

Lesson 1
ASSESSMENT
(March 2012)

CONTENTS

I.	INTRODUCTION	2
II.	OBJECTIVES	2
III.	OVERVIEW OF ASSESSMENTS	3
A.	Essential Requirements	3
B.	Assessment Provisions	3
C.	Summary of Types of Assessments	4
IV.	TYPES OF ASSESSMENTS	5
A.	Summary or Immediate Assessments	5
1.	General definition	5
2.	Overstatements of Withheld Income Tax and Estimated Income Tax Payments	5
3.	Math Errors	5
4.	Other Circumstances	6
B.	Deficiency Procedures	7
1.	Two Types of Statutory Notices: Notice of Deficiency and Notice of Liability	7
2.	Definitions	7
3.	Regular Procedures	7
4.	Burden of Proof	8
C.	Termination and Jeopardy Assessments	9
1.	General	9
2.	Certain Procedures for Termination/Jeopardy Assessments	11
3.	Administrative and Judicial Review	13
V.	STATUTE OF LIMITATIONS ON ASSESSMENT	14
A.	General	14
B.	Extension	15
C.	Some Exceptions to General 3-Year Assessment Statute	15
D.	Certain Suspensions or Lack of Suspensions	17
VI.	PROVING AN ASSESSMENT	18
A.	Glossary of Important Terms, Documents and References	18
B.	Certificate of Assessments, Payments and Other Specified Matters	20
C.	Supporting Records to Prove Older ADP Assessment	21
D.	Presenting Documents to Prove Older ADP Assessments and Manual Assessments	21
E.	Proving an Assessment - Current Procedures	23
VII.	ABATING AN ASSESSMENT	24
A.	Section 6404(a)	24
B.	Section 6404(c)	24
VIII.	TEFRA PARTNERSHIP PROCEDURES	24
IX.	Limited Liabilities Companies	25
A.	Introduction	25
B.	Limited Liability Companies	26
1.	Classification of an LLC for Federal Tax Purposes	26

2.	Tax Reporting by LLCs	27
3.	Enforced Collection with Respect to LLCs	28
C.	Guidance	31

I. INTRODUCTION

Usually the first step in collecting unpaid taxes is making an assessment. The Service has the authority to determine and assess all taxes, which include interest, additional amounts, additions to tax, and penalties. Section 6201.¹ An assessment is a bookkeeping entry, the recordation of a tax liability determined by the taxpayer or the Service. Section 6203. The assessment establishes the beginning of the 10-year statutory period for collection. Section 6502. In addition, the assessment is a prerequisite to administrative collection action (creation of a lien, making of a levy). Sections 6321, 6322, 6331.

II. OBJECTIVES

At the end of this lesson, you will be able to:

- Explain the assessment process.
- Explain procedures which must be followed to have a valid assessment.
- Explain the different types of assessments
- Explain how partnerships are treated for federal tax purposes.
- Explain how an LLC is classified for federal tax purposes.
- Explain when an LLC will be disregarded as a separate entity for federal tax purposes.
- Explain what assets are subject to enforced collection when an LLC has been disregarded as a separate entity for federal tax purposes.
- Explain the recent changes in the regulations with respect to excise and employment taxes incurred by a single-member LLC.

¹ Throughout this and other lessons, unless otherwise indicated, “section” numbers refer to the Internal Revenue Code of 1986 (I.R.C.), as amended.

III.OVERVIEW OF ASSESSMENTS

A. Essential Requirements

An assessment is made by an assessment officer signing the summary record of assessments. The summary record of assessments, through supporting records (frequently identified by cycle number or document locator number, DLN), shall provide identification of the following:

- Taxpayer (e.g., name, taxpayer identification number, TIN)
- Character of the liability assessed (e.g., income tax)
- Taxable Period (if applicable)
- Amount Assessed

The date of assessment is the date the summary record of assessments is signed by the assessment officer. Except in rare instances, the summary record of assessment is a computer generated form, Revenue Accounting Control System (RACS) Report 006, Assessment Certificate. In rare instances, a manually prepared form, Form 23C, Assessment Certificate (the predecessor to RACS 006), is used.

B. Assessment Provisions

- § 6201 Assessment authority
- § 6202 Establishment by regulations of mode or time of assessment
- § 6203 Method of assessment
- § 6204 Supplemental assessments
- § 6205 Special rules applicable to certain employment taxes
- § 6206 Special rules applicable to excessive claims under certain sections
- § 6207 Cross references
- § 6213 Restrictions applicable to deficiencies; petition to Tax Court
- § 6215 Assessment of deficiency found by Tax Court
- § 6225 Assessments made only after partnership level proceedings are completed
- § 6229 Period of limitations for making assessments [attributable to partnership item]
- § 6342(a)(2) [Assessment following] Application of proceeds of levy
- § 6501 Limitations on assessment and collection
- § 6502 Collection after assessment
- § 6503 Suspension of running of period of limitations
- § 6601(e)(1) Interest on underpayment, nonpayment, or extensions of time for payment, of tax [treated as, and assessable as tax]
- § 6665 Applicable rules [additions to tax treated as tax]
- § 6671(a) Rules for application of assessable penalties

- § 6851 Termination assessments of income tax
- § 6852 Termination assessments in case of flagrant political expenditures of section 501(c)(3) organizations
- § 6861 Jeopardy assessments of income, estate, gift, and certain excise taxes
- § 6862 Jeopardy assessments of tax other than income, estate, gift and certain excise tax
- § 6863 Stay of collection of jeopardy assessments
- § 6867 Presumptions where owner of large amount of cash is not identified
- § 6871 Claims for income, estate, gift, and certain excise taxes in receivership proceedings, etc.
- § 6872 Suspension of period on assessment
- § 6901 Transferred Assets
- § 7429 Review of jeopardy levy or assessment procedures
- § 7501 Liability for taxes withheld or collected
- § 7804(c) Other personnel [assessment against revenue officers and employees]

C. Summary of Types of Assessments

1. **Summary.** An assessment that can be made summarily (immediately) under section 6201.

