creditors vests the legal title of the debtor's property in the assignee. The property is beyond the control of the assignor or the reach of any of the assignor's creditors, other than their rights under the assignment to share in the distribution of the assigned property. Normally, the assignee takes title to the assigned property as a trustee, and in general the assignee's duties, powers, and liabilities are those of a fiduciary.

- (5) The assignee takes the assigned property subject to all liens and encumbrances.
- (6) Some states have enacted statutes prohibiting an assignor from preferring one or more creditors over other creditors in making an assignment for the benefit of creditors. Under these statutes, the assignment must be for the equal benefit of all the assignor's creditors.
- (7) Like a receivership, the assignment differs from a bankruptcy case in that the debtor does not receive a discharge of debts.

5.17.13.11.1
(07-09-2012)
**Assessment and
Collection**

- (1) Like a receiver, an assignee for the benefit of creditors does not fall within one of the protected categories of IRC 6323. Therefore, the assignee is subject to the federal tax lien even though a Notice of Federal Tax Lien has not been filed. If the tax liability is assessed before the assignment, a valid tax lien exists against all the assignor's property. The effect of the assignee taking the property is that the Government retains its interest in the property to the extent of its lien and the Government is entitled to enforce its lien against the property.
 - a. The priority of competing creditors claiming an interest in the assets will be determined under IRC 6323.
 - b. The IRS cannot take administrative collection action against the assigned assets if the assignment is judicially supervised, and the assets are within the control or custody of the court. Instead, the IRS may file a claim in the proceeding to assert a right to the assets. See IRM 5.17.13.6, above, for considerations before filing a proof of claim.
- (2) Generally, if the tax liability is assessed after the assignment, the taxpayer no longer has an interest in the property at the time of assessment, so the tax lien does not attach to the assigned property.
- (3) The United States can assert a priority claim under 31 USC 3713(a) for voluntary assignments for the benefit of creditors. See *United States v. Cole*, 733 F.2d 651 (9th Cir. 1984). The assignee is a fiduciary who can be personally liable under 31 USC 3713(b) for using property of the insolvent estate to pay lower priority creditors ahead of known federal tax liabilities. If other creditors have priority over the United States under IRC 6323 (e.g., mortgages and other consensual security interests), however, the federal priority statute will not provide superior priority.

5.17.13.12
(10-16-2007)
**State-law Corporate
Dissolutions**

- (1) A corporation is considered a "person." A corporation exists separately from the identity of its stockholders and officers.
 - a. This means that the corporation itself can own property, can sue and be sued, and can incur tax liability.
 - b. It also means that this separate existence may come to an end. When the corporation's existence does end, the corporate affairs are wound up (the corporation must pay its debts and distribute its remaining assets). This process is a "corporate dissolution."
- (2) A corporation's existence is artificial, created by state law. State statutes provide for:
 - a. the creation of the corporation,

- b. the period of its existence, and
- c. termination of its life.

- (3) Stockholders of a corporation may decide to terminate the corporate existence. They may voluntarily dissolve the corporation and forfeit the corporate charter.
- (4) The state may also initiate a proceeding to forfeit the corporate charter. Usually, a state will do this as a method of enforcing some state law requirement. The most common example of this is the state requirement that corporations pay a state franchise tax. If the required payment is not made, the state may bring an action to forfeit the charter, thereby terminating the corporate existence.

5.17.13.12.1
(10-16-2007)

