



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

5.17.14

OCTOBER 26, 2023

EFFECTIVE DATE

(10-26-2023)

PURPOSE

- (1) This transmits revised IRM 5.17.14, Legal Reference Guide for Revenue Officers, Fraudulent Transfers and Transferee and Other Third Party Liability.

MATERIAL CHANGES

- (1) IRM 5.17.14.5(3), Content not changed, but moved (c) to position (b) for better user-flow.
- (2) Editorial update to move some content into tables.
- (3) Editorial update to remove underlining from legal case cites to comply with changes in the Style Guide.
- (4) Editorial changes made throughout to update references, for organizational, IRM style guide, and title updates and remove block paragraphs.

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 5.17.14 dated September 25, 2020.

AUDIENCE

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5.17.14

Fraudulent Transfers and Transferee and Other Third Party Liability

Table of Contents

5.17.14.1 Program Scope and Objectives

5.17.14.1.1 Background

5.17.14.1.2 Authority

5.17.14.1.3 Roles and Responsibilities

5.17.14.1.4 Program Management and Review

5.17.14.1.5 Program Controls

5.17.14.1.6 Terms and Acronyms

5.17.14.1.7 Related Resources

5.17.14.2 Third Party Liability Overview

5.17.14.2.1 Transferee Theory

5.17.14.2.2 Fiduciary Liability Theory

5.17.14.2.3 Successor Liability Theory

5.17.14.2.4 Nominee Theory

5.17.14.2.5 Alter Ego Theory

5.17.14.3 Transferee Accountability in General

5.17.14.3.1 Transfer Types

5.17.14.3.2 Collection from the Transferee is Secondary

5.17.14.3.3 Establishing Transferee Liability

5.17.14.3.3.1 Transferee Liability Directly Imposed on the Transferee ("At Law")

5.17.14.3.3.2 Transferee Liability Based on Fraudulent Transfers ("In Equity")

5.17.14.3.3.2.1 Fraudulent Transfers Under Federal and State Law

5.17.14.3.3.2.2 Types of Fraud in a Fraudulent Transfer

5.17.14.3.3.2.2.1 Constructive Fraud

5.17.14.3.3.2.2.2 Actual Fraud

5.17.14.3.3.2.3 Subsequent Transfers

5.17.14.3.3.3 Trust Fund Doctrine

5.17.14.3.3.4 Successor Liability of a Corporation as a Transferee

5.17.14.3.3.5 Transferee Liability of a Shareholder or Distributee of a Corporation

5.17.14.3.4 Extent of Transferee Liability

5.17.14.4 Fiduciary Liability

5.17.14.5 Methods of Collecting from a Transferee or Fiduciary

5.17.14.5.1 Assessing Transferee and Fiduciary Liability

5.17.14.5.2 Assessing Liability Under IRC 6901

5.17.14.5.2.1 Periods of Limitation and Extensions for Assessment Under IRC 6901

5.17.14.5.3 Burden of Proof Under IRC 6901

-
- 5.17.14.5.4 Establishing Transferee or Fiduciary Liability by Suit
 - 5.17.14.5.5 Defenses to Transferee or Fiduciary Liability
 - 5.17.14.5.6 Suit to Set Aside a Fraudulent Transfer
 - 5.17.14.5.6.1 Statute of Limitations for a Fraudulent Transfer Suit
 - 5.17.14.5.6.2 Defenses for the Transferee in a Fraudulent Transfer Suit
 - 5.17.14.5.7 Considerations: Assess Under IRC 6901 or File Suit
 - 5.17.14.6 Successor Liability as Primary Liability
 - 5.17.14.7 Nominee, Alter Ego, and Transferee Elements
 - 5.17.14.7.1 Enforcement in Nominee, Alter Ego, and Lien Tracing Transferee Situations

5.17.14.1
(09-25-2020)
Program Scope and Objectives

- (1) **Purpose:** This Revenue Officer legal reference guide discusses the different legal theories and methods of collection from third parties.
- (2) **Audience:** This IRM is used by Collection employees developing and investigating cases where third party liabilities become an important factor for administrative and judicial collection. Primarily Collection Advisory staff or Field Collection Revenue Officers use this IRM when pursuing or assisting Counsel and the Department of Justice with affirmative judicial actions.
- (3) **Policy Owner:** Director, Collection Policy SBSE.
- (4) **Program Owner:** Collection Policy, SBSE, Enforcement is the program owner of this IRM.
- (5) **Primary Stakeholders:** Field Collection, Advisory, and Chief Counsel. Other areas that are affected by these procedures or have input to the procedures include Appeals, the Taxpayer Advocate Service (TAS), and Department of Justice Attorneys.
- (6) **Program Goals:** Taxpayers sometimes try to thwart the collection of their liabilities by disguising and/or transferring property ownership. This Legal Reference Guide positions the Revenue Officer to identify and defeat these deceptions. In this IRM is a working knowledge of the third-party legal fundamentals that, when applied, may result in collecting the taxpayer's liability through a third party. Revenue Officers and Advisors use these fundamentals to recognize the applicable theory and initiate appropriate action.

5.17.14.1.1
(09-25-2020)
Background

- (1) This section provides guidance on the methods the United States can use to collect an unpaid liability where an initially liable person, e.g., a taxpayer (the "transferor"), has transferred property to a third party (the "transferee") prior to or after the liability to the United States is incurred. However, it is not the source of procedural instructions. Revenue Officers and other Internal Revenue Service personnel must still look to the procedural Internal Revenue Manual (IRM) provisions outside this Handbook for such instructions.
- (2) Whenever action or 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 reviewers, approvers, and lawyers charged with the responsibility of handling the cases must rely on those facts and reports when making case decisions.

5.17.14.1.2
(09-25-2020)
Authority

- (1) A request, for institution of an administrative or legal proceeding to effect or assist in the collection of a tax, generally originates with an individual Revenue Officer within a Field Collection Area Director's organization.
 - Specific policies related to collection work start with IRM 1.2.1.6, Policy Statements for the Collecting Process.
 - Specific delegations of authority related to collection work are in IRM 1.2.2, Servicewide Delegations of Authority, and throughout IRM 1.2.65.3, SB/SE Functional Delegation Orders – Collection.
- (2) The authorities for the legal theories discussed in this IRM are found in the following United States Code and Regulation sections.

Table Listing Code and Regulations

| U.S. Code Section | Regulation | Title |
|--------------------------|--|---|
| 26 USC 368 | no regulation | Definitions relating to corporate reorganizations |
| 26 USC 6321 | 301.6321-1 | Lien for taxes |
| 26 USC 6323 | 301.6323(a)-1 thru 301.6323(j)-1 | Validity and priority against certain person |
| 26 USC 6324 | 301.6324-1 | Special liens for estate and gift taxes |
| 26 USC 6334(e) | 301.6334-1 | Property exempt from levy |
| 26 USC 6501 | 301.6501(a)(1) thru 301.6501(o)(3) | Limitations on assessment and collection |
| 26 USC 6502 | 301. 6502-1 | Collection after assessment |
| 26 USC 6601 | 301.6601-1 | Interest on underpayment, nonpayment, or extensions of time for payment, of tax |
| 26 USC 6672 | 301.6672-1 | Failure to collect and pay over tax, or attempt to evade or defeat tax |
| 26 USC 6901 | 301.6901-1 | Transferred assets |
| 26 USC 6902 | 301.6902-1 | Provisions of special application to transferees |
| 26 USC 7401 | 301.7401-1 | Civil Actions by the United States, Authorization |
| 26 USC 7402(a) | no regulation | Jurisdiction of district courts |
| 26 USC 7403 | 301.7403-1 | Action to enforce lien or to subject property to payment of tax |
| 28 USC 1340 | no regulation | District Courts;, Jurisdiction, Internal Revenue; Customs Duties |
| 28 USC 1345 | no regulation | United States as plaintiff |
| 28 USC 3001 | no regulation | Federal Debt Collection Procedure (FDCP), Applicability of chapter |
| 28 USC 3003(b)(1) | no regulation | FDCP, Rules of construction |
| 28 USC 3301 | no regulation | FDCP, Fraudulent Transfers Involving Debts (FTID), Definitions |
| 28 USC 3302 | no regulation | FDCP, FTID, Insolvency |
| 28 USC 3303(b) | no regulation | FDCP, FTID, Value for transfer or obligation |
| 28 USC 3304 | no regulation | FDCP, FTID, Transfer fraudulent as to a debt to the United States |
| 28 USC 3306(b) | no regulation | FDCP, FTID, Remedies of the United States |
| 28 USC 3307 | no regulation | FDCP, FTID, Defenses, liability, and protection of transferee |
| 31 USC 3713 | no regulation | Priority of Government claims |

5.17.14.1.3
(09-25-2020)

Roles and Responsibilities

- (1) Director, Collection Policy is the executive responsible for the policies and procedures employed by Collection personnel.
- (2) Director, Field Collection, has executive oversight for all Field Collection programs.
- (3) Field Collection Area Directors, Territory Managers and Group Managers are responsible for ensuring compliance by Field personnel with these procedures.
- (4) Revenue Officers are responsible for reading and implementing the procedures listed in this IRM.
- (5) Field Collection Advisors review and advise Revenue Officers on work relating to the guidance and procedures described in this IRM. They also ensure compliance with IRM guidance.
- (6) IRM 5.17.1, General Information, describes Counsel and Revenue Officer roles with suits.

5.17.14.1.4
(09-25-2020)

Program Management and Review

- (1) **Program Effectiveness:** Field Collection Group Managers use Document 12359, Embedded Quality Job Aid Field Collection, to complete:
 - Annual case reviews IRM 1.4.50.5.2.2, Requirements for Annual Performance Case Reviews,
 - Completed case work IRM 1.4.50-2, Criteria for Review of Completed Work, and
 - eApproval recommendation reviews.
- (2) Field Collection Advisory Group Managers use Document 12746, Embedded Quality Advisory - Litigation, and Document 12739, Embedded Quality Job Aid Advisory Lien Core, to complete:
 - Annual and case reviews IRM 1.4.53.4.7, Reviews, and
 - eApproval recommendation reviews for assignment.
- (3) National Quality Review System (NQRS) reviewers also review case work for certain attributes. See *Quality Knowledge Base - Home (sharepoint.com)*

5.17.14.1.5
(09-25-2020)

Program Controls

- (1) Management and review when pursuing a third-party liability varies with the type of action:
 - Initiating Special Condition Notice of Federal Tax Lien (NFTL) filing requires Group Manager, Advisory, and Counsel review and approval prior to filing.
Note: IRM 5.12.7.6.5.2, Revenue Officer Request Actions, including its subsections discuss the elements of the request memorandum and required case essentials. IRM 5.12.7.6.5.4, Advisory Review Actions, discusses the elements needed when reviewing.
 - Initiating suit to establish a transferee liability requires Group Manager, Advisory, Territory Manager, and Counsel review and approval prior to forwarding the recommendation to the Department of Justice.
Note: Suits are individual to the case. The Collection employee provides a Narrative Report laying out the basis for the case

identifying all pertinent facts. Narrative Reports are discussed in IRM 5.17.12, Investigations and Reports.

- Initiating an Internal Revenue Code (IRC) 6901 assessment requires Group Manager review prior to forwarding the case to Exam Planning and Special Programs (PSP) for assessment.

Note: IRM 5.1.14.2.1, Report of Investigation of Transferee Liability, describes the preparation and presentation of the report. IRM 4.1.1.6.11.2, Collection Referrals-Form 3031, Report of Investigation of Transferee Liability, discusses the PSP review.