Note: The Service uses the terms “quick” and “prompt” internally to refer to certain assessments that need to be processed manually, generally because the statute of limitations on assessment is about to expire (e.g. less than 60 days) or collection appears to be at risk. For more information, see IRM 4.4.25 and 5.1.4. This should not be confused with a “request for prompt assessment” provided by section 6501(d), as an exception to the general 3-year statute of limitations.

2. **Deficiency.** Before the Service can assess a deficiency (as defined in section 6211) of income, estate, gift and certain excise taxes, the Service must first follow the deficiency procedures set forth in § 6213. Section 6201(e). Generally, the Service must mail the taxpayer a notice of deficiency (as defined in § 6212) and provide the taxpayer the opportunity to petition the Tax Court. Section 6213(a).

3. **Termination.** On or before the due date of the return, the Service can make an immediate assessment of income tax if it determines that collection of tax for the current or immediately preceding taxable year would be endangered if the usual procedures were followed. Section 6851. Section 6867 provides rules for a termination assessment with respect to large amounts of cash where the owner cannot be identified. A termination assessment terminates the taxable year for purposes of determining the amount of tax to be assessed and collected. After the Service makes a termination assessment, it must send a notice of deficiency for the full taxable year within 60 days of the later of (1) the due date of the return for that taxable year or (2) the date the return for that taxable year is filed. § 6851(b).

4. **Jeopardy.** An immediate assessment of any tax made without delay where it is determined that collection of the tax would be endangered if the usual procedures were followed, except to the extent the termination provisions of section 6851 apply. Sections 6861, 6862. For income, estate, gift and certain excise taxes, the jeopardy assessment is made after the due date of the return. Section 6861. For other classes of tax, the jeopardy assessment may be made without regard to the due date for filing of the return or payment of the tax. Section 6862. Section 6867 provides rules for a jeopardy assessment with respect to large amounts of cash where the owner cannot be identified.

IV. TYPES OF ASSESSMENTS

A. Summary or Immediate Assessments

1. General definition

Taxes not subject to the deficiency procedures are assessed under summary assessment procedures. Generally, these taxes include taxes shown on a return, employment taxes, overstatements of withheld income tax and estimated income tax payments, math errors, restitution, and taxes other than income, estate, gift, and excise taxes under Chapters 41-44. The sections below cover some of these summary assessments in more detail.

2. Overstatements of Withheld Income Tax and Estimated Income Tax Payments.

Under section 6201(a)(3), overstatements of withheld income tax and estimated income tax payments may be summarily assessed. If a return contains an overstatement of income tax prepayment credits, the overstatement can be summarily assessed under procedures applicable to math errors (see section 6213(b)(1)), but without the taxpayer having the right, under section 6213(b)(2), to disagree and force issuance of a deficiency notice.

3. Math Errors

Under section 6213(b)(1), the Service is authorized to summarily assess math errors appearing on a return. Math errors are defined in section 6213(g)(2) to include *inter alia*:

- An error in addition, subtraction, multiplication or division shown on any return;
- An incorrect use of any table provided by the Service with respect to any return if such incorrect use is apparent from the existence of other information on the return;

- An entry on a return of an item which is inconsistent with another entry of the same or another item on such return;
- An omission of information which is required to be supplied on the return to substantiate an entry on the return; and
- An entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, of Chapters 41, 42, 43, 44, or 45, if such limit is expressed:
 - as a specified monetary amount, or
 - as a percentage, ratio, or fraction, and if the items entering into the application of such limit appear on such return.

Abatement of Math Error Assessment. A taxpayer may request abatement of a math error assessment within 60 days after the Service sends a math error notice. Section 6213(b)(2)(A). After the abatement is made, the Service must follow the deficiency procedures to reassess the tax. The Service cannot levy or institute any court action to collect the assessed amount during the 60-day period that the taxpayer has to request abatement. Section 6213(b)(2)(B).

4. Other Circumstances

Tentative carryback or refund adjustments. An excessive tentative carryback of net operating loss, business credit, or capital loss adjustments may be assessed as a math error but section 6213(b)(2) does not apply. 6213(b)(3).

Amounts paid. Any amount paid as a tax or in respect of a tax may be immediately assessed. Section 6213(b)(4).

Receiverships and certain bankruptcy cases. Immediate assessment may be made of (1) a deficiency of a taxpayer in a receivership proceeding (state or Federal court), upon the appointment of a receiver and (2) a deficiency of the debtor's bankruptcy estate or a deficiency of the debtor, if the deficiency was determined by a final bankruptcy court decision in a case under Title 11. Section 6871.

Restitution. After the time for making any appeal has expired, the Service may make an immediate assessment against a taxpayer ordered to pay restitution with respect to a crime for failure to pay any tax. Section 6201(a)(4).

B. Deficiency Procedures

1. Two Types of Statutory Notices: Notice of Deficiency and Notice of Liability

Notice of Deficiency – notice to a taxpayer for taxpayer's own deficiency liability.

Notice of Liability - notice to a transferee or a fiduciary for the tax liability of another.

Note: Notice of deficiency or notice of liability procedures must be followed if there is to be a valid assessment. Transferee liability is discussed in Lesson 17.

2. Definitions

Deficiency equals the correct tax imposed, plus the rebates, minus the tax reported on the return, minus amounts previously assessed (or collected without assessment) as a deficiency. Section 6211; Interlake Corp. v. Commissioner, 112 T.C. 103, 110 (1999) (citing Kurtzon v. Commissioner, 17 T.C. 1542, 1548 (1952)) (reduced to mathematical terms -- deficiency equals the correct tax imposed, plus rebates, minus the tax reported on the return, minus prior assessment of a deficiency). Note: Under section 6211(b)(4) certain amounts are treated as negative tax for purposes of computing a deficiency.

A **rebate** is so much of an abatement, credit, refund or other repayment, as was made on the ground that the tax was less than the excess of the amount shown on the return plus any amounts previously assessed (or collected without assessment) as a deficiency, over the rebates previously made. Section 6211(b)(2).

Note: Deficiency is a term of art applied only to income, estate, gift and certain excise taxes (Chapters 41-44). The term becomes important in considering the restrictions placed upon the assessment process, if a deficiency is involved. These restrictions do not apply to additional amounts of other taxes, such as employment taxes, that are found to be due. Failure to follow the deficiency procedures may subject collection to injunction under section 6213(a), notwithstanding the anti-injunction provisions of section 7421(a).

3. Regular Procedures

- a) A revenue agent conducts an examination and makes a determination of deficiency or liability. If there is no agreement to the determination, the Service sends a 30-day letter advising of the right to file a protest, request a conference, and present any additional evidence or argument. If agreement is not reached with the area office personnel in Examination, the Appeals Office may be requested to further consider the case and grant a conference with that office. At each step, the Service personnel have greater latitude and authority to make settlements.

b) If agreement cannot be reached, a statutory notice of deficiency is issued that sets forth the amount and nature of the liability and notifies that a petition to the United States Tax Court must be filed within 90 days (or 150 days if the taxpayer is outside the United States) to further contest the merits of the liability in a pre-payment forum. The statutory notice must at a minimum indicate that the Service has determined the liability of the taxpayer based on information relating to the taxpayer. Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987) (Service sent a form letter with respect to a tax shelter transaction but the notice lacked evidence that a determination of the taxpayer's liability had been made). See section 7522 for requirements relating to the notice. The Tax Court has no jurisdiction over a deficiency unless a statutory notice is issued.

c) The statutory notice of deficiency must be sent to the taxpayer's last known address or to a fiduciary, if one has furnished notice as is required under section 6903 (applies to a dissolved corporation, deceased taxpayer, etc.). Registered or certified mail must be used. For a taxpayer outside of the United States, registered mail must be used as there is no provision for certified mail outside of the country. See section 6212, IRM 4.8.9.11.

d) Section 6212(c) prohibits issuance of a second statutory notice after a Tax Court proceeding on the first one has begun, in the absence of fraud. Any increased liability must be asserted in the Tax Court proceeding.

e) Waiver. A liability subject to statutory notice procedures may be assessed by agreement. Form 870, Waiver of Restrictions, may be signed by the taxpayer as a matter of right at any time. Section 6213(d). Interest stops 30 days later, if notice of the deficiency and demand for payment have not been made. See section 6601(c).

4. Burden of Proof

Presumption of Correctness. Since the taxpayer is in the best position to know the facts and to defend and to secure evidence, the determination of the Commissioner is generally presumed to be correct. The notice must not sustain conflicting determinations for the same tax for the same year, however, or the determination may be invalid because section 6211 requires a determination.

Section 7491 addresses the burden of proof in tax litigation and contains important **exceptions to the Commissioner's presumption of correctness:**

a) If the taxpayer introduces credible evidence in any court proceeding with respect to any factual issue relevant to ascertaining the liability of the taxpayer, the burden of proof with respect to such issue generally then shifts to the Service, with some important exceptions. For this rule to

apply, the taxpayer must show compliance with all substantiation requirements; maintenance of all the records required by the Code; cooperation with the Service's reasonable requests for witnesses, information, documents, meetings, and interviews; and meet certain net worth requirements. Section 7491(a)

b) The Service has the burden of proof if it asserts an item of income based solely on statistical information relating to unrelated taxpayers. In this event, there is no requirement that the taxpayer maintain records or cooperate with the Service. This will require additional investigation and documentation of unreported income, i.e., the Service can show evidence that the taxpayer's lifestyle or expenditures of funds is consistent with the statistical information. Section 7491(b).

c) When the Service asserts penalties, additions to tax, or additional amounts, the Service must initially produce evidence with respect to the penalty before the general burden of proof rules apply. The Service is not able to rest on the presumption of correctness if it does not provide any evidence whatsoever relating to penalties. Section 7491(c).

The burden of proof is imposed on the Service on an alternative or new issue, for fraud, to show that a foundation manager engaged in certain conduct, or to show that a petitioner is liable as a transferee.

Weimerskirch Rule. In cases involving illegally-sourced income, before a deficiency determination is entitled to the presumption of correctness, the government must set forth "some evidentiary foundation linking the taxpayer to the alleged income-producing activity where...the taxpayer engaged in an activity that is otherwise illegal." Weimerskirch v. Comm'r, 596 F.2d 358, 362 (9th Cir. 1979).

C. Termination and Jeopardy Assessments

1. General

a) IRM Provisions

IRM 1.2.13.1.27 & 28, 4.4.17, 4.15.1 thru 4.15.7, 5.1.4, and 5.11.3.

b) Applicability

(1) Termination Assessment

Applies to income tax for the present tax year or the immediately preceding tax year if the due date for the return has not passed. In such cases, the taxpayer's tax year is terminated and treated as a complete tax year for assessment purposes. Section 6851.

(2) Jeopardy Assessment

For taxes subject to deficiency procedures (income, estate, gift, and certain excise taxes), assessment is made pursuant to section 6861 after the due date of the return. For other kinds of taxes, assessment is made pursuant to section 6862 without regard to the due date of the return or payment.

c) Grounds for sections 6851, 6861 or 6862

(1) That the taxpayer is, or appears to be, planning an act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the respective tax; or

(2) That the taxpayer is, or appears to be, planning quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein; or

(3) That the financial solvency of the taxpayer is, or appears to be, imperiled.

The grounds above include transfers to others or the dissipation of assets, and specifically include the distribution by a corporation of all or a part of its assets in liquidation or otherwise.

d) Additional Background

(1) The financial solvency of the taxpayer is not imperiled by virtue of the accrual of the tax, penalty and interest proposed for termination or jeopardy assessment. However, reported liability that is a balance due is included in the insolvency determination.

(2) For termination and jeopardy assessments in respect of income tax under sections 6851 and 6861, section 6867 provides a number of presumptions where the owner of a large amount of cash is not identified, including that collection of the tax on that income will be jeopardized by delay.

(3) See Lesson 11 for a further discussion of jeopardy and termination assessments.

2. Certain Procedures for Termination/Jeopardy Assessments.

a) Common Procedures

(1) A recommendation to make a termination or jeopardy assessment is made by Form 2644, Recommendation for Jeopardy/Termination Assessment, together with an attached report.

i. There must be full compliance with all procedural requisites.

ii. Facts must support the determination of jeopardy.

iii. All such assessments must have a revenue purpose; the amount must be supportable; the determination must not be arbitrary, capricious or excessive in amount under the circumstances; there must be a reasonable factual basis for determining the taxpayer is liable for the tax.

(2) When determining tax under an unorthodox method or by a projection of short period data over a longer period, there should be a rational connection between facts known or ascertainable and facts presumed or inferred. This may require a showing that:

i. The volume of operation or number of transactions cover a reasonable period of time;

ii. The business activity continued over the entire period covered by the projection;

iii. The operations during the limited period are reasonably comparable to the operations over the entire period; and

iv. Any inferences drawn are limited to those for which there is a foundation of fact.

(3) **Illegally Seized Evidence.** Although the general rule prohibits use of illegally seized evidence, and it is advisable to avoid such use if possible, the government may be able to use illegally seized evidence in civil tax proceedings. See United States v. Janis, 428 U.S. 433 (1976). Generally, the Service can use such evidence when the Service did not initiate or participate in the illegal search. See, e.g., id. The Service has developed internal policy criteria for determining whether illegally seized evidence may be used for civil purposes in cases where the Service's own agents were

involved in the illegal search and seizure. See Field Service Advisory, 1996 WL 33321006 (May 23, 1996). Under that policy, the Service may use evidence obtained from the following:

- i. Good faith state search.
- ii. Technically defective Federal search.

Attorneys should consult the Service's current internal policy on illegally obtained evidence before using, or recommending using, such evidence.

(4) Under section 7429, Counsel must review and approve all termination and jeopardy assessments. Counsel will review the method and manner of determining the underlying tax as well as the facts leading to the determination of jeopardy.

(5) Counsel should sign the Form 2644 as the last reviewer, otherwise, reviews by other officials in the district office may be perfunctory or they may be intimidated by the fact that Counsel has already approved. Each review made should be meaningful.

(6) The Director (Compliance) or the Area Director must finally approve the termination or jeopardy assessment recommendation. Section 7429(a)(1). The director must find that the taxpayer is liable for the tax and that at least one ground of jeopardy exists.

(7) The tax is immediately assessed.

(8) Notice of Assessment (including, if applicable, Notice of Termination) with demand for immediate payment is (are) issued to taxpayer.

b) Certain Termination Procedures

(1) There can be no joint termination since no return has been filed and only the taxpayer and spouse can make the election to file a joint return.

(2) Annual accounting period not affected.

(3) Taxpayer's accounting period remains the same as it was before termination, even though termination may involve accounting for a portion of the taxpayer's taxable period.

(4) A terminated period can be reopened if:

- i. Taxpayer files a full-period return,
- ii. The Director determines a full taxable year deficiency,
or
- iii. The Director terminates again before the full year return due date.

3. Administrative and Judicial Review

Section 7429 provides for administrative and judicial review of jeopardy or termination assessments.

Within 5 days after such an assessment, a sufficient "written statement of the information upon which the Secretary relied in making such assessment" must be given to taxpayer. Section 7429(a). If applicable to the type of tax involved, a statutory notice of deficiency or liability can, at least in part, serve this purpose. If a statutory notice of deficiency or liability is applicable but not previously sent:

- a) With respect to jeopardy assessment, a notice of deficiency must be issued within 60 days from the section 6861 assessment date.
- b) With respect to termination assessment, a notice of deficiency must be issued within 60 days after the later of the due date of the return for such taxable year as extended, regardless of whether the taxpayer files a return, or the date such return is filed. Section 6851(b).

Within 30 days after the written statement is furnished (or 30 days after the 5-day period expires), the taxpayer may ask for an administrative review. § 7429(a)(2). Administrative review is a prerequisite to later judicial review. § 7429(b)(1). Pursuant to § 7429(a)(3), upon the taxpayer's request, the Service must determine whether:

- a) the making of the assessment is reasonable under the circumstances;
and
- b) the amount so assessed is appropriate under the circumstances.

Judicial review pursuant to section 7429(b) may be sought by the taxpayer within 90 days after the earlier of:

- a) the day the Secretary notifies the taxpayer of his [administrative] determination; or

- b) the 16th day after the request for administrative review (described in 2 above).

The Tax Court has concurrent jurisdiction with the district courts over section 7429 review only where a Tax Court petition was previously filed and one or more of the taxable periods before the Tax Court is covered by the jeopardy assessment. Section 7429 (b)(2). Otherwise, the district courts have exclusive jurisdiction.

The court's review is limited to the issues in section 7429(a)(3) as noted above. Humphreys v. U.S., 62 F.3d 667 (5th Cir. 1995). The court's determination is non-reviewable. Id.; § 7429(f). Twenty days are allowed for the court determination. § 7429(b)(3). The taxpayer may upon reasonable grounds get an extension of not more than 40 days. § 7429(c).

Burden of Proof

- a) With respect to reasonableness of making the assessment, the burden of proof is on the government. I.R.C. § 7429(g)(1).
- b) With respect to reasonableness of the amount, the government shall provide a written statement as to how the amount was determined, but the taxpayer has the burden of proof. I.R.C. § 7429(g)(2).

Both judicial and administrative reviews are based upon all of the facts known at the time of the review. Therefore, abatement is not demonstrative of error, since facts at assessment may have been less complete.