Dissolution Proceedings

- (1) If difficulties arise in the liquidation of assets, payment of claims, or distribution of assets, or if state law requires, dissolution may be conducted in a court proceeding.
 - a. Usually the court appoints a receiver, liquidator, or other fiduciary. The fiduciary must attend to the dissolution under orders of the court and the court will hear and determine all controversies that arise during the course of the dissolution.
 - b. The IRS should file a claim in such a proceeding to collect from the assets of the corporation.
 - c. The IRS cannot levy on any property within the custody of the court.
 - d. A bankruptcy corporate liquidation differs from a non-bankruptcy corporate judicial liquidation in that the bankruptcy proceeding is governed by federal bankruptcy law and is supervised by a federal court, while the non-bankruptcy judicial proceeding is governed by state corporate law and is supervised by a state court.
- (2) If the parties are able to liquidate the corporation without the help of a court and if all parties and creditors are satisfied that justice is being done, there is no reason for court action. The parties may conduct the liquidation entirely out of court if state law permits.
 - a. A non-judicial liquidation is likely if there is either enough money to pay all corporate creditors or if the value and disposition of the assets and the priority among claimants is not disputed.
 - b. A non-judicial dissolution is usually conducted by the officers of the corporation. Such officers become trustees for creditors and act in a fiduciary capacity.
 - c. If at any time during a non-judicial dissolution the government determines that the interests of the United States are not protected, then the government may bring suit to subject corporate properties to payment of tax under IRC 7403. The government can seek to appoint a receiver under IRC 7403 (d). Such action converts the non-judicial dissolution into a judicial dissolution.
 - d. The government may also consider administrative collection action in non-judicial dissolutions.

5.17.13.12.2
(10-16-2007)

Duties of Fiduciaries

- (1) The fiduciary who is charged with liquidating the corporation will first collect all corporate assets, inventory the assets, value, liquidate them and make distributions to creditors and stockholders.

- (2) The fiduciary must ordinarily give notice of the dissolution to all who might hold claims against the corporation. This will usually be a public notice such as newspaper publication in addition to specific notice to each known creditor as required by state law. The notice will give the place where claims are to be filed and the date by which they should be filed.
- (3) If money or property remains in the hands of the liquidator after satisfaction of claims against the corporation, the balance will be distributed to the stockholders. All valid claims against the corporation must be paid before anything is distributed to stockholders, but after payment of claims all equity remaining in the corporation belongs to the stockholders.

5.17.13.12.3
(10-16-2007)

Priority of Federal Taxes

- (1) Priority of the United States versus other creditors of the corporation will often be determined by IRC 6323.
- (2) However, with respect to persons without priority under IRC 6323, such as state entities and stockholders, the United States can claim priority pursuant to 31 USC 3713(a).
- (3) Where the United States has priority under 31 USC 3713(a), it can assert personal liability under 31 USC 3713(b) against fiduciaries who pay claims with lower priority than the federal claim, so long as the fiduciary had knowledge of the tax liability.

5.17.13.12.4
(07-09-2012)

Collection Options

- (1) If a tax claim against the corporation is not paid, and corporate assets are distributed to stockholders, collection may be effected from such stockholders to the extent of the property received by each. There are three possible grounds for collection from stockholders:
 - a. If federal tax liens attached to the corporate property before the distribution, the transfer would not divest the tax liens, and, therefore, the property received may be foreclosed in the hands of the stockholders by a suit under IRC 7403(a).
 - b. Transferee liability may be asserted against the stockholders under IRC 6901 See IRM 5.17.14.3.3.5, **Transferee Liability of a Shareholder or Distributee of a Corporation**.
 - c. When appropriate, a suit could be filed to set aside the transfer as a fraudulent transfer. See IRM 5.17.14.3.3.2, *Transferee Liability Based on Fraudulent Transfers (In Equity)*.
- (2) In the event of a corporate merger or consolidation, the successor corporation often takes all the assets and assumes all the liabilities of the old corporation. Collection from the successor corporation can be effected by the same means as discussed with respect to stockholders.

Note: Corporate mergers or consolidations can take many forms. Before attempting to collect from a successor corporation, contact the successor corporation to obtain documents describing the transaction and consult with Chief Counsel.

- (3) When the tax in question is a withheld employment tax or collected excise tax, the Trust Fund Recovery Penalty under IRC 6672 provides an effective means to collect the unpaid liability from corporate officers who were responsible for payment of the tax.

- (4) An offer in compromise may be considered when it is unlikely that the tax liability can be collected in full, and the amount offered reasonably reflects collection potential. An offer in compromise may achieve the goal of collecting what is potentially collectible at the earliest possible time and at the least cost to the government. Refer to IRM 5.5.8, **Offer in Compromise**