

CC-2018-005

April 5, 2018

Subject: Passport Actions Under Section 7345 **Cancel Date:** Upon incorporation into CCDM

Purpose

This notice provides guidance to Chief Counsel attorneys handling passport actions under section 7345 of the Internal Revenue Code. Given that this is a new area of litigation and there are still many unanswered questions, these cases must be coordinated with Procedure & Administration, Branches 3 and 4.

Background

The Fixing America's Surface Transportation Act requires the State Department to deny a passport application by, and authorizes it to revoke the passport of, any individual that the Internal Revenue Service certifies as having a "seriously delinquent tax debt." See Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32101(e), 129 Stat. 1311, 1732 (2015). Section 7345 of the Code governs the Service's certification process and provides taxpayers a limited right to judicial review.

Section 7345(b)(1) sets forth the elements of a "seriously delinquent tax debt." First, a "seriously delinquent tax debt" is an unpaid, legally enforceable federal tax liability of an individual. I.R.C. § 7345(b)(1). The term does not include non-tax liabilities collected by the Service such as criminal restitution, FBAR penalties, and past-due support payments collectible under sections 6305(a) and 6402(c). Second, the liability must be assessed. I.R.C. § 7345(b)(1)(A). Third, the liability must exceed \$50,000.¹ I.R.C. § 7345(b)(1)(B). This requirement is met if the total amount of all tax liabilities assessed against an individual (including assessed penalties and interest) exceeds the dollar-amount threshold. Finally, the Service must have filed a notice of federal tax lien under section 6323 (with the taxpayer's collection-due-process (CDP) rights under section 6320 having lapsed or been exhausted) or made a levy under section 6331 with respect to the liability.² I.R.C. § 7345(b)(1)(C).

Section 7345(b)(2) lists two exceptions to the term "seriously delinquent tax debt": a liability being paid in a timely manner pursuant to an installment agreement under section 6159 or an

¹ This amount is indexed for inflation each year. I.R.C. § 7345(f). For 2018, the amount is \$51,000. Rev. Proc. 2017-58. For years after 2018, the amount will be listed in the applicable annual revenue procedure that sets forth inflation-adjusted amounts in the Internal Revenue Code.

² A liability will not be considered a seriously delinquent tax debt based on a levy unless pre- or post-levy CDP rights were provided regarding the levy.

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agreement under section 7122³ and a liability for which collection has been suspended because the taxpayer requested either a CDP hearing under section 6330 or innocent-spouse relief under section 6015. In addition to these statutory exceptions, the Service is exercising discretion to exclude additional categories of liabilities from certification. The current categories of discretionary exclusions are listed in sections 5.1.12.27.4 and 5.19.1.5.19.4 of the Internal Revenue Manual. The categories are subject to change to ensure the integrity and effectiveness of the certification program.

The Service will rely on automated systems to identify every module (electronic record of tax liability) on an individual's account with an unpaid assessed tax liability that is not statutorily excepted from the definition of seriously delinquent tax debt or otherwise in a category excluded from certification. Once all eligible modules have been identified, the systems will aggregate the amount of unpaid liabilities. If the total is more than the statutory threshold, the taxpayer will be identified as having a seriously delinquent tax debt, and a Transaction Code (TC) 971 Action Code (AC) 641 will post to each module.

The SBSE Commissioner will certify that the identified individuals each have a seriously delinquent tax debt. The Service, under section 7508(a)(3), will postpone the certification of taxpayers serving in a combat zone or contingency operation. The Service will send a list of all certified individuals to the State Department. Once it has received notice from the Service, the State Department will not issue a new or renewed passport to a certified individual and it may revoke a previously issued passport, except for return travel to the United States. FAST Act § 32101(e)(1)(A) and (2). Contemporaneously with the certification, the Service will notify individuals of their certification by sending them a CP508C notice by regular mail. The CP508C notice will list the tax liabilities giving rise to the certification by taxpayer identification number, tax period, and type and will inform the individual of the right to seek judicial review in a federal district court or the Tax Court.