A possessor of cash, within the meaning of section 6867, does not have standing under section 7429 to request administrative review or bring a judicial action. Under section 6867(b)(3), the possessor is treated as the taxpayer solely for purposes of § 7429(a)(1). See Morgan v. U.S., 958 F.2d 950 (9th Cir. 1992).

V. STATUTE OF LIMITATIONS ON ASSESSMENT²

A. General

- The assessment period normally expires 3 years from the date of filing the return. § 6501(a).
- For early filed returns, the period runs from the return's due date. § 6501(b)(1).
- For certain employment taxes, there is a presumptive filing date (due date) of April 15 of the following year. § 6501(b)(2).

² For more information on the statute of limitations on assessment, see IRM 25.6.

B. Extension

The assessment period may be extended by agreement. Form 872 should be the consent form most commonly used, but there are a number of forms that are also accepted. See I.R.M. 25.6.22.4.1. The agreement must be executed before expiration of the statute; both the taxpayer and the Service representative must sign the agreement before the assessment period expires. Section 6501(c)(4)(A) and Treas. Reg. § 301.6501(c)-1(d). Each time that the Service requests that the taxpayer extend the assessment period, the taxpayer must be notified of his right to refuse to extend the assessment period or, in the alternative, to limit an extension of the assessment period to particular issues or for specific periods of time. § 6501(c)(4)(B).

The statute specifically excludes estate tax from the provisions for an extension of the statute of limitations for assessment by agreement. § 6501(c)(4). Thus, any such attempted waiver would be ineffective.

C. Some Exceptions to General 3-Year Assessment Statute

The following is a non-exclusive list of common exceptions to the general 3-year statute of limitations on assessment:

1. False or Fraudulent Return

"[T]he tax may be assessed . . . at any time." Section 6501(c)(1). Any later filing of a non-fraudulent amended return by the taxpayer does not start the running of the assessment statute. Badaracco v. Commissioner, 464 U.S. 386 (1984).

2. Willful Attempt to Defeat or Evade Tax

"[T]he tax may be assessed ... at any time." I.R.C. § 6501(c)(2).

3. No Return.

"[T]he tax may be assessed . . . at any time." I.R.C. § 6501(c)(3).

The filing of a non-fraudulent return after a failure to file (including a fraudulent failure to file) will start the assessment period running. Note that a substitute for return (see section 6020(b)) prepared by the Service and not signed by the taxpayer, is not a return for statute of limitations purposes. See I.R.C. § 6501(b)(3). It is only a processing device used where the taxpayer failed to file a return.

A document must meet the following requirements to constitute an income tax return for statute of limitations purposes: (1) contain sufficient data to calculate tax liability; (2) purport to be a return; (3) evidence an honest and reasonable attempt to satisfy the requirements of the tax laws; and (4) be executed under penalties of perjury. Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986). Depending on the purpose for which a return is being used by the government, a Form 1040 showing zeroes on every

line, but that is signed by the taxpayer without any modifications to the penalties of perjury verification, may be a valid return even though the reporting is based on invalid constitutional objections to the tax system. United States v. Long, 618 F.2d 74 (9th Cir. 1980) (government did not prove taxpayer guilty of crime of failing to file a return as some computation was possible as a result of the zeroes). But see Coulton v. Commissioner, T.C. Memo. 2005-199 (distinguishing Long and applying Beard in a case appealable to the Ninth Circuit).

With respect to the excise taxes imposed by sections 4001-5000, see section 6501(b)(4), which provides that each line of a return for a specified period on which an entry has been made is a return. If there is no entry on the particular line of an excise tax return, then no return has been filed for that category of excise tax for that taxable period. The entry of the word "none" across the return or in the summary portion, provided it clearly indicates a denial of liability for all taxes, constitutes a return of all taxes listed on an Excise Tax Form (*i.e.*, Form 720). See Treas. Reg. §40.6011(a)-1.

4. Substantial Omission of Items (an amount in excess of 25 percent of the amount of gross income stated in the return)

"[T]he tax may be assessed . . . at any time within 6 years after the return was filed." I.R.C. § 6501(e). An omission is not taken into account if it is disclosed in the return, a statement attached to the return, or in a manner adequate to apprise the Service of the nature and amount of the item. The exception applies to substantial omissions from:

- a) Gross income;
- b) Gross estate or total amount of gifts made;
- c) Amount of excise tax imposed under sections 4001-5000.

Research case law on the concept of adequate disclosure to determine if the exception applies. See, *e.g.*, University Country Club v. Commissioner, 64 T.C. 460, 469 (1975); George Edward Quick Trust v. Commissioner, 54 T.C. 1336 (1970), *aff'd per curiam*, 444 F.2d 90 (8th Cir. 1971).

The Service's position is that an overstatement of basis in property can result in an omission from gross income. Final Treasury regulations have been promulgated to reflect this position. See Treas. Reg. §§301.6501(e)-1 and 301.6229(c)(2)-1 (T.D. 9511, December 14, 2010). The Supreme Court granted certiorari in Home Concrete & Supply, LLC v. United States, 634 F.3d 249 (4th Cir. 2011), *certiorari granted* 132 S.Ct. 71 (2011). The Supreme Court's decision should resolve the existing circuit split. See Beard v. Commissioner, 633 F.3d 616 (7th Cir. 2011); Salman Ranch, Ltd. v. Commissioner, 647 F.3d 929 (10th

Cir. 2011); Grapevine Imps., Ltd. v. United States, 636 F.3d 1368 (Fed. Cir. 2011); Intermountain Ins. Service of Vail v. Commissioner, 650 F.3d 691 (C.A.D.C. 2011). But see Home Concrete & Supply, LLC v. U.S., 634 F.3d 249 (4th Cir. 2011); Burks v. U.S., 633 F.3d 347 (5th Cir. 2011); Bakersfield Energy Partners v. Commissioner, 568 F.3d 767 (9th Cir. 2009).

5. Carrybacks

In the case of a deficiency attributable to the application to the taxpayer of a carryback (net operating loss, capital loss, foreign tax, credit, or tentative), such deficiency may be assessed within the period for assessing a deficiency for the taxable year which produced the carryback. I.R.C. § 6501(h)-(k).