5.17.14.1.6 (1)
(09-25-2020)
Terms and Acronyms

Term Table

| Terms | Definition |
|--------------------------------|---|
| Alter Ego | A second self or lacking a separate identity |
| Fiduciary | Person or group legally responsible for controlling and managing assets or other interests of another |
| Fiduciary Responsibility | Legal obligation to act in the best interests of another person or organization |
| Nominee | A party having title but not the actual owner |
| Successor in Interest | Successor in ownership where business controlled substantially as it was before the transfer |
| Transferee | Party to whom a transfer is made |
| Transferee Liability | Method of collecting an unpaid liability (tax or non-tax) from the transferee / property recipient |
| Transferee Liability at law | Transferee liability directly imposed by federal or state law or agreed to as part of a contract |
| Transferee Liability in equity | Transferee liability imposed by a court based on equity or fairness principles |
| Transferor | Party transferring property to another |

(2)

Acronym Table

| Acronym | Definition |
|----------------|--|
| FDCPA | Federal Debt Collection Procedures Act of 1990 |
| IRS | Internal Revenue Service |
| IRC | Internal Revenue Code |
| IRM | Internal Revenue Manual |
| NFTL | Notice of Federal Tax Lien |

| Acronym | Definition |
|---------------|---|
| PEO | Professional Employer Organization |
| PSP | Planning and Special Programs |
| SB/SE or SBSE | Small Business / Self-Employed Division |
| SNOD | Statutory Notice of Deficiency |
| TAS | Taxpayer Advocate Service |
| TBOR | Taxpayer Bill of Rights |
| TFRP | Trust Fund Recovery Penalty |
| UCC | Uniform Commercial Code |
| UFCA | Uniform Fraudulent Conveyance Act |
| UFTA | Uniform Fraudulent Transfer Act |
| ULA | Uniform Laws Annotated |
| USC or U.S.C. | United States Code |
| UVTA | Uniform Voidable Transactions Act |

5.17.14.1.7
(09-25-2020)

Related Resources

- (1) Listed below are resources for Special Condition NFTLs (i.e. nominee, transferee, alter ego, and successor in interest).

Resources for Special Condition NFTLs

| Location | Title |
|--------------------------|---|
| IRM 5.12.7.6 | Special Condition NFTL (Nominee, Alter Ego, Transferee, Successor-in-Interest), and all of its sub-sections |
| IRM 5.17.2.5.7 | Property Held By Third Parties |
| IRM 5.11.1.3.6 | Approval of Alter Ego and Nominee Notices of Levy |
| Knowledge Management web | <i>Alter Ego or Nominee - That is the Question. . .</i> |
| Knowledge Management web | <i>Special Condition NFTL</i> |

- (2) Listed below are resources for suits to establish a transferee liability.

Resources for Establishing a Transferee Liability

| Location | Title |
|-----------------|---|
| IRM 5.17.4.16.4 | Establishing a Fiduciary's Liability |
| IRM 5.17.12.11 | Fraudulent Transfers and Transferee and Other Third Party Liability |

| Location | Title |
|--------------------------|---|
| IRM 5.17.12.20.2.2.2 | Additional Items for Setting Fraudulent Transfer Aside Based on Constructive Fraud |
| IRM 25.3.2 | Suits by the United States |
| Suit Forms | <i>Suit Forms</i> |
| Knowledge Management web | <i>Suit Overview</i> |
| Knowledge Management web | <i>KM web page Suits-Resources/Examples</i> |
| Example Transferee Suit | <i>Example Transferee Liability (Estate Beneficiary) plus Assertion-v-Fiduciary</i> |

(3) Listed below are resources for assessing a transferee using IRC 6901.

Resources for Assessing Under IRC 6901

| Location | Title |
|-------------------|---|
| IRM 5.1.14.2 | Transferee Liability and Fraudulent Conveyances |
| IRM 4.10.13.3 | Transferor - Transferee Liability |
| IRM 4.8.9.17.5 | Transferor-Transferee Liability and Fiduciary Liability Cases |
| IRM 4.11.52 | Examining Officers Guide (EOG), Transferee Liability Cases |
| IRM 4.1.1.6.11.2 | Collection Referrals-Form 3031, Report of Investigation of Transferee Liability |
| IRM 4.10.13.3.1.1 | Referral From Collection Function |
| Form 3031 | Report of Investigation of Transferee Liability |

(4) The IRS adopted an additional <https://www.irs.gov/taxpayer-bill-of-rights> in June 2014. There are three previous TBOR, which have been incorporated into IRM instructions over the years. Employees are responsible for being familiar with and acting in accord with all taxpayer rights provisions and instructions including the 2014 TBOR. See IRC 7803(a)(3), Commissioner of Internal Revenue; other officials, Execution of duties in accord with taxpayer rights. For additional information about Taxpayer Bill of Rights see:

- TBOR 1: IRM 13.1.1.2(2), Evolution of the Office of the Taxpayer Advocate,
- TBOR 2: IRM 13.1.1.2(3), Evolution of the Office of the Taxpayer Advocate, and
- TBOR 3: IRM 13.1.1.2.1, IRS Adoption of Taxpayer Bill of Rights and IRC 7803(a)(3), also known as TBOR 3.

5.17.14.2
(09-25-2020)

Third Party Liability Overview

- (1) There are a variety of situations where a third party can be held liable for the tax liability of another. Although the circumstances require the application of different laws and different theories for collection, common elements exist in any analysis of third party liability. The legal theory that is pursued by the IRS will ultimately depend on the specific facts of a case. The **Third Party Legal Theories** generally encountered include:

Third Party Legal Theories

| Item | Theory | Link to Discussion |
|------|-----------------------|--------------------|
| a. | Transferee | IRM 5.17.14.2.1 |
| b. | Fiduciary Liability | IRM 5.17.14.2.2 |
| c. | Successor in Interest | IRM 5.17.14.2.3 |
| d. | Nominee | IRM 5.17.14.2.4 |
| e. | Alter Ego | IRM 5.17.14.2.5 |

- (2) Because the legal theory applied depends on the specific facts, Field Collection will want to fully develop the factual background for each case. This includes, but is not limited to, any information or facts regarding the transfer and the relationship between the parties.
- (3) Many of the legal theories for third party liability also involve the assertion of fraud by the IRS and, therefore, any evidence or facts suggestive of fraud should also be included when developing the factual background.
- (4) Administrative and judicial remedies are introduced below.

Administrative Remedies

Administrative levy or seizure action becomes possible against third parties, where at least one of the administrative items in the list below has occurred.

- Notice of Federal Tax Lien (NFTL) filing before the transfer to the third party.
- Special Condition Transferee NFTL filing, where the statutory lien arose before the transfer. See IRM 5.12.7.6.3.
- Special Condition NFTL filing **other than** the Transferee NFTL, where the third party is in possession of a taxpayer's assets. See Nominee NFTL definition IRM 5.12.7.6.1, Alter Ego definition IRM 5.12.7.6.2, and Successor in Interest definition IRM 5.12.7.6.4.
- Internal Revenue Code (IRC) 6901 assessment against the transferee.

Judicial Remedies

Consideration turns to judicial action, in conjunction with one or more of the administrative items from the administrative remedy list above, where administrative levy or seizure action is unavailable or impractical.

- Suit to foreclose the taxpayer's federal tax lien secured by a regular or Special Condition NFTL filing.

- b. Suit to establish a transferee liability where IRC 6901 is unavailable and the property value decreased after the transfer.

Reminder: A transferee liability results in a judgment against the transferee. It does not create a federal tax assessment against the transferee. IRS administrative collection action under the provisions of the Internal Revenue Code is unavailable where there is no underlying federal tax assessment or federal tax lien. But, filing a certified copy of the abstract of judgment creates the judgment lien against the transferee's real property. Then DOJ Tax Division or local U.S. Attorney's Office collects the judgment following the Federal Debt Collection Procedures Act (FDCPA).

- c. Suit to set aside a fraudulent conveyance where IRC 6901 is unavailable and the property value increased after transfer. This is generally in conjunction with a lien foreclosure.

- (5) These methods of collection are all discussed in greater detail in the provisions that follow. A determination of the best approach to take will depend upon the particular facts of the case. After the factual background of a case has been fully developed, Area Counsel is available to assist Field Collection in determining such matters as the applicable state law, or the best legal theory to proceed under given the specific facts. See IRM 25.3.2.2.1, Area Counsel Assistance.

5.17.14.2.1
(09-25-2020)

Transferee Theory

- (1) The term transferee has many connotations when discussing third parties. For the purposes of this sub-section's discussion, the term transferee refers to those areas where the term is used, either with an NFTL, a type of assessment, or a suit.
- (2) The IRS may seek to collect a taxpayer's unpaid tax, penalty or interest through pursuit of one of the transferee theories. An actual transfer occurred but there is a legal basis for collecting the tax liability from the transferee. A transferee liability may arise under a contract, under federal statutes, or under state law. Collection's basis may arise on a finding that the transfer was fraudulent. Concepts for using a transferee theory include:

- **Lien Tracing:** A statutory federal tax lien attaches to property and the property has been transferred by the taxpayer through a gift, bequest, devise, or inheritance before an NFTL could be filed. There is no requirement that the taxpayer retain use of or a beneficial interest in the property IRM 5.12.7.6.3(1), Transferee NFTL. See instructions for filing a Special Condition Transferee NFTL in IRM 5.12.7.6.5, Special Condition NFTL Approval Process: Request, Advisory Review, and Post-Approval.

Caution: This theory is unavailable for a transferee qualifying as a bona fide purchaser. See IRC 6323.

Reminder: Using lien tracing to file a Special Condition Transferee NFTL, allows the IRS to collect through administrative or judicial remedies.

- **IRC 6901:** Legal title to property has been transferred and no statutory federal tax lien attached prior to the transfer. As defined by IRC 6901(h) a transferee includes a donee, heir, legatee, devisee, and distributee,

and with respect to estate taxes, includes any person who, under IRC 6324(a)(2), is personally liable for any part of such tax. The liability is income, estate, or gift tax. It could also include other taxes, such as employment taxes through a liquidating partnership or corporation, or a corporate reorganization. The assessment is made within the limited timeframes described in IRC 6901(c) including any applicable extensions. See also IRM 5.17.14.5.2.

Note: Using IRC 6901 and a substantive provision of the law to assert liability against the transferee allows the IRS to collect through administrative or judicial remedies. The liability of the transferee is secondary to that of the transferor similar to a trust fund liability's relationship to the underlying corporate liability. Meaning the transferee liability is derived from the transferor's liability. It does not create a new liability. Instead, it provides a secondary method to collect the transferor's tax liability.

- **Litigation to Establish a Transferee Liability:** Legal title to property has been transferred and no statutory federal tax lien attached prior to the transfer, and either the IRC 6901 time-frames or type of tax are unavailable. See IRM 5.17.14.3.3.1, Transferee Liability Directly Imposed on the Transferee (At Law).

Note: Use when the value of the transferred property has decreased.

Reminder: Using litigation and a substantive provision of the law to establish a transferee liability creates a judgment against the transferee for the amount determined by the court. If the abstract of judgment is filed, it creates a judgment lien. The judgment does not merge with the transferor's liability. The judgment lien does not merge with the transferor's federal tax lien nor does it create a federal tax lien against the transferee. Collection is judicial only.

- **Litigation to Set Aside a Fraudulent Transfer:** Legal title to property has been transferred and no statutory federal tax lien attached prior to the transfer, and either the IRC 6901 time-frames or type of tax are unavailable. See IRM 5.17.14.3.3.2, Transferee Liability Based on Fraudulent Transfers (In Equity).

Note: Use when the value of the transferred property has increased.

Reminder: Using litigation to set aside a fraudulent transfer places the asset(s) back into the taxpayer / transferor's name and encumbered by the taxpayer / transferor's federal tax lien. This type of litigation is generally done in conjunction with a suit to foreclose the federal tax lien, which has been protected by the filing of an NFTL.

5.17.14.2.2
(09-25-2020)
**Fiduciary Liability
Theory**

- (1) A representative of a person or an estate (except a trustee acting under the Bankruptcy Code of Title 11) paying any part of a debt of the person or estate before paying a debt due to the United States is personally liable to the extent of the payment for unpaid claims of the United States.

- (2) A fiduciary is not liable unless the fiduciary knows of the debt or had information that would put the fiduciary on notice that an obligation was owed to the United States.
- (3) Fiduciary liability is discussed more fully in
 - IRM 5.17.13.7, Personal Liability of the Fiduciary Under 31 USC 3713(b), and
 - IRM 5.17.13.9.3, Fiduciary Liability of Personal Representatives.

5.17.14.2.3
(09-25-2020)
Successor Liability Theory

- (1) Under the successor liability theory, the IRS seeks to impose liability because the taxpayer sold or transferred assets to - or merged with - another corporation and the recipient or surviving corporation is liable under state law for the debts of the predecessor corporation. A successor liability is dependent on *state law*. Under certain circumstances, a successor in interest named on a Special Condition NFTL is entitled to Collection Due Process rights. See IRM 5.12.7.6.4(3), Successor-In-Interest NFTL.
- (2) The successor corporation may be liable:
 - a. As a transferee, as more fully discussed in IRM 5.17.14.3.3.4, Successor Liability of a Corporation as a Transferee, or
 - b. As the successor corporation may be primarily liable, as more fully explained in IRM 5.17.14.6, Successor Liability as Primary Liability.

5.17.14.2.4
(09-25-2020)
Nominee Theory

- (1) The nominee theory allows collection from specified property held in the name of the taxpayer's nominee. This theory is based on the premise that both -1- a third party holds specific assets for the taxpayer; and -2- at the same time the taxpayer retains benefit, use, or control over the specific assets. Terminology used includes, the third party *holding the property nominally, or holding it in name only*. Sometimes the property has been transferred, though a transfer is not a requirement of this theory. Thus, the nominee theory focuses on the relationship between the taxpayer and the property. A transfer of legal title may or may not have occurred. Whether or not that is the case, the IRS believes substantive control over the property remains with the taxpayer. See IRM 5.12.7.6.1, Nominee NFTL, and IRM 5.17.14.7, Nominee and Alter Ego Theory Elements.

5.17.14.2.5
(09-25-2020)
Alter Ego Theory

- (1) The alter ego theory allows collection from all the property of a taxpayer's alter ego. This theory is based on the premise that the taxpayer and the alter ego are so intermixed that their affairs are not readily separable. Thus, the alter ego theory focuses on the relationship between the taxpayer and the alter ego. See IRM 5.12.7.6.2, Alter Ego NFTL, and IRM 5.17.14.7, Nominee and Alter Ego Theory Elements.

5.17.14.3
(10-26-2023)
Transferee Accountability in General

- (1) The basis for collecting a taxpayer's debt from a transferee always originates with a limitation on the IRS' ability to collect from a taxpayer due to a property transfer. The transfer can occur either before or after assessment of the taxpayer's debt. Payment for the underlying taxpayer debt, pursued through collection from the transferee, can be either a tax or non-tax debt.
- (2) Identified below are examples of tax and non-tax debt. While the list is not exhaustive, it indicates a range of underlying debt, particularly non-tax debt.

Example: Tax examples in table below.

| Tax | |
|-------------|--|
| Item | Description |
| 1 | A self-reported tax liability assessed against the taxpayer. |
| 2 | A tax liability for which a statutory notice of deficiency (SNOD) was issued to the taxpayer and that is assessed against the taxpayer, or that is set forth in a judgment against the taxpayer. |
| 3 | A liability for a tax not subject to the deficiency procedures that is assessed against the taxpayer (i.e., math error, jeopardy assessment, or SNOD waiver), or that is set forth in a judgment against the taxpayer. Example: The IRS issues a SNOD before assessing additional income tax, estate tax, gift tax, and certain excise taxes, unless the taxpayer agrees to the additional assessment. |
| 4 | A tax liability for which a deficiency notice could have been issued to the taxpayer, or a judgment obtained against the taxpayer, but for which, instead, a notice of deficiency is issued to a transferee or fiduciary, or a judgment obtained against the transferee or fiduciary. |

Example: Non-Tax examples in table below.

| Non-Tax | |
|----------------|---|
| Item | Description |
| 1 | A judgment against a taxpayer for an unaccessible liability (i.e., erroneous refund or credit). See IRM 25.3.5, Litigation and Judgments, Judgment Follow-up. |
| 2 | Property or funds originating from trust funds or the employer's portion of employment tax liabilities received by a professional employer organization (PEO) from a common law employer which is diverted to a person related to the PEO, where the amount is determined in a judgment against the PEO. See IRM 5.1.24, Third-Party Payer Arrangements for Employment Taxes. |

5.17.14.3.1
(09-25-2020)

Transfer Types

- (1) The transfer from the taxpayer / transferor to the transferee can be direct or indirect:

Comparison of Direct and Indirect Transfers

| Direct Transfers | Indirect Transfers |
|---|--|
| The disposition of or parting with an asset or an interest in an asset. | The release of a debt or claim. |
| The payment of money or payment of debt. | The creation of a lien or other encumbrance. |

| Direct Transfers | Indirect Transfers |
|--|--|
| The granting of a lease. | The distribution of sale proceeds or other corporate assets to shareholders. |
| The compensation, especially when excessive, paid to corporate officers. | The transaction was a sham in fact or sham in substance (lacks business purpose and economic substance) and did not give rise to valid deductions or losses (e.g., in a stock sale context). |

5.17.14.3.2
(09-25-2020)

**Collection from the
Transferee is Secondary**

- (1) Courts generally consider a transferee's liability to be secondary to the primary liability of the transferor. Secondary liability means:
 - a. The transferee derives its liability from the transferor's liability, and
 - b. Property is received under circumstances subjecting the transferee to the liabilities of the transferor.
- (2) Before pursuing a transferee, the IRS must generally exhaust all legal remedies it may have against the transferor for collection of the tax. The general rule is that the IRS must show that collection remedies against the transferor have been exhausted or would be futile. See, *Gumm v. Commissioner*, 93 T.C. 475, 480 (1989). The extent to which the IRS must proceed against the transferor depends on the facts and circumstances. For example, the IRS need not pursue a corporate taxpayer that has been stripped of its assets or a trust that has distributed its property to a beneficiary and terminated.

5.17.14.3.3
(09-25-2020)

**Establishing Transferee
Liability**

- (1) A transferee is liable for a tax either "at law" or "in equity."
- (2) **At Law:** This is where the liability of the transferee is directly imposed by federal or state law or agreed to as part of a contract (either an express or implied agreement).
- (3) **Establishing Transferee Liability At Law:** The IRS must prove:

Transferee At Law Additional Proof

| | | |
|---|--|--|
| 1 | Transferor transferred property to the transferee plus the transferor remains liable for the tax, | |
| 2 | AND Transferor was liable for the tax at the time of the transfer, | OR Transfer occurred in the year of liability, |
| 3 | AND Transferor and the transferee entered into a contract in which the transferee expressly or impliedly agreed to assume the transferor's tax liability, | OR Liability is directly imposed on the transferee (strict liability) under a federal or state statute (e.g., a bulk sales law or a state corporate merger or dissolution statute) or case law. |

Note: While not a required element for establishing transferee liability at law, information regarding the value of the property at the time of transfer should be provided because applicable law may limit the transferee's liability to this amount. Additionally, information regarding efforts made to collect the tax from the transferor, or why collection actions against the transferor would be futile, should be provided.

- (4) **In Equity:** This is where the liability of the transferee is imposed by a court based on equity or fairness principles.
- Transferee liability in equity is based on fraudulent conveyance laws that were initially developed by courts based on the principle that debtors may not transfer assets for less than adequate consideration if they are left unable to pay their liabilities.
 - Although the doctrine was initially based on the common law (case law), both federal and state statutes now address setting aside transfers based on a fraudulent conveyance.

- (5) **Establishing Transferee Liability In Equity:** The IRS must prove:

Transferee In Equity Additional Proof

| | | |
|---|--|---|
| 1 | All reasonable efforts have been made to collect the liability from the transferor-taxpayer, | |
| 2 | Transferor transferred property to the transferee plus the transferor remains liable for the tax, | |
| 3 | AND Transferor was liable for the tax at the time of the transfer, | OR Transfer occurred in the year of liability, |
| 4 | AND The value of the transferred property at the time of transfer (which generally determines the limits of the transferee's liability) and that the transfer was for less than adequate consideration. | |
| 5 | AND The transferor was insolvent, | OR The transfer made the transferor insolvent. |

- (6) The tax liability arises at the end of the tax year. However, a transfer occurring during the tax year may give rise to a contingent tax liability at the time of the transfer.
- (7) For certain kinds of transfers (e.g., fraudulent transfers, gifts and testamentary distributions), the IRS must also prove the value of the transferred property at the time of the transfer, which generally determines the limits of the transferee liability. See IRM 5.17.14.3.4, Extent of Transferee Liability.
- (8) The methods of establishing transferee liability, discussed below, are not mutually exclusive. Frequently, the facts in a particular case may support a number of different theories for imposing transferee liability. For example, depending upon applicable state law, the same set of facts could support imposing liability on the transferee under the following theories:
- fraudulent transfer
 - trust fund doctrine
 - successor liability
 - transfer to shareholder or corporate distributee
- (9) Additionally, states may use different terminology for these different theories. For example, not all states specifically recognize the doctrine of "successor liability" but instead will impose transferee liability under the same or a similar set of facts and call it something else (e.g., trust fund doctrine, fraudulent conveyance). For Field Collection, fully developing the facts of the case that support varying theories of transferee liability is more important than determin-

ing which specific legal theory applies. Consult with Area Counsel to determine the appropriate legal theory or theories under which suit may be brought in your state. See also IRM 5.17.14.3.3.3, Trust Fund Doctrine and IRM 5.17.14.3.3.5, Transferee Liability of a Shareholder or Distributee of a Corporation.

Note: Many of the State Law Guides on the My SB/SE Counsel website include a discussion of applicable state law for fraudulent conveyances or other types of transferee liability. See <http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/sbse/Pages/LawGuides.aspx>.

5.17.14.3.3.1
(09-25-2020)

**Transferee Liability
Directly Imposed on the
Transferee ("At Law")**

- (1) A transferee liability is considered "at law" when it is directly imposed by a federal or state law specifying that in a particular situation a transferee will be liable for the debts of the transferor. The transferee liability may be directly imposed by a statute or by judicially created doctrine embodied in case law.

Note: When transferee liability is based on the fraudulent transfer of property, the transferee liability is "in equity" even though a state statute provides the mechanism to set aside the fraudulent conveyance. In these scenarios, the fraudulent transfer statute sets forth criteria to be considered by a court to determine if a fraudulent transfer took place, and authorizes the court (a) to enter a judgment of liability against the transferee, and/or (b) to set aside the fraudulent transfer. See IRM 5.17.14.3.3.2, Transferee Liability Based on Fraudulent Transfers ("In Equity").

- (2) The Internal Revenue Code has provisions which impose direct liability on a transferee for the transferor's tax.
 - a. A distributee/recipient of certain types of property from a decedent's estate is personally liable under IRC 6324(a)(2) for estate taxes to the extent of the value of the property received. See IRM 5.17.2.9.1(4), The Estate Tax Lien.
 - b. A donee of a gift is personally liable under IRC 6324(b) for any gift tax incurred by the donor to the extent of the value of the gift. See IRM 5.17.2.9.2(2), The Gift Tax Lien.

Note: In the situations listed above in (a) and (b), no assessment against the transferee or fiduciary is needed to collect during the 10 year lien period provided by IRC 6324 with respect to the lien that arises automatically without assessment. A judgment or assessment may be needed after expiration of the 10 year lien period.