Section 7345(c) requires the Service to reverse a certification in three circumstances: (1) if the certification is found to be erroneous, (2) if the seriously delinquent tax debt is fully satisfied⁴ (or the liability that composes it becomes unenforceable), or (3) if the debt on which the certification is based ceases to be a seriously delinquent tax debt due to an exception set forth in section 7345(b)(2). The Service will also reverse a certification when the debt on which it is based falls into one of the discretionary exclusions, either entirely or in combination with the circumstances listed in section 7345(c), or the taxpayer enters a combat zone or participates in a contingency operation within the meaning of section 7508(a).

When a certified module meets the criteria for reversal, a TC 972 AC 641 will be posted to it. But a certification will not be reversed until all modules covered by it have been fully satisfied or otherwise meet the criteria for reversal. Once all modules meet the criteria for reversal and have TC 972 AC 641 posted to them, the Service will contemporaneously notify the taxpayer and the State Department that the certification is reversed. The Service will notify the taxpayer by sending a CP508R notice by regular mail.

³ An agreement under section 7122 may include an offer-in-compromise accepted by the Service or a settlement reached between the Department of Justice and the taxpayer.

⁴ Partial payment of the aggregated tax liabilities to an amount below the threshold does not qualify the taxpayer to have the certification reversed.

Judicial Review of Certifications

Section 7345(e)(1) provides that any individual who has been certified may bring a civil action to determine whether the certification was erroneous or should have been reversed. The action may be filed in either a federal district court or the Tax Court.⁵ If the court determines that a certification was erroneous or should be reversed, it may order the Service to notify the State Department.

The Tax Court has proposed adding a new Title XXXIV (inclusive of Rules 350 through 354) to its Rules of Practice and Procedure that sets forth procedures for certification actions. In general, the proposed rules describe the jurisdiction of the court, specify the title and content of a petition, require the filing of an answer, and state when the case is deemed at issue. The proposed rules also require the petitioner to attach a copy of the CP508C to the petition. Docket numbers ending in “P” will denote section 7345 cases.

Three issues that we expect petitioners will raise in challenges to certification and that are not explicitly addressed by the Code are challenges to the underlying liabilities, the period of limitations for bringing an action, and the scope and standard of review in certification actions. The following paragraphs address these three issues.

Section 7345 does not provide for judicial review of the amount of the liability that constitutes a seriously delinquent tax debt. Unlike certain provisions of the Code and Title 28, section 7345 does not waive the Government’s immunity to liability challenges. It is well established that the United States cannot be sued except in strict accordance with the terms of a specific waiver of sovereign immunity granted by Congress. See United States v. Dalm, 494 U.S. 596, 608 (1990). A liability challenge would also have the effect of restraining the collection of an assessed tax because a liability determination in a section 7345 proceeding would bind the Service in other litigation. Section 7421 prohibits any suit that restrains the assessment or collection of any tax except as provided in specified sections of the Code. Section 7345 is not one of those sections.

Section 7345(e) does not specify a period of limitations within which an individual may bring a certification action. In the absence of a specific statutory limitation, the general six-year limitations period provided by 28 U.S.C. § 2401(a) applies to these cases. Cf. Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir.1988) (applying the general limitations period provided by section 2401(a) to an action brought under a statute—the Administrative Procedure Act—that does not contain a specific limitations period). Individuals will have six years from the issuance of a certification notice to bring an action to determine whether a certification was erroneous when made or six years from the date that grounds for reversal existed to bring an action challenging whether the Service failed to reverse a certification.

Section 7345(e) does not specify the scope or standard of review applicable to certification actions. In situations where Congress has simply provided for review, without setting any standards to be used or procedures to be followed, review is confined to the administrative record, and “no de novo proceeding may be held.” United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963). The Service bases certifications and reversals of certifications on whether the tax modules in individuals’ accounts satisfy the statutory criteria in section 7345 or fall into the discretionary exclusion categories listed in the Internal Revenue Manual. Judicial review is

⁵ If an individual files actions in both federal district court and the Tax Court, the court in which the first action was filed shall have sole jurisdiction. I.R.C. § 7345(e)(1).

thus logically limited to the computerized records of those modules.⁶ When review is confined to the administrative record, the standard of review is whether agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Accordingly, review should be limited to the Service’s records and whether the certification or failure to reverse the certification was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

For actions arising in the federal district courts, 28 U.S.C. § 1294 generally places venue in the court of appeals for the circuit embracing the district in which an action is brought. For certification actions arising in Tax Court, however, section 7482(b)(1) places appellate venue in the U.S. Court of Appeals for the District of Columbia Circuit because none of that section’s specific venue provisions apply.