6. Listed Transactions

Section 6501(c)(10) provides that if a taxpayer fails to include on a return or statement for any tax year any information with respect to a listed transaction, which is required to be disclosed under section 6011, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after the earlier of: the date on which the Secretary is furnished the required information, or the date that a material advisor meets the requirements of section 6112 with respect to a request by the Secretary under section 6112 relating to the transaction and taxpayer. This provision applies to taxable years with respect to which the period to assess a deficiency did not expire before October 22, 2004. Rev. Proc. 2005-26 (2005-1 CB 965) provides interim guidance for taxpayers and material advisors to follow to disclose listed transactions that were not properly disclosed under section 6011 in order to limit the extension of the period of limitations on assessment under section 6501(c)(10).

D. Certain Suspensions or Lack of Suspensions

If a statutory notice of deficiency is timely issued, section 6503(a) suspends the assessment period for the section 6213(a) period of prohibition (90 days (or 150 days if the taxpayer is out of the country) after mailing of a notice of deficiency and, if a petition is filed with the Tax Court, until the decision of the Tax Court has become final), plus 60 days. An assessment made in contravention of section 6213 is void.

The automatic stay in bankruptcy does not prevent the Service from issuing a statutory notice to the taxpayer during bankruptcy. 11 U.S.C. 362(b)(9). Accordingly, there is no tolling of the assessment statute under section 6503(h)(1) as a direct consequence of a stay of the Service's ability to assess. However, the section 6213(a) prohibition on assessment (i.e., after the issuance of a statutory notice of deficiency and during the period in which the taxpayer may petition the Tax Court up until a decision becomes final) applies when a taxpayer is unable to petition the Tax Court on account of the 11

U.S.C. § 362(a)(8) stay against the commencement or continuation of a Tax Court proceeding. Thus, a bankruptcy case indirectly suspends the period of limitations on assessment if the taxpayer is either unable to file a Tax Court petition or to continue an already begun Tax Court case. Section 6503(a)(1). See Revenue Ruling 2003-80, 2003-29 I.R.B. 83, for a more complete discussion of the effect of a bankruptcy petition on the section 6501 period of limitation for assessment.

Note: For bankruptcy cases filed on or after October 17, 2005, the section 362(a)(8) stay does not apply to individual debtors with respect to post-bankruptcy-petition tax periods.

Section 6872 provides for suspension of the statute of limitations on assessment if notice is not given to the Service of appointment of a receiver or other fiduciary as required by section 6036. This applies to the appointment of a fiduciary in a proceeding under the Bankruptcy Act or a receiver in any other court proceeding.

While joint filers may have a joint tax liability, the assessment period may be separate for each spouse. See Rev. Rul. 72-338, 1972-2 C.B. 641. When a spouse fails to petition the Tax Court or a taxpayer fails to put a tax year in issue, the assessment period is not suspended as to that spouse or that tax year because the Tax Court does not acquire jurisdiction as to that spouse or tax year. We therefore must move quickly and assess such liabilities.

Similarly, if two or more years were petitioned to the Tax Court but the losing party specifically appeals as to only some of those years, the assessment period starts running again as to the years not appealed upon the expiration of the appeal period.

VI. PROVING AN ASSESSMENT

A. Glossary of Important Terms, Documents and References

1. **Assessment Date.** Regular or summary assessments under section 6201 will usually have an assessment date on a Monday. IMF Notices on returns processed before the due date will bear an April 15 (generally) assessment date, even if processed with an issued date in January, February or March.

Manual assessments can have an assessment date of any work day. Quick, Prompt, Jeopardy and Termination assessments are considered manual assessments and are made and transferred to the appropriate IMF or BMF data processing system.

2. **Assessment Certificate (Summary Record of Assessments).** Normally, RACS Report 006 is used to summarize assessments made at a service center for a week. Assessments are made by an assessment officer signing this certificate. Form 23C is rarely used.

3. **Document 6209, ADP and IDRS Information (Current Year).** Lists transaction codes (TC), and contains other essential information, necessary to read transcripts. The current document is available on-line by accessing the Service's Intranet web site, selecting "Forms/Pubs/Docs," selecting "Tax Forms," selecting "Document" and entering "6209" where indicated.
4. **Document Locator Number (DLN).** Upon receipt of a return or making of a request for assessment, a DLN is imprinted on the return or request. See Doc. 6209 for a detailed description of the composition of the DLN. The DLN identifies the return or request on the tax account and in the assessment process.
5. **Master File (MF).** A computer system that includes the Individual Master File (IMF), containing the tax accounts for individuals, and the Business Master File (BMF), containing the tax accounts for businesses and providing complete tax entity control.
6. **Non Master File (NMF).** This automated system is used for control and processing of items that cannot be handled on Master File; for example, judgments for un-assessable amounts, and collection under liens filed before bankruptcy where the tax liability is discharged in bankruptcy. The NMF account is usually keyed to a MF account.
7. **Retention Register.** Accounts that have reached certain criteria drop from Service Center Master File into a retention system. These accounts may be reactivated when necessary and will then be available through Master File.
8. **Transcripts.**
 - a) **Certificate of Assessments, Payments, and other Specified Matters (Form 4340).** This transcript is used to certify (as true and complete) essential account information. It is computerized on MF as MF Transcript Type J (MFTRA-J), and computerized on a stand alone system for NMF use, or specialized requests, as the National Standard Application (NSA).
 - b) **An uncertified transcript of Assessments, Payments, and Other Specified Matters.** This is used to provide more quickly the information provided in the certified format described above. It is computerized on MF as MF Transcript Type X (MFTRA-X).
 - c) **Microfilm Request (CC ESTABMZ).** Service employees will receive this paper request, and will research and provide a print of microfilm for tax modules removed to retention in 1993 and prior.

d) **Integrated Data Retrieval System (IDRS) printout (CC IMFOLT).** The IDRS is a large scale computer system designed to maintain campus regional data base files with random access capability from remote locations. Working in harmony with the IMF, BMF, and NMF, the system presents a ready source of current information on taxpayers. See Document 6209, Sec. 13. With the exception of notice of deficiency indicators, this transcript provides complete information about post-1993 accounts or accounts with post-1993 activity.