- (3) Most states also have statutes which directly impose liability on a transferee in certain circumstances.
 - a. Bulk sale provisions found in the Uniform Commercial Code (UCC) or other state laws impose liability for a business' debts on the purchaser of substantially all of the inventory or equipment of the business if notice of the purchase is not given to the business's creditors.
 - b. Corporate merger or consolidation - The corporate laws of many states impose liability on the surviving corporation for the debts of the disappearing constituent corporations following a merger or consolidation.
 - c. Most states have case law that imposes liability when one corporation sells its assets to another corporation and the asset sale is tantamount to

a “de facto merger” or a “mere continuation” of the transferor corporation. See, *Atlas Tool v. Commissioner*, 70 T.C. 86, 113-114 (1978), *aff’d*, 614 F.2d 860 (3d Cir. 1980).

Note: In these scenarios, the surviving corporation may also have primary liability as a successor in interest. See IRM 5.17.14.3.3.4, Successor Liability of a Corporation as a Transferee.

- d. Distributions upon dissolution of corporation: Most states have statutes that authorize creditors to sue shareholders for distributions upon dissolution of the corporate taxpayer. Some states have statutes imposing liability on a director for distributions made upon dissolution of a corporation even if the director is not a shareholder.

- (4) Transferee liability may also be directly imposed on a transferee “at law” if the transferee expressly or impliedly agreed to assume the transferor’s tax liability in a contract.

5.17.14.3.3.2 (09-25-2020) **Transferee Liability Based on Fraudulent Transfers (“In Equity”)**

- (1) Transferee liability in equity may also result from a fraudulent transfer. The concept of transferee liability based on a fraudulent transfer is that fairness dictates that the IRS should be able to collect from the fraudulently transferred property as if the transferor still held the property.
- (2) Although fraudulent transfers take many forms, their common goal is to put assets out of the reach of creditors. It is important to look for a transaction which diminishes a taxpayer’s assets. Any transaction which leaves a taxpayer with something less than what the taxpayer started with can potentially be a fraudulent transfer. For example, the forgiveness by a taxpayer of a debt owed him or the release by a taxpayer of a bona fide claim against a third party constitutes a transfer which may be set aside if the necessary elements of fraud are present.
- (3) A transfer is fraudulent when a debt owed to a creditor exists and where real or personal property is transferred to a third party with the object or the result of placing the property beyond the reach of the creditor or hindering the creditor’s ability to collect a valid debt.
- (4) Many theories of liability require a party seeking to set aside a transfer of property as fraudulent to exhaust all other available remedies against the transferor. See, *Gumm v. Commissioner*, 93 T.C. 475, 480 (1989). The general rule is that the IRS must show that collection remedies against the transferor have been exhausted or would be futile. This means that the IRS should always make a reasonable and well-documented search for additional assets retained by the transferor, and first attempt to satisfy the debt out of those assets.
- (5) When fraudulent transfers are identified, it may be advisable to file a specially worded (special condition) NFTL identifying the third party receiving property and identifying specific property involved on a Nominee and/or Transferee NFTL to prevent further clouding of title while enforcement actions are being taken. Alter Ego and Successor in Interest NFTLs do not require that the specific property be identified. Approval of and guidance as to the styling of such specially worded NFTLs must be secured from Area Counsel before filing. See IRM 5.12.7.6.5, Special Condition NFTL Approval Process: Request,

Advisory Review, and Post-Approval, through IRM 5.12.7.6.8, Retention, Release, and Withdrawal of Special Condition NFTL, for the Special Condition NFTL process.

- (6) Depending on the facts of the case and the applicable state law, transferee liability based on fraudulent transfer may overlap with liability imposed under the trust fund doctrine (IRM 5.17.14.3.3.3), successor liability (IRM 5.17.14.3.3.4), and the liability of shareholder and corporate distributees (IRM 5.17.14.3.3.5).

5.17.14.3.3.2.1
(09-25-2020)

Fraudulent Transfers Under Federal and State Law

- (1) The Federal Debt Collection Procedures Act (FDCPA) became effective in 1991. 28 USC 3001 et seq. Prior to the FDCPA, the United States relied on applicable creditor and debtor law of the various states to attack fraudulent transfers.
- The FDCPA gives the United States a uniform federal procedure for setting aside a fraudulent transfer to aid in the collection of federal debts, including tax debts. 28 USC 3301 et seq. These sections of the FDCPA are based on the Uniform Fraudulent Transfers Act, 7A Pt. II Uniform Laws Annotated (ULA) 2.
 - The United States is not bound to use the FDCPA to collect its debts. If necessary, it can proceed under any cause of action provided by state or federal law. See, *United States v. Letscher*, 99-2 USTC ¶ 50,947 (S.D.N.Y. 1999).
- (2) All states recognize a cause of action to set aside a fraudulent transfer. A majority of jurisdictions have adopted either the Uniform Fraudulent Conveyance Act (UFCA), 7A Pt. II ULA 246 (2 states & U.S. Virgin Islands) or its successor, the Uniform Fraudulent Transfer Act (UFTA), 7A Pt. II ULA 2 (43 states and the District of Columbia). There is a 2014 revision to the UFTA enacted by 21 states. This UFTA revision is called the *Uniform Voidable Transactions Act*. The fraudulent transfer provisions found in the UFTA are similar to those in the FDCPA.

Note: It is important to review the law of the state in which the transfer occurred. Many of the State Law Guides on the My SB/SE Counsel website include a discussion of applicable state law for fraudulent conveyances or other types of transferee liability. See <http://ccintranet.prod.irsounsel.treas.gov/OrgStrat/Offices/sbse/Pages/LawGuides.aspx>.

- (3) The FDCPA, the UFCA and the UFTA recognize both actual fraud and constructive fraud as grounds for setting aside a transfer.

5.17.14.3.3.2.2
(09-25-2020)

Types of Fraud in a Fraudulent Transfer

- (1) **Constructive fraud** and **actual fraud** are the two principal kinds of fraud. At least one of them must be proven to set aside a transfer.
- Proof of constructive fraud is sufficient to set aside a transfer that occurs **after** the debt arises. FDCPA 3304(a); UFTA 5; UFCA 4 and 5.
 - Proof of actual fraud will defeat a transfer whether the debt arises **before or after** the transfer. FDCPA 3304(b); UFTA 4; UFCA 6 and 7.
- (2) **Constructive Fraud:** Exists when property is transferred for inadequate consideration (or for less than the reasonably equivalent value) and the transferor either is insolvent when the transfer occurs or is made insolvent by the transfer. FDCPA 3304(a); UFTA 4(a)(2) and 5; UFCA 6 and 7. A transferor's

intent is immaterial if constructive fraud is proven. See IRM 5.17.14.3.3.2.2.1.

Reminder: The fact that a taxpayer is in debt does not preclude the taxpayer from transferring property for adequate consideration. A transfer founded on adequate consideration and made with a bona fide intent is valid against the United States. But see the discussions of preferential transfers in IRM 5.17.14.3.3.2.2.1(6) and the trust fund doctrine in IRM 5.17.14.3.3.3, below.

- (3) **Actual Fraud:** Occurs when property is transferred with the actual intent to hinder, delay, or defraud a creditor in the collection of a debt owed it. FDCPA 3304(b); UFTA 4(a)(1).
 - a. It can be difficult to prove that a transfer was made with the actual intent to defraud a creditor. A fraudulent transfer usually is made without any verbal or written expression of the reason for the transfer.
 - b. Because of this, actual fraud is generally proved through circumstantial evidence known as the “indicators of fraud,” such as lack of adequate consideration or a transfer to insiders. For other indicators of fraud, see IRM 5.17.14.3.3.2.2.2(3), below.

5.17.14.3.3.2.2.1 (09-25-2020) Constructive Fraud

- (1) The IRS, when proving constructive fraud, may set aside a transfer that occurs after the debt arises.
- (2) Constructive fraud exists when a transferor does not receive reasonably equivalent value (FDCPA & UFTA) or fair consideration (UFCA) in exchange for the transfer, and the transferor was insolvent at the time of the transfer or became insolvent as a result of the transfer.
- (3) **Reasonably equivalent value:** FDCPA 3303(b) defines the term as it relates to 3304 and 3307 as, “the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive foreclosure sale or execution of a power of sale for the acquisition or disposition of such interest upon default under a mortgage, deed of trust, or security agreement”. See also UFTA 3(b). The concept of reasonably equivalent value does not exist under the UFCA; instead, the concept of fair consideration is used.
- (4) Fair consideration for purposes of the UFCA is given in exchange for property if:
 - a. it is a “fair equivalent” to the property conveyed; and
 - b. exchanged in good faith. UFCA 3.
- (5) A transferor is insolvent if the sum of the transferor’s debts exceeds a fair valuation (FDCPA & UFTA) or the fair salable value (UFCA) of the transferor’s assets. FDCPA 3302; UFTA 2; UFCA 2.
 - a. The FDCPA and the UFTA presume that a transferor who generally is not paying debts as they come due is insolvent.
 - b. Where insolvency results from a series of related transfers, some of which may have occurred before actual insolvency, all of the transfers can be set aside as fraudulent.

- (6) The FDCPA and the UFTA contain another category of transfers which are considered fraudulent as to a current creditor commonly known as a preferential transfer to an insider. FDCPA 3304(a)(2); UFTA 5(b). A transfer is fraudulent if:
- the transfer was made to an insider on account of an antecedent (prior) debt;
 - the transferor was insolvent at the time; and
 - the insider had reason to believe that the transferor was insolvent when the transfer occurred.

Example: The table below contains insider examples.

| Item | Description |
|------|---|
| 1 | Family members, when the transferor is an individual. |
| 2 | Directors and officers, when the transferor is a corporation. |
| 3 | General partners and relatives of general partners, when the transferor is a partnership. FDCPA 3301(5); UFTA 1(7). |

5.17.14.3.3.2.2.2
(01-24-2012)

Actual Fraud

- (1) Proof of actual fraud, as to a debt owed to the United States, is sufficient under the FDCPA, the UFCA and the UFTA to set aside a transfer whether the debt arises before or after the transfer. FDCPA 3301(5); UFCA 7; UFTA 4(a)(1).
- (2) Actual fraud exists when a transferor actually intended to hinder, delay or defraud a creditor. Because it can be difficult to prove that a transfer was made with the actual intent to defraud creditors, use of circumstantial evidence, "indicators of fraud," is often necessary.
- (3) A transferor's actual intent is generally proved through the indicators of fraud. The commonly recognized indicators of fraud include:

Indicators

| Item | Description |
|------|---|
| 1 | The transfer lacks fair consideration. |
| 2 | The transferor and transferee are closely related, such as family members, or a shareholder and the shareholder's closely held corporation. |
| 3 | The transferor retains the enjoyment, possession and control of the property after its transfer. |
| 4 | The transfer was concealed. |
| 5 | Before the transfer, the transferor had been sued or was threatened with suit. |
| 6 | Substantially all of the transferor's assets were transferred. |
| 7 | The transferor left the jurisdiction secretly. |
| 8 | The transferor removed or concealed assets. |

| Item | Description |
|------|---|
| 9 | The transferor was insolvent at the time of transfer or became insolvent shortly after the transfer occurred. |
| 10 | The transfer occurred shortly before or after a substantial debt was incurred. |
| 11 | The transferor transferred the essential assets of a business to the holder of a lien who subsequently transferred the assets to an insider. See FDCPA 3304(b)(2); UFTA 4(b). |