Litigating Certification Actions in the Tax Court

The following sections provide instructions to Counsel attorneys for handling certain procedural aspects of certification actions.

1. Answers

As in other Tax Court actions, and consistent with proposed Tax Court Rule 353, the title of the answer to a petition should be “Answer.”

The following is recommended language for the prayer for relief when the taxpayer is not entitled to relief:

WHEREFORE, it is prayed that the relief sought in the Petition for Certification or Failure to Reverse Certification Action Under Code Section 7345(e) be denied.

If the taxpayer does not attach a CP508C to the petition, a copy of the CP508C, which can be requested from the Service’s CDP coordinators, should be included with the answer. Before filing the answer the assigned attorney must verify that the petitioner’s certification has not been reversed.

Consistent with Notice 2018-01, after the assigned attorney files the answer, the attorney will not refer the docketed case to the Office of Appeals. 2018-3 I.R.B. 299. Appeals consideration of these cases under Rev. Proc. 2016-22 will not occur given the automated nature of the Service’s process for identifying modules and certifying individuals with seriously delinquent tax debts and because the determinations will have been verified by the assigned attorneys in answering the cases.

⁶ The administrative record for these actions will generally be shown by Form 4340 transcripts for each of the modules that form the basis of a certification.

2. Motions

a. Motion to Dismiss for Lack of Jurisdiction

A motion to dismiss for lack of jurisdiction should be filed when the Service has not certified the taxpayer as having a seriously delinquent tax debt or when the taxpayer's certification was reversed before the petition was filed.⁷

In a case where the taxpayer was never certified, the motion should explain that, based on a diligent search of the Service's records, there is no record of the taxpayer's certification. In a case in which the taxpayer's certification was reversed before the petition was filed, the motion should explain that the certification was reversed, and a Form 4340 for each module upon which the certification was based should be attached.

b. Motion to Change Caption

If the taxpayer has been certified as having a seriously delinquent tax debt, but the docket number does not include a "P," the attorney should consider filing a motion to change caption. This filing will clarify whether the court agrees the case is an action under section 7345(e). The omission of a "P" from the docket number will usually occur when a CP508C is not attached to the petition. A copy of the CP508C should be attached to the motion.

c. Motion to Dismiss for Failure to State a Claim or Motion for Judgment on the Pleadings

As discussed above, certification actions are not the forum for addressing liability issues. If a petition is based solely on a claim that a certification should be reversed because the individual is not substantively liable for the seriously delinquent tax debt, a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings may be appropriate. These motions may also be appropriate in cases in which the petition is solely based on frivolous arguments or requests for monetary damages or other remedies not available under section 7345.

d. Motion for Summary Judgment

Most actions under section 7345(e) should be resolved using a motion for summary judgment. The motion must establish that at the time of the certification each of the statutory elements in section 7345(b)(1) was satisfied, and that none of the statutory exceptions, discretionary exclusions, or section 7508(a) postponement applied. In addition, the motion must establish that none of the conditions requiring reversal of the certification are currently present.

The statutory elements that must be established will appear on the Form 4340 for each module on which the certification was based. Similarly, the absence of a statutory exception, discretionary exclusion, or section 7508(a) postponement at the time of certification and absence of a basis for reversal of the certification at the time of the motion will also appear on the Form 4340. The assigned attorney should therefore obtain these forms as soon as possible.

⁷ The assigned attorney must verify that at least one of the tax modules for the liabilities listed on the CP508C contains an unreversed TC 971 AC 641 as of the date the petition was filed. If the transcript for each module lacks a TC 971 AC 641 or shows a reversed TC 971 AC 641, meaning it shows a TC 972 AC 641, before the petition date, the attorney should file a motion to dismiss for lack of jurisdiction.