B. Certificate of Assessments, Payments and Other Specified Matters

1. To prove an assessment, the Service will normally prepare a Form 4340 (MFTRA-J or NSA). The Form 4340 is a transcript that translates code and field information stored on the computer into plain language. Federal Rule of Evidence 1001(3) provides that “if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original’.”
2. To prove an assessment in court, two certifications are needed. The first is a certification that the data shown on the document are true and complete. This certification is made by the signing of a certification pre-printed at the end of Form 4340. It certifies that all assessments, abatements, credits, refunds, and advanced or unidentified payments, and the assessed balance relating thereto are shown, and that other specified matters appear, in the records of the Service. The second is a certification under seal that the Form 4340 is a transcript of an official record. This certification is made by execution of Form 2866, Certificate of Official Record, together with the embossing thereon of the seal of the official (usually a director) making the certification.
3. Federal Rule of Civil Procedure 44(a) (1) specifically provides for certification under seal of a transcript of an official record.
4. Section 7514 provides authority for, and requires judicial notice of, the seal. See also Fed. R. Evid. 902(1) and cases cited in 2 A.L.R. Fed. 306.
5. By the seal on Form 2866, the Form 4340, as the transcript of official record certified by the Form 2866, self-authenticates pursuant to Federal Rule of Evidence 902(1) or 28 U.S.C. § 1733 to prove the act, transaction, or occurrence as a memorandum of which the same was made or kept. U.S. v. Jimenez, 513 F.3d 63, 79-80 (3d Cir. 2008); U.S. v. Bisbee, 245 F.3d 1001, 1006 (8th Cir. 2001); Hughes v. U.S., 953 F.2d 531, 535 (9th Cir. 1992). Note that 28 U.S.C. § 1733 is applicable only to the cases to which the Federal Rules of Evidence do not apply.

6. Form 4340 certified under seal is presumptive evidence of a proper assessment. Huff v. U.S., 10 F.3d 1440, 1445-46 (9th Cir. 1993) (Form 4340 is adequate to prove a valid assessment if it lists the date on which the actual assessment was made); Hefti v. Commissioner, 8 F.3d 1169, 1172 (7th Cir. 1993); Long v. U.S., 972 F.2d 1174, 1181 (10th Cir. 1992); U.S. v. McCallum, 970 F.2d 66, 71 (5th Cir. 1992); Geiselman v. U.S., 961 F.2d 1, 6 (1st Cir. 1992); U.S. v. Chila, 871 F.2d 1015, 1017 (11th Cir. 1989).
7. Upon introduction of the certified under seal Form 4340, the taxpayer bears the burden to show that the information reflected therein is not correct. Fidelity Bank v. U.S., 616 F.2d 1181 (10th Cir. 1980).

C. Supporting Records to Prove Older ADP Assessment

1. **Tax Return.**
2. **Document Register**, Form D-813, which is used for manual assessments and remit documents, or the equivalent; Form 1332, Block and Selection Record, used as the transmittal for non-remit documents, usually returns.
3. **Transcript of Account.** While any transcript that is true and complete can be used, a Form 4340 is strongly preferred.
4. **Service Center Recap of Assessments, Abatements and Other Post-Journalized Transactions.** Secure from service center campus and get assistance to explain the documents.
5. **Assessment Certificate**, RACS 006 (or Form 23C), which need not identify taxpayers. Gentry v. United States, 962 F.2d 555 (6th Cir. 1992).
6. **Notice List.** Notice lists are normally destroyed after one year but check on its availability; do not assume its destruction as you must account for it. The retained list is merely magnetic tape from which the original was printed and which can be reprinted to duplicate the original notice; check the revision date of the form on which any reprint is made and determine whether it is the revision used at the date of the original printing. The Service can rely, as in In re Saunders, 70-2 U.S.T.C. (CCH) ¶ 9594 (N.D. Cal. 1970), upon the legal presumption of official regularity.

D. Presenting Documents to Prove Older ADP Assessments and Manual Assessments

Try to persuade the opposing attorney to stipulate the Form 4340, Certificate of Assessments and Payments under seal. Stress the futility of requiring the needless presentation of proof that will merely consume the court's time, increase the cost of the

proceeding and irritate the judge. Most judges will readily accept the certificate and, if necessary, will usually question the party opposing the introduction of such a certificate as to why they feel the assessment should be required to be proved in painful detail, consuming the court's time. Only after you have exhausted every argument should you resort to the following procedure.

Present the return and supporting documents in the following logical sequence; otherwise, the procedure will be neither persuasive nor understandable.

1. First, identify and present to the court a copy of the taxpayer's tax return, having the taxpayer identify his signature, if not previously stipulated. Then have the government's witness, the custodian of records, identify the DLN and explain the number to the court, including the significance of each numeric digit. Have the witness explain that this DLN is unique, identifying only this specific document. Make sure that the witness explains that this DLN identifies the return on the Service's computerized records and on other records about the taxpayer.
2. Then, introduce and identify the document register, a Form D-813, Block Sheet, or its equivalent. Through your witness, show that the tax return you just introduced is in the block of tax returns controlled by this block sheet. This can be shown by pointing out the DLN on the return and the corresponding entry on the Form D-813 or equivalent.
3. Next, if you do not have a fully certified Form 4340 (MFTRA-J or NSA), present another or older form of transcript (MRS, Form 4303, Form FC-4, or MFTRA). If fully certified, these may be used instead of Form 4340. Put this document into evidence through your witness whether or not it is under seal. For manual assessments or those made manually and transferred into the ADP system, introduce a copy of the unit ledger card or the NMF transcript, and tie the DLN to the unit ledger card or NMF transcript.
4. Let the witness explain to the court that the transcript is error free and discuss the checks and balances in processing in the service center campus that assure this. Have your witness from the service center campus explain the error safeguards in each of the processing steps in the service center campus. Explain how any errors are corrected, the liability is computed, and the computations are verified.
5. At this point, the witness should tie in the fact that the DLN was imprinted on the tax return when received and that the same DLN has been followed through the control documents and into the data input to the master file computer, as shown by the computer printed transcript; point out the same DLN on each document and on the transcript.
6. Next, take the settlement register or accounts register and have the witness show the DLN, transaction data and the computer cycle shown for posting of the

transactions. Also, have the witness point out that the same computer cycle information was shown on the computer printed transcript.