- (4) The adequacy of the consideration for the transfer is an important indicator of fraud. *United States v. Green*, 201 F.3d 251 (3d Cir. 2000); *United States v. Denlinger*, 982 F.2d 233 (7th Cir. 1992).
 - a. A person cannot give property away if it is to the detriment of creditors. If some consideration has changed hands, it may be necessary to determine whether the consideration was merely a “cover” for a fraudulent transfer.
 - b. Although the possibility exists of proving that a transfer was fraudulent even if consideration changed hands, the presence of adequate consideration is a strong defense.
- (5) A transfer of all or nearly all of a taxpayer’s property which leaves the taxpayer without any means of paying creditors is highly indicative of fraud. It must be determined, however, whether this property was transferred in an attempt to pay the transferor’s debts. If so, there may be no basis to invalidate the transfer without showing that the United States had legal priority over the creditors who were paid.
- (6) A transfer made shortly before or after the tax is due may be evidence of fraud. *United States v. Scherping*, 187 F.3d 796 (8th Cir. 1999); *United States v. Parks*, 91-1 USTC ¶ 50,263 (D. Utah 1991).
- (7) In attempting to set aside a transfer, it is helpful to show that the transaction was not made in the usual course of business. Examples of this are:
 - a sale made outside of usual business hours;
 - a failure to record an instrument that would normally be recorded;
 - an extension of credit for an unusually long period of time to a purchaser without security; and
 - a failure by the transferee to properly inventory goods transferred to him.
- (8) A reservation of an interest in the transferred property that is inconsistent with a bona fide transfer indicates fraud.
- (9) The FDCPA, the UFTA and the UFCA also consider a transfer of property without receipt of reasonably equivalent value (FDCPA and UFTA) or fair consideration (UFCA) to be fraudulent, whether the debt arises before or after the transfer, if the transferor:
 - a. was engaged in or was about to engage in a business or a transaction for which the remaining assets of the transferor were unreasonably small in relation to the business or transaction, or

- b. intends or believes that he will incur debts beyond his ability to pay as they mature. FDCPA 3304(b)(1)(B); UFCA 5 & 6; UFTA 4(a)(2).

5.17.14.3.3.2.3
(01-24-2012)

Subsequent Transfers

- (1) A good-faith purchaser from a transferee of the transferred property generally takes the property free of the initial transferor's fraud. The same holds true for a creditor who in good faith extends a loan to the transferee and takes a security interest in the transferred property.
- (2) A subsequent transferee with notice of the fraudulent transfer is subject to the rights of creditors of the initial transferor.

5.17.14.3.3.3
(09-25-2020)

Trust Fund Doctrine

- (1) The trust fund doctrine is a judicially created equitable doctrine. The theory behind the doctrine is that when a transfer leaves the transferor without enough assets to pay debts, the transferee holds the transferred property "in trust" for the benefit of the transferor's creditors.
- (2) Although you should look to the specific requirements under the relevant state case law, the trust fund doctrine generally requires the IRS to show that -
 - a. the alleged transferee received property of the transferor;
 - b. the transfer was made without consideration or for less than adequate consideration;
 - c. the transfer was made during or after the period for which the tax liability of the transferor accrued;
 - d. the transferor was insolvent prior to or because of the transfer of property or that the transfer of property was one of a series of distributions of property that resulted in the insolvency of the transferor;
 - e. all reasonable efforts to collect from the transferor were made and any further collection efforts would be futile; and
 - f. the value of the transferred property.
- (3) The trust fund doctrine is most commonly used to impose transferee liability on a shareholder for taxes incurred by a corporation when the shareholder receives assets from a corporation prior to its dissolution. See, e.g., *Benoit v. Commissioner*, 238 F.2d 485, 491 (1st Cir. 1956). Recovery under the doctrine is limited to the value of the property transferred. Many states have also enacted statutes to permit creditors of a corporation to sue shareholders. See IRM 5.17.14.2.3.5, Transferee Liability of a Shareholder or Distributee of a Corporation.

Note: Application of the "trust fund doctrine" as used here should not be confused with the assertion of the "trust fund recovery penalty" under IRC 6672. IRC 6672 directly imposes liability on a third party – the person required to collect, truthfully account for, and pay over any tax imposed who willfully fails to do so.

5.17.14.3.3.4
(09-25-2020)

Successor Liability of a Corporation as a Transferee

- (1) Successor liability for a transferee may arise under two different scenarios:
 - a. a corporation surviving or resulting from a merger, consolidation or reorganization of one or more corporations; or
 - b. a corporation to which all or substantially all of the assets of another corporation has been sold or otherwise transferred.

- (2) Successor liability may be a primary liability if a state statute provides that a corporation surviving or resulting from a merger or consolidation assumes by operation of law all of the liabilities of the constituent corporations. See IRM 5.17.14.6, Successor Liability as Primary Liability, for more information.
- (3) State law governing successor liability generally imposes liability in the following circumstances:
 - a. when the successor expressly or impliedly assumes the liabilities;
 - b. when a corporation reorganizes, merges or consolidates with another corporation;
 - c. when one corporation transfers its assets to another corporation but the corporations do not formally merge, there may nevertheless be a de facto merger or the successor may be considered a mere continuation of the corporation selling or transferring assets; or
 - d. the transaction amounts to a fraudulent conveyance.
- (4) In these instances, the IRS may rely on successor liability doctrine to hold a successor corporation liable for the tax debts of its predecessor. Given the potential for differences in state law, consultation with Area Counsel is important.
- (5) Because whether the successor assumed the transferor's liabilities will generally be a contract interpretation issue, the more difficult instances for the IRS to establish successor liability are when there is a de facto merger or the seller is a mere continuation. When determining whether a de facto merger or mere continuation exists, courts may look at whether:
 - a. the second corporation continues the business or performs the same functions of the taxpayer;
 - b. the taxpayer's employees become the employees of the second corporation;
 - c. the taxpayer and the second corporation are owned or controlled by the same individual or individuals;
 - d. the successor's business activities are carried out in the same location;
 - e. less than full consideration is paid for the transferred assets; and
 - f. the business relationships remain relatively static.
- (6) If the surviving corporation may be held liable for the transferor's debts as a successor under either a statute imposing liability or case law, the transferor's tax liability may be collected from the successor using the IRC 6901 procedures. See IRM 5.17.14.6, Successor Liability as Primary Liability, for additional discussion.

5.17.14.3.3.5
(09-25-2020)

Transferee Liability of a Shareholder or Distributee of a Corporation

- (1) Shareholders/distributees who receive assets from a corporate liquidation can be subject to transferee liability for the unpaid corporate income taxes, penalties and interest.
- (2) Shareholders who receive assets of a corporation on its dissolution and who are liable as transferees are jointly and severally liable to the extent of the assets transferred to them. The IRS is not obligated to pursue all of the shareholders for collection of the corporation's unpaid income taxes. Since the liability of a shareholder, however, is generally limited to the value of the

assets received from the corporation, it may be necessary as a practical matter to pursue all shareholders in order to collect the full liability.

- (3) Shareholders/distributees may also be liable as transferees when assets are distributed but the corporation is not liquidated or dissolved. The liability in the following examples would most likely be based on a fraudulent transfer:
 - a. A distribution to a shareholder based on the shareholder's equity interest in a corporation, such as a dividend, or a payment by the corporation of a debt owed to a shareholder, can be a preferential transfer to an insider, thus, resulting in transferee liability. See IRM 5.17.14.3.3.2.1, Constructive Fraud.
 - b. If a stockholder is also an officer or an employee of the corporation, and receives a bonus or salary which is unreasonable, the stockholder may be treated as a transferee on the theory that the excessive salary is the equivalent of a distribution of corporate assets.
- (4) A corporation or person who acquired the stock or any asset of a corporation may be liable as a transferee.
 - a. If the acquisition of assets is a fraud to the creditors of the transferor corporation, the acquiring corporation is liable as a transferee based on a fraudulent transfer. See IRM 5.17.14.3.3.2, Transferee Liability Based on Fraudulent Transfers. A sale or distribution of corporate assets may also result in a trust in favor of creditors under the trust fund doctrine. See IRM 5.17.14.3.3.3, Trust Fund Doctrine.
 - b. Transferee liability may arise in a stock or asset sale context, where the sale is in economic substance a "sham." This liability is most likely to be based on a fraudulent transfer. See IRM 5.17.14.3.3.2, Transferee Liability Based on Fraudulent Transfers.
 - c. The purchase of the stock of a corporation, followed by the liquidation of the corporation, may render the purchaser liable as a transferee as a successor. See IRM 5.17.14.3.3.4, Successor Liability of a Corporation as Transferee.
- (5) Transferee liability may also be a consideration in *Notice 2001-16, 2001-09 I.R.B. 730*, Intermediary Transactions Tax Shelter and *Notice 2008-111, 2008-51 I.R.B. 1299*, Intermediary Transaction Tax Shelters. These listed transactions are basically intended to avoid the payment of taxes on a corporate stock or asset sale. The participants to the transaction — the seller's shareholders, the buyer, the intermediary, and the transaction's facilitators — may all be possible transferees. Their potential liability for unpaid taxes resulting from the transaction will depend on the facts of the case and the proper tax treatment of the transaction. Intermediary transaction tax shelters may also be analyzed under any of the other transferee liability theories listed above, depending on the facts of the case.

5.17.14.3.4
(09-25-2020)
Extent of Transferee Liability

- (1) The amount of the transferee's liability for the transferor's unpaid tax, penalties, and interest depends on whether transferee liability is based "in equity" or "at law."
- (2) When transferee liability is based "in equity," the transferee's liability is generally limited to the value of the property transferred.

- a. For example, liability of shareholders under the trust fund or similar doctrine is limited to the value of property received. *Phillips-Jones Corporation v. Parmley*, 302 U.S. 233, 237 (1937).
 - b. Transferee liability in equity is equal to the value of transferred property at the time of transfer. However, if the value has decreased since the transfer, the liability may be equal to the value of the property at the time the transfer is found to be fraudulent by a court. See, *United States v. Verduchi*, 434 F.3d 17 (1st Cir. 2006).
- (3) Generally, transferee liability “at law” is full liability, regardless of the value of the assets received, unless limited by state or federal law or by agreement.
- a. When transferee liability is “at law” because the transferee has agreed to assume the transferor’s liability, the transferee is liable for the full amount of the transferor’s liability, regardless of the value of the assets transferred. *Bos Lines, Inc. v. Commissioner*, 354 F.2d 830, 837 (8th Cir.1965) *aff’d*, T.C. Memo.1965-71.
 - b. Where transferee liability is based on state law, state law determines the extent of liability. *Commissioner v. Stern*, 37 U.S. 39, 44-45 (1940).
 - c. Liability is not limited to the value of the assets transferred if there is a reorganization, merger, consolidation, or the successor corporation is the result of a de facto merger or a mere continuation of the taxpayer. See, e.g., *Atlas Tool v. Commissioner*, 70 T.C. 86, 113-14 (1978), *aff’d*, 614 F.2d 860 (3d Cir. 1980).
 - d. Shareholder liability is limited to the value of the distribution to the shareholder where a state statute imposes liability upon distribution of assets upon dissolution of a corporation if creditors have not been paid. See, e.g., *C.D. Const. Corp. v. Commissioner*, 451 F.2d 470 (4th Cir. 1971), *aff’d*, T.C. Memo. 1970-297.
 - e. Similarly, a transferee’s liability for gift taxes and estate taxes, based on the Internal Revenue Code, is limited to the value of the gift or the property distributed from the decedent estate. IRC 6324(a)(2) and (b).
- See IRM 5.17.14.3.3, Establishing Transferee Liability, for further discussion on the distinction between “at law” liability and “in equity” liability.
- (4) Each transferee is jointly and severally liable for the transferor’s unpaid taxes to the extent of the value of assets received at the time of transfer. The IRS therefore is not required to apportion liability among transferees.

Example: If three transferees each received transfers worth \$20,000 and the transferor’s liability is \$15,000, then each transferee is liable for the entire \$15,000 and not a mere pro rata share (\$5,000). The IRS may collect the liability from one, two, or all three of the transferees, subject to a total collection of \$15,000.

- (5) Generally, a transferee is liable for the transferor’s total tax liability, including interest that accrues on that tax liability before the transfer, but only to the extent of the value of the assets transferred. If the value of the transferred assets is less than the transferor’s liability, interest is determined under state law.

- (6) Interest in transferee liability cases calculates based on two separate periods—**pre-notice** and **post-notice**. **Notice** refers to the notice of transferee liability. Before the issuance of the notice (**pre-notice**), if
- a. The value of the assets transferred is less than the transferor's total tax liability on the transfer date, the **pre-notice period** is measured from a point of time that would not be earlier than the date of transfer up to (but not including) the notice of liability issue date. The existence, starting date, and rate of interest are controlled by state law. *Estate of Stein v. Commissioner*, 37 T.C. 945 (1962).
- Note:** The total liability imposed on the transferee may exceed the value of the transferred assets, however, if interest accrues under state law with respect to the assets. See *Stansbury v. Commissioner*, 102 F.3d 1033 (10th Cir. 1996).
- b. The value of the assets transferred is more than the transferor's total tax liability on the transfer date, the **pre-notice period** would run from the date that the transferor's tax payment was due up to the date the notice of liability was issued. Interest would be determined under Federal law. *Lowy v. Commissioner*, 35 T.C. 393 (1960).
- (7) Regardless of the value of assets transferred, federal law governs the imposition of interest once the notice of transferee liability is issued (i.e., **post-notice**). A transferee is liable for interest under IRC 6601 from the date of this notice to the date of payment. *Patterson v. Simms*, 281 F.2d 577 (5th Cir. 1960)
- (8) A transferee of the initial transferee may be subject to liability for the tax of the transferor. A transferee of an initial transferee is liable if:
- the initial transferee is liable and
 - there is a basis for transferee liability of the subsequent transferee (such as a fraudulent transfer from the initial transferee).
- (9) The liability of a subsequent transferee is generally limited to the value of the property received (see (1) – (9) above).

Note: Remember, however, that a good-faith purchaser from a transferee of the transferred property generally takes the property free of the initial transferor's fraud. See IRM 5.17.14.2.3.2.3.

5.17.14.4 (09-25-2020)

Fiduciary Liability

- (1) Pursuant to 31 USC 3713(b), a representative of a person or an estate (except a trustee acting under the Bankruptcy Code, Title 11) paying any part of a debt of the person or estate before paying a debt due to the United States is personally liable to the extent of the payment for unpaid claims of the United States. See IRM 5.17.13.9.3, Fiduciary Liability of Personal Representatives, and IRM 5.17.13.7, Personal Liability of the Fiduciary Under 31 USC 3713(b), for additional discussion.
- (2) A fiduciary is not liable unless the fiduciary knows of the debt or had information that would put the fiduciary on notice that an obligation was owed to the United States.
- (3) Personal liability under 31 USC 3713(b) only applies where the United States has priority under 31 USC 3713(a), the applicable insolvency statute.

- a. The priority generally applies where the person or estate is insolvent.
 - b. The priority is superseded by interests that would have priority over the federal tax lien under IRC 6323.
- (4) Personal liability is limited to the value of the assets that the fiduciary distributes in violation of federal priority.
- (5) Prior to enactment of IRC 6901, the United States proceeded against a fiduciary by means of a suit filed in a federal district court. This procedure is still available. See IRM 5.17.14.5.4, Establishing Transferee or Fiduciary Liability by Suit.
- (6) IRC 6901(a)(1)(B) permits the IRS to impose personal liability on a fiduciary under 31 USC 3713(b) by way of a procedure commenced with the issuance of a notice of fiduciary liability. The fiduciary may then contest the proposed liability in the Tax Court. See IRM 5.17.14.5.2, Assessing Liability under IRC 6901 and IRM 5.17.13.8, Asserting Personal Liability Against a Fiduciary.

5.17.14.5
(09-25-2020)
**Methods of Collecting
from a Transferee or
Fiduciary**

- (1) **District Court Suit.** The IRS may use judicial enforcement remedies to pursue collection of the tax liability. The IRS may bring an action in district court against a transferee or fiduciary to impose transferee or fiduciary liability, discussed at IRM 5.17.14.5.4, Establishing Transferee or Fiduciary Liability by Suit, or a suit to set aside a fraudulent conveyance, discussed at IRM 5.17.14.5.6, Suit to Set Aside a Fraudulent Transfer.
- (2) **IRC 6901 Procedures.** The IRS may invoke the procedures under IRC 6901, which provides a mechanism for collecting the unpaid taxes, penalties and interest from a transferee or fiduciary when a separate substantive legal basis provides for the transferee's or fiduciary's liability. An assessment under IRC 6901 allows for collection against any assets held by the transferee or fiduciary.

Note: IRC 6901 is strictly a procedural statute that does not by itself create any liability. The existence or extent of a transferee's or fiduciary's liability is determined by applicable state or federal law. The procedures for assessing transferee liability under IRC 6901 are discussed at IRM 5.17.14.5.1, Assessing Transferee and Fiduciary Liability.

- (3) **Other Administrative Remedies.**
- a. **NFTL is filed prior to transfer:** If a NFTL was properly filed before the transfer, then the lien will generally take priority over any subsequent transferees, purchasers, or other interests. See IRC 6323. If this is the case, the federal tax lien can be enforced by levy/seizure without recourse to the IRC 6901 procedures or filing suit in federal district court.
 - b. **Statutory lien exists prior to transfer but no NFTL filed prior to transfer:** In these circumstances the IRS could file a Special Condition "Transferee" NFTL (based on lien tracing) if the property is transferred to a third party without adequate consideration.

Caution: The IRS' legal position is that there is nothing to which a federal tax lien can attach after a bona fide conveyance divests a taxpayer of all interest in the property, regardless of what applicable state law may provide under these circumstances regarding the rights of creditors to immedi-

ately levy or execute against fraudulently transferred property without first obtaining a judgment setting aside the transfer. See also IRM 5.17.2.7.1.19, Unrecorded Conveyances.

- c. **Statutory lien does not exist prior to transfer:** There is generally no administrative remedy available in this situation. If legal title to property has been transferred by the transferor or fiduciary and no lien attached prior to the transfer, the IRS generally may not levy or seize the property without first making an assessment against the transferee under IRC 6901 or filing suit in district court. This general rule is subject to one exception:

Exception: The filing of an NFTL and serving of a levy or seizure may be permissible if the transferor has retained an equitable interest in the property by continuing to assert dominion or control over the transferred property. This is the nominee or alter ego situation, described more fully in IRM 5.17.14.7, Nominee and Alter Ego Theory Elements.

5.17.14.5.1
(09-25-2020)
**Assessing Transferee
and Fiduciary Liability**

- (1) The following provisions describe how the IRS administratively imposes liability for the transferor's tax liability on a transferee or fiduciary. The liability may then be collected from *any* of the transferee's or fiduciary's property. This approach is generally preferable when the value of the property has decreased since the transfer.
- (2) To hold a transferee or fiduciary liable for another's tax, the IRS mails a notice of transferee or fiduciary liability to the transferee or fiduciary's last known address. Then if a Tax Court petition is not filed or if the liability is sustained by the Tax Court, the IRS can assess the tax against the transferee under the authority of IRC 6901. See IRM 5.1.14.2.1, Report of Investigation of Transferee Liability and IRM 4.8.8.13.4, Statutory Notice of Transferee Liability, for more information.

5.17.14.5.2
(09-25-2020)
**Assessing Liability
Under IRC 6901**

- (1) IRC 6901 provides a procedure by which the IRS may assess and collect the unpaid taxes, penalties, and interest:
 - a. from a transferee, or
 - b. from a fiduciary liable under 31 USC 3713.
- (2) IRC 6901 is strictly a procedural statute; it does not create the substantive liability of a transferee for the transferor's tax debt. The existence of, or extent of, a transferee's liability is determined by applicable state or federal law. *Commissioner v. Stern*, 357 U.S. 39 (1958).
- (3) A transferee's liability may be established
 - a. **At Law:** by contract, or under a state or federal law directly imposing liability on the transferee.
 - b. **In Equity:** based on fraudulent transfer statutes. IRC 6901(a). These types of transferees look to state or federal fraudulent conveyance statutes. Specific state statutes determine liability for a particular case. See *Hagaman v. Commissioner*, 100 T.C. 180 (1993).
- (4) The procedures for establishing transferee and fiduciary liability under IRC 6901 are similar to the deficiency procedures.

- a. A notice of transferee or fiduciary liability must be mailed to the last known address of the transferee or fiduciary.
- b. The transferee or fiduciary may petition the Tax Court within 90 days.
- c. The liability will be assessed against the transferee or fiduciary if:

Example:

An IRC 6901 Assessment Occurs After

| | |
|---|---|
| 1 | Transferee or fiduciary agrees to an assessment of the liability; |
| 2 | Transferee or fiduciary defaults on the notice of liability; or |
| 3 | Transferee or fiduciary petitions the Tax Court and it enters a decision against the transferee or fiduciary. |

Reminder: See IRM 4.4.17.4.2.1, Closing Instructions.

- d. Once the liability is assessed, and after notice and demand and a refusal to pay, a lien is created which attaches to all property of the transferee or fiduciary. A Notice of Federal Tax Lien must be filed to protect the IRS' interests under IRC 6323.
- e. The assessment may be collected administratively or judicially from all property and rights to property of the transferee or fiduciary.
- f. The period for collection of the assessment against the transferee is the IRC 6502 collection statute of limitations (10 years running from the assessment against the transferee).

Reminder: Procedural References for initiating an IRC 6901 transferee assessment.

Reference List

| Location | Title |
|-------------------|---|
| IRM 5.1.14.2 | Transferee Liability and Fraudulent Conveyances |
| IRM 5.1.14.2.1 | Report of Investigation of Transferee Liability |
| IRM 4.10.13.3 | Transferor - Transferee Liability |
| IRM 4.8.9.17.5 | Transferor-Transferee Liability and Fiduciary Liability Cases |
| IRM 4.11.52 | Examining Officers Guide (EOG), Transferee Liability Cases |
| IRM 4.1.1.6.11.2 | Collection Referrals-Form 3031, Report of Investigation of Transferee Liability |
| IRM 4.10.13.3.1.1 | Referral From Collection Function |
| Form 3031 | Report of Investigation of Transferee Liability |

- (5) A transferee is defined under IRC 6901(h) to include a donee, heir, legatee, devisee, and distributee, and with respect to estate taxes, any person who, under IRC 6324(a)(2), is personally liable for such tax.
 - a. The regulations add the following examples to the definition of a transferee: a distributee of an estate of a deceased person, a shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the

successor of a corporation, a party to a reorganization as defined in IRC 368, all other classes of distributees, and with respect to the gift tax, a donee. Treas. Reg. 301.6901-1(b).

- b. These definitions are not all-inclusive, but are merely examples of transferees.

- (6) Assessments against a transferee can be made under IRC 6901 for a transferor's:
 - Income tax, estate tax or gift tax; or
 - Other taxes, such as employment taxes, if the transferee's liability arises out of a liquidation of a partnership or corporation, or a corporate reorganization under IRC 368(a).
- (7) Assessments against a fiduciary can be made under IRC 6901 for the income tax, estate tax or gift tax due from the estate of a taxpayer, decedent or donor. IRC 6901(a)(1)(B).
- (8) The transferee or fiduciary may be assessed for any of the above-mentioned taxes shown on a return or for any deficiency or underpayment of these taxes. IRC 6901(b).

5.17.14.5.2.1
(09-25-2020)

**Periods of Limitation
and Extensions for
Assessment Under IRC
6901**

- (1) **Period of Limitations:** for the assessment under IRC 6901(c) of the liability of a transferee or fiduciary are:

- a. **Initial Transferee:** one year after the assessment period against the transferor ends.
- b. **Transferee of a Transferee:** one year after the period for assessment against the preceding transferee ends, but not more than three years after the period for assessment against the transferor ends.

Note: If, however, before the end of the period for assessment against the transferee, a court proceeding to collect the tax is begun against the transferor or the last preceding transferee, then the period for assessment against the transferee expires one year after the "return of execution" in the court proceeding (when the officer charged with carrying out a judgment returns the order to the court stating the judgment has been executed).

- c. **Fiduciary:** one year after the fiduciary liability arises or the period for collection of the tax ends, whichever is the later.

- (2) **Extensions of the Period of Limitations:**

- a. **By agreement:** Under IRC 6901(d) prior to expiration of the assessment period a transferee may agree to extend the period of limitations; however, in the case of a transferee of a transferee, execution of an extension agreement by the initial transferee is not effective to extend the overall three-year limitations period discussed above in paragraph (b)(9) of this subsection.
- b. **IRC 6901(f):** If a notice of liability has been mailed to a transferee or fiduciary, the running of the statute of limitations for assessment is suspended for the period during which an assessment is prohibited by IRC 6213 and for 60 days thereafter.

- c. **IRC 6501(c):** Where the statute of limitations on assessment with respect to the transferor is open because of the transferor's tax fraud or his failure to file a tax return, then the statute of limitations remains open as to the transferee.

- (3) Statutes of limitations for state fraudulent transfer statutes do not apply to IRC 6901. *Bresson v. Commissioner*, 111 T.C. 172 (1998).

5.17.14.5.3 (09-25-2020) **Burden of Proof Under IRC 6901**

- (1) **Transferor's Deficiency:** A transferor's deficiency is presumed correct, but a transferee may prove otherwise. The transferee, not the IRS, has the burden of proof on this issue. IRC 6902(a). The transferee may not relitigate a transferor's tax liability when a court has already decided the issue. *Jahncke Serv., Inc. v. Commissioner*, 20 BTA 837 (1930).
- (2) **Transferee Liability:** In a proceeding before the United States Tax Court under IRC 6901, the burden is on the IRS to prove that a transferee is liable for the tax of the transferor taxpayer. IRC 6902(a).
- (3) **Fiduciary Liability:** The IRS has the burden to prove that the fiduciary paid a debt of the person or estate for whom the fiduciary is acting before paying the debts due the United States to establish fiduciary liability under 31 USC 3713(b). The fiduciary is not liable unless the fiduciary knew of the tax debt or had information that would put a reasonably prudent person on notice that an obligation was owed to the United States. *United States v. Coppola*, 85 F.3d 1015 (2d Cir. 1996).

5.17.14.5.4 (09-25-2020) **Establishing Transferee or Fiduciary Liability by Suit**

- (1) The United States may establish transferee or fiduciary liability by filing a suit in district court pursuant to IRC 7402 and 28 USC 1340 and 1345. This suit is brought against the transferee or fiduciary and results in a judgment against the third party, permitting collection from any of the transferee's or fiduciary's assets.

Reminder: The judgment obtained through a suit to establish a transferee liability does not create a federal tax assessment against the transferee. Without a federal tax assessment, there is no statutory federal tax lien. Without a statutory federal tax lien, no NFTL can be filed. Therefore, IRS administrative collection action is unavailable. But, filing a certified copy of the abstract of judgment creates the judgment lien against the transferee's real property. Then DOJ Tax Division or local U.S. Attorney's Office collects the judgment following the Federal Debt Collection Procedures Act (FDCPA). See IRM 25.3.5, Judgment Follow-up.

- (2) A suit to impose transferee liability may be necessary when the procedures of IRC 6901 are not available because the statute of limitations to create a federal tax assessment for the transferee or fiduciary has expired.
- (3) Since a suit to establish transferee or fiduciary liability is a collection suit based on the taxpayer/transferor's federal tax liability, the ten-year statute of limitations in IRC 6502 for suits to collect taxes applies. The ten-year statute of limitations provided for in IRC 6324 from the date of death or the date of the gift applies for collection of estate and gift taxes if the suit is based on IRC 6324 transferee liability.

- (4) A suit to establish transferee or fiduciary liability is not limited to certain types of taxes as are the assessment procedures of IRC 6901. All types of taxes, including employment and excise taxes, can be collected in a transferee suit.
- (5) A suit to impose transferee liability may be preferable to assessment when:
 - the transferred property has depreciated in value;
 - the transferee has concealed, disposed of, or converted the transferred property; or
 - the transferee has commingled the transferred property with other property.

Note: Where the value of the property has decreased following the transfer, the amount of any personal judgment against the transferee ordinarily cannot exceed the value of the property at the time of the transfer.

- (6) **Burden of Proof:**
 - a. The burden of proof is on the United States as the petitioning party, where liability is sought to be imposed on a third-party for another's tax by way of a suit brought by the United States in a district court.
 - b. The burden of proof remains with the transferee, when a transferee files a refund suit.
- (7) **Alternatively:** The IRS may also bring a suit to set aside a fraudulent transfer, allowing collection from property transferred into the hands of the transferee. See IRM 5.17.14.5.6, Suit to Set Aside a Fraudulent Transfer.

5.17.14.5.5
(09-25-2020)
**Defenses to Transferee
or Fiduciary Liability**

- (1) **Transferor's Liability Paid:** The transferor's liability will be collected only once. Proof by the transferee that the transferor's tax liability has been paid is a valid defense to transferee liability.
 - a. A transferee's liability is extinguished once the tax liability is paid by the transferor or other transferee, and either the transferor waives any right to a refund or the period of limitations for seeking a refund has expired.
 - b. Because a transferee's liability is secondary to the primary liability of the transferor, a compromise of the transferor's liability may either reduce or extinguish the liability of the transferee.
- (2) A transferee may contest the liability of the transferor.
 - a. No liability is imposed on the transferee if it is proven that the transferor is not liable for any tax.
 - b. A prior decision on the merits of a tax liability of a transferor fixes the amount of the tax for purposes of a transferee's liability. The transferee is barred from litigating the transferor's liability, just as the transferor would be barred from re-litigating the transferor's liability in another forum.
- (3) To determine whether there is a prior decision on the merits, requires obtaining specific information regarding the resolution of the litigation.
 - **Decision on the Merits**
Example: Determination by a court following a trial or an agreed stipulation of a tax liability.
 - **Not a Decision on the Merits**

Example: A voluntary dismissal prior to entry of court's decision or a dismissal for lack of jurisdiction, allows the transferee to later litigate the transferor's tax liability in another forum.

Example: A defaulted notice of deficiency.

- A closing agreement between a transferor and the IRS binds the transferee.
- (4) Acceptance of an offer to compromise a transferee's liability has no effect on the transferor's primary liability or on the liability of other transferees. Any payment by the transferee, though, reduces the transferor's liability and, thereby, the liability of other transferees.
- (5) Other defenses include:
- a. the expiration of the statute of limitations;
 - b. return of all or a part of the transferred property;
 - c. any other defense that can be used for the type of liability asserted (e.g., that the IRS has not exhausted its remedies against the transferor).
- (6) For defenses of a fiduciary, see IRM 5.17.13.8(5), Asserting Personal Liability Against a Fiduciary.

5.17.14.5.6 (09-25-2020) **Suit to Set Aside a Fraudulent Transfer**

- (1) Rather than a suit to impose liability on the transferee, the United States may commence a civil lawsuit against the transferor and the transferee in a United States district court when the original taxpayer transferred property in fraud of a tax debt owed to the United States. Ordinarily, the suit requests that the court set aside the transfer. If successful, ownership of the property is reinstated in the transferor, and the transferor's tax is collected from the property. This approach is generally preferable when the value of the property has increased since the transfer.
- (2) The relief requested from the court is:
- to set aside the transfer,
 - to reinstate the transferor's ownership of the property, and
 - to order the property sold to pay the transferor's debt.
- (3) The right of the United States to set aside a fraudulent transfer is found in federal law and in state law.
- a. The Federal Debt Collection Procedures Act (FDCPA) provides a federal cause of action for setting aside a fraudulent transfer in a federal district court, other than the United States Tax Court. 28 USC 3301 et seq.
 - b. The United States may also use all of the remedies available to a private creditor under applicable state law to defeat a fraudulent transfer. Generally, the law of the state in which the transfer occurs will govern.
- (4) **Burden of Proof:** The burden is on the United States to prove that the transfer of the property was in fraud of a debt owed the United States. Depending on the circumstances, the United States must prove that the transfer was the result either of the transferor's actual fraud or constructive fraud.

- (5) **Focus of the Suit:** Focus for the cause of action is generally the transferred property (an “in rem” action). Usually, a personal judgment is not rendered against the transferee. See FDCPA 3307(b).
- (6) Generally, a suit to set aside a fraudulent transfer is combined with a suit to foreclose any liens for the transferor’s taxes which attach to the transferred property once the transferor’s ownership in the property has been reinstated.

Reminder: If a Notice of Federal Tax Lien was properly filed **before** the transfer, then the statutory federal tax lien for the assessment(s) maintains the priority set by the filing of the NFTL(s) irrespective of the transfer. See IRC 6323. Thus, an administrative collection action or a lien foreclosure action can be considered in lieu of a fraudulent transfer suit.

- (7) A suit to set aside a fraudulent transfer may also be combined with a suit to impose personal liability on a transferee if the transferred property has depreciated in value. See IRM 5.17.14.5.4, Establishing a Transferee or Fiduciary Liability by Suit. The extent of the personal liability would be the difference between the value of the property when transferred and the value of the property when it is sold by order of the district court.

5.17.14.5.6.1 (09-25-2020)

Statute of Limitations for a Fraudulent Transfer Suit

- (1) A fraudulent transfer suit brought by the United States under IRC 7402(a) to impose transferee liability on a transferee to collect on an assessment against the transferor is subject to the statute of limitations on collection of a tax imposed by IRC 6502 (ten years after assessment against the transferor, plus applicable extensions). See also FDCPA, 28 USC 3003(b)(1) (FDCPA does not impose time limits on actions to collect taxes brought under provisions outside the FDCPA).
- (2) It is the position of the majority of the courts that the United States is not bound by any state statute of limitations, including the UFTA (generally, four years after transfer). Thus, in a fraudulent transfer suit brought by the United States pursuant to IRC 7402(a) and a state statute, the limitations period under IRC 6502 should control.
- (3) Where the United States brings a suit under the fraudulent transfer provisions of the FDCPA, those provisions generally impose a six-year limitations period. See FDCPA, 28 USC 3306(b). However, the FDCPA also provides that its provisions shall not be construed to curtail or limit the right of the United States under any other Federal law to collect taxes. See FDCPA, 28 USC 3003(b)(1). Accordingly, an argument could be made that the United States may rely on whichever limitations period is longer, ten years from assessment against the transferor under IRC 6502, or six years from the fraudulent transfer to the transferee under the FDCPA, 28 USC 3306(b).

Note: If it is anticipated that the suit will be brought under the fraudulent transfer provisions of the FDCPA and the six year statute of limitations under the FDCPA is imminent or has expired, consult with Area Counsel to determine whether the argument can be made that the ten-year statute of limitations applies in the particular case. To avoid the issue, suits relying upon the FDCPA to set aside a fraudulent transfer should be filed within the six year statute of limitations whenever possible.

5.17.14.5.6.2
(01-24-2012)

Defenses for the Transferee in a Fraudulent Transfer Suit

- (1) A transferee who takes property in good faith and for a reasonably equivalent value is not affected by a transferor's actual fraud. The transferee's rights in the transferred property are superior to the transferor's creditors, and the transfer will not be set aside. FDCPA 3307(a); UFTA 8(a).
- (2) To be considered a good faith purchaser, the transferee must be without knowledge of the fraudulent purpose of the transferor at the time of the transfer and at the time consideration passes between them.
- (3) To qualify as a purchaser for reasonably equivalent value, the transferee must have exchanged property for the transfer. A promise to pay or payment with a nonnegotiable note is not sufficient.
- (4) If the transferee is not a good faith purchaser for reasonably equivalent value, then the transferee will be ordered to surrender the property or an equivalent amount of money. The transferee also is subject to an accounting for any rents or profits generated by the transferred property.
- (5) Even though a transfer is set aside as fraudulent, a good-faith transferee is allowed a credit for any consideration given to the transferor. The credit may be in the form of a lien on the transferred property or a setoff against any money judgment entered against the transferee. The transferee also will receive a credit for amounts expended to preserve the transferred property.
- (6) Another defense available to a transferee is a claim that he has paid other creditors of the transferor to the extent of the value of the transferred property.
- (7) The defense of "laches" (which will bar a lawsuit that is filed so unreasonably late that it is unfair to the party sued) does not apply to an action by the United States to set aside a fraudulent transfer.

5.17.14.5.7
(09-25-2020)

Considerations: Assess Under IRC 6901 or File Suit

- (1) **The advantages of using IRC 6901 procedures are:**
 - a. Following the assessment, the IRS may use all administrative collection procedures and may file NFTLs against the transferee or fiduciary. The federal tax lien attaches to all the property of the transferee or fiduciary.
 - b. Use of IRC 6901 procedures is consistent with the general preference to attempt all administrative collection before pursuing judicial collection action.
- (2) **The advantages of a district court suit are:**
 - a. The limitations period for bringing suit to assert transferee or fiduciary liability is generally longer than the limitations period for administratively asserting transferee liability.
 - b. Transferee liability can be asserted for any type of tax. The IRC 6901(a) limitations do not apply.
 - c. In one action, the IRS may reduce a liability to judgment, establish transferee or fiduciary liability (or, alternatively, set aside a fraudulent transfer) and foreclose a lien. If the court orders a sale, it will be able to give clear title, thereby increasing what a purchaser is willing to pay over what a purchaser would pay at an administrative sale of seized property.
 - d. If the property has increased in value, a suit to set aside a fraudulent transfer allows for recovery of the increased property value.

Note: If the property has decreased in value, both the IRC 6901 procedure and a suit to impose transferee liability are preferable to a suit to set aside a fraudulent transfer.

5.17.14.6
(09-25-2020)

**Successor Liability as
Primary Liability**

- (1) Many state corporate merger and consolidation statutes provide that a surviving corporation is liable for the debts of a predecessor corporation when the surviving corporation is the result of a formal merger or consolidation of two corporations. In these cases, the surviving corporation is primarily liable for the tax debts of the predecessor corporation as a successor in interest. The successor in interest becomes the taxpayer and is primarily liable for the predecessor's tax liability. *Oswego Falls Corp. v. Commissioner*, 26 B.T.A. 60 (1932).
- (2) The IRS should generally handle successor liability cases by asserting primary liability against the successor. The IRS may also seek to hold the successor liable as transferee under the IRC 6901 procedures. See, *Southern Pacific Transportation Company v. Commissioner*, 84 T.C. 367 (1985). See also IRM 5.17.14.5.2, Assessing Liability Under IRC 6901.

Note: A number of courts have held that a successor corporation cannot be primarily liable and liable as a transferee based on the same legal theory. See, e.g., *Commissioner v. Oswego Falls Corp.*, 71 F.2d 673, 676 (2d Cir. 1934). Although the IRS does not agree with this holding, it is advisable to identify a separate legal basis for liability of the successor as transferee before resorting to the IRC 6901 procedures. Consult Area Counsel before recommending the pursuit of an assessment against the successor under IRC 6901.

- (3) Like nominee or alter ego scenarios, a taxpayer's liability may be collected from the successor in interest using administrative collection procedures. This is assuming that a valid assessment exists against the original corporate taxpayer because the successor corporation steps into the shoes of the transferor corporation. Although the IRS may rely on foreclosure of the statutory federal tax lien for assessments against the successor, a new Special Condition Successor in Interest NFTL should be filed against the successor naming the successor corporation (corporation X, as successor to taxpayer A). This will preserve the IRS' priority over other creditors.
- (4) Successor liability may also be established in federal district court pursuant to IRC 7402(a) and 28 USC 1340 and 1345. The ten-year statute of limitations under IRC 6502 for the original corporation's tax liability applies to collect from the successor corporation.
- (5) If it appears that successor liability may apply, consult Area Counsel for approval before filing a Successor in Interest NFTL or taking any collection action against the successor corporation.

5.17.14.7
(09-25-2020)

**Nominee, Alter Ego, and
Transferee Elements**

- (1) Nominee and alter ego situations are distinguishable from Special Condition Transferee NFTL and transfers for which transferee liability may be asserted, including fraudulent transfers. Nominee and alter ego often share common facts and although one case can involve both concepts, nominee and alter ego situations are different from fraudulent transfers as discussed in paragraphs two and three below.

- (2) **Simulated Transfer Versus Actual Transfer:** If a transfer has occurred, the nominee and alter ego situations are based on simulated transfers. Often, the simulated transfer may be to a fictitious entity owned and controlled by the taxpayer. See, *United States v. Klimek*, 952 F. Supp. 1100 (E.D. Pa. 1997). The simulated transfer is not intended to divest the transferor of any rights to the property. In both examples below, the transfer is a sham and taxpayer remains the true owner.

Example: In the nominee scenario, there may be a transfer to a third party while the taxpayer actually retains the benefit and use of the property or with the understanding that the property will be returned to the transferor after the transferor's creditors lose interest in collecting their claims.

Example: Example: In the alter ego scenario, the taxpayer may transfer property to an entity owned and controlled by the taxpayer to shield assets from creditors.

- (3) **Transfer of Legal Title Not Required:** A transfer of legal title is not necessary to prove a nominee or alter ego relationship exists. *Holman v. United States*, 505 F.3d 1060, 1064-65 (10th Cir. 2007). Sometimes the transfer by the taxpayer is indirect.

Example: A Special Condition Nominee NFTL may be appropriate where property was purchased by a nominee with money from the taxpayer.

Example: The taxpayer was solvent at the time of the transfer and not rendered insolvent by the transfer. Or, a transfer may have occurred well before the tax liability accrued. Insolvency or the accrual of taxes near the date of transfer must be shown to prove a transfer was fraudulent.

- (4) **Nominee:** A tax liability may be collected from the taxpayer's property held by a nominee. Elements to consider include:
- The nominee theory focuses on the relationship between the taxpayer and the transferred property. See IRM 5.17.2.5.7.2 for factors used to show the presence of a nominee situation.
 - A taxpayer places the taxpayer's assets(s) in the name of another person or entity, but control of the asset(s) and other incidents of ownership remain with the taxpayer. The transfer is "in name only." In other words, in a nominee situation, a separate person or entity, such as a trust, holds specific property for the exclusive use and enjoyment of the taxpayer.
 - The specific property being held by the nominee must be identified and listed on a Special Condition Nominee NFTL. See IRM 5.12.7.6, Special Condition NFTL (Nominee, Alter Ego, Transferee, Successor-in-Interest) (et seq.).
 - If it is determined that a nominee situation may exist, consult Area Counsel before instituting administrative collection action against the nominee.
- (5) **Alter Ego:** A tax liability may also be collected from the taxpayer's alter ego. Elements to consider include:

- The alter ego theory focuses on the relationship between the taxpayer and alleged alter ego entity. See IRM 5.17.2.5.7.1 for factors used to show the presence of an alter ego.
- The taxpayer usually establishes an entity (often a corporation) and transfers assets to it, but there is such unity of ownership and interest between the taxpayer and the entity that the entity is not considered a genuine separate entity.
- An alter ego entity should be considered the same as the taxpayer for collection purposes. All of the assets owned by the alter ego may be used as a source from which to collect the taxpayer's tax liability.
- If it is determined that an alter ego may exist, consult Area Counsel before instituting administrative collection against the alter ego. See IRM 5.12.7.6 et seq., Special Condition NFTL (Nominee, Alter Ego, Transferee, Successor-in-Interest).

(6) **Lien Tracing Transferee:** A tax liability may also be collected from the taxpayer's transferee. See IRM 5.12.7.6.3(1), Transferee NFTL. Elements to consider include:

- The Special Condition Transferee NFTL filing theory focuses on lien tracing. This occurs when a statutory lien attaches to property and the property has been transferred by the taxpayer through a gift, bequest, devise, or inheritance before an NFTL could be filed.
- There is no requirement that the transfer be fraudulent or the taxpayer retain use of or a beneficial interest in the property.
- The specific property being held by the transferee must be identified and listed on a Special Condition Transferee NFTL.
- If it is determined that lien tracing may exist, consult Area Counsel before instituting administrative collection against the transferee. IRM 5.12.7.6 et seq., Special Condition NFTL (Nominee, Alter Ego, Transferee, Successor-in-Interest).

(7) **Additionally:** In other situations where a transferee liability may be asserted, including fraudulent transfers, the parties intend to affect an actual transfer of property or an interest in property. Between the transferor and the transferee, the transfer is valid under contract law. In contrast to the nominee or alter ego situation, transferee liability is generally only asserted when the taxpayer has transferred both legal title and control over the property to the transferee.

5.17.14.7.1
(09-25-2020)
**Enforcement in
Nominee, Alter Ego, and
Lien Tracing Transferee
Situations**

- (1) Administrative collection of a taxpayer's liability can come from the taxpayer's property held by a nominee, alter ego, or lien tracing transferee. Documentation of the third party's involvement in a purported transfer allows the IRS to ignore that transfer while relying on assessments made against the taxpayer and Special Condition NFTL filings naming the taxpayer and the third party. The Special Condition NFTL filing protects the priority of the statutory federal tax lien(s) against other creditors. It also puts other creditors on notice that property in the hands of the named third-party is encumbered by the taxpayer's federal tax lien(s). Area Counsel approves the issuance of Special Condition NFTLs and levies. See IRM 5.11.1.3.6, Approval of Alter-Ego and Nominee Notices of Levy and IRM 5.12.7.6 et seq., Special Condition NFTL (Nominee, Alter Ego, Transferee, Successor-in-Interest).
- (2) Field Collection should always work to fully develop the factual background of each particular case, but it may not be possible to develop sufficient facts to establish which theory best fits the case, or the available facts may suggest

the application of more than one theory. In these cases, the IRS may take the position that a taxpayer has transferred the property to a third party by means of a fraudulent transfer or, alternatively, that the taxpayer's property is held by a nominee or alter ego. Area Counsel is also available to assist in determining which legal theories apply given the specific facts of the case.

- (3) A suit in federal district court pursuant to IRC 7402(a) and 7403 and 28 USC 1340 and 1345 may be advisable under some circumstances as an alternative to levy/seizure to establish that the property is held by the taxpayer's nominee or that the legally separate entity is an alter ego of the taxpayer.
 - For example, a suit is advisable if the IRS would like to maximize the sale of nominee or alter ego property, because a court will be able to give clear title to the property and potential buyers will pay more than if the property is seized and sold.
 - Similarly, if the property is encumbered and there is likely to be a dispute about the priority of lien or security interests, a suit would probably be the most prudent approach.
 - If the property to be collected from is a principal residence, a suit should be filed because judicial approval of the seizure of the residence would be required under IRC 6334.
 - A suit may be in order if the expiration of the collection statute of limitations is near.
 - If there is some uncertainty about whether there was a fraudulent transfer or a nominee situation, a suit should be filed.
- (4) The ten-year statute of limitations under IRC 6502 for collecting the taxpayer's liability applies to collect from nominees and alter egos, whether by levy or suit.