7. Then, through the witness, introduce the journal type documents from the service center campus from which the RACS 006 (or Form 23C) summary assessment certificate was prepared. These may include a Service Center Campus Recap of Assessments, Abatements & Other Post-Journalized Transactions and a Journal of Miscellaneous Transactions, or the forms may be revised from time to time; you will need whatever was used as the current procedure at the time the subject assessment was made. These documents are now routinely prepared entirely by the computer. Get the assistance of a knowledgeable service center campus employee prior to examining the witness on the stand. Become familiar with the documents so that you can find the items you want to point out. Make a list of each item and cover each carefully as you are forming a chain which must have every link.

8. Introduce, through the witness, the RACS 006 (or Form 23C) summary assessment certificate, and point out the total of tax assessed which includes the tax assessed against the taxpayer. By the testimony of the witness, point out and tie in that the total on the RACS 006 (or Form 23C) is the same amount from the preceding journal document which summarized the total of the transactions for a particular weekly cycle of the system. Have the witness testify that it is from these documents the totals are taken for inclusion in the RACS 006 (or Form 23C). All of these items must be carefully tied together with each document properly put into evidence by identification and verification by the witness.

9. Next, through the witness, introduce a copy of the notice list from which notice of the assessment and demand for payment was prepared, or if destroyed, account for its destruction in the normal course of business. The notice list is on magnetic tape and is printed out on computer type billing documents about 2/3 page in size. If the tape has not been destroyed it will have to be reprinted; your witness should be able to testify as to its reproduction and that it is the same tape from which the original was printed. This step should complete your proof.

E. Proving an Assessment - Current Procedures

The process of proof is the same as under the older procedure except that you will note many of the documents are produced by the data processing system, including the RACS 006. Since these documents are produced almost simultaneously, we must tie them together, but we must explain that they now validate each other, rather than being prepared in sequence. The data is keyed to the cycle of the computer in which the assessment posts and our proof must show the cycle and cycle date in each of the items introduced. The return, by its DLN, can be traced to the tax account on which the cycle number and cycle date are shown, and the cycle number and cycle date can be traced through the upper level assessment documents.

It is still the first course of action to try to use a Form 4340 under seal, and to get it admitted by stipulation. If some entries appear unfavorable, use a witness to explain them; such a certification must reflect what the Service's records show.

VII. ABATING AN ASSESSMENT

A. Section 6404(a)

Section 6404(a) provides that the Service may abate any portion of an assessment that (1) is excessive in amount, (2) is assessed after the expiration of the applicable period of limitations, or (3) is erroneously or illegally assessed. Once the Service abates an assessment under part (a), absent clerical error, it cannot again reflect the taxpayer's liability on the Service's books by simply reversing the abatement. Rather, it must follow the proper procedures to reassess the liability within the section 6501 assessment limitations period. See Crompton-Richmond Co. v. United States, 311 F.Supp. 1184 (S.D.N.Y. 1970) (an erroneous abatement due to a clerical error may be reversed and reinstated without a new assessment); see also Bugge v. United States, 99 F.3d 740 (5th Cir. 1996) (an unauthorized abatement of an assessment is not effective).

B. Section 6404(c)

Section 6404(c) permits the Service to reduce assessments when the Service determines under uniform rules prescribed by the Secretary that the administration and collection costs involved would not warrant collection of the amount due. Unlike a determination under section 6404(a), a determination under section 6404(c) has nothing to do with the merits of the taxpayer's liability or with the merits of the assessment. A section 6404(c) determination is a collection determination, not a determination that the assessment is in any way improper or that the taxpayer owes no tax. In bankruptcy, the significance of section 6404(c) abatement is that it allows the Service to reverse the abatement to collect against hidden assets encumbered with a pre-petition Notice of Federal Tax Lien, even when the tax liability has been discharged.

VIII. TEFRA PARTNERSHIP PROCEDURES

The unified partnership audit and litigation procedures present an alternative to normal assessment procedures when a partnership is involved. Although partnerships do not pay Federal income taxes, they are required to file annual information returns reporting the partners' distributive shares of tax items. I.R.C. §§ 701 and 6031. The partners report their distributive shares of the tax items on their respective Federal income tax returns. I.R.C. §§ 701-704. To remove the substantial administrative burden occasioned by duplicative audits and litigation, and to provide consistent treatment of partnership tax items among partners in the same partnership, Congress enacted the unified partnership audit and litigation procedures as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub.L. No. 97-248, sec. 401, 96 Stat. 648.

Under the TEFRA partnership procedures, prior to assessing the tax liability of the partners, the Internal Revenue Service determines the tax treatment of partnership items in a partnership-level proceeding. §§ 6221 and 6225. Determinations at the partnership level are binding upon all direct and indirect partners of the partnership. Sente Inv. Club P'ship of Utah v. Comm'r, 95 T.C. 243, 247-250 (1990). In the absence of a partnership-level proceeding, the Service is bound by the partnership items as reported on the partnership return. Roberts v. Comm'r, 94 T.C. 853, 862 (1990). Section 6231(a) provides that the TEFRA partnership procedures apply to any partnership except for partnerships with ten or fewer partners, all of which are: individuals who are not nonresident aliens; C corporations; or estates of deceased individuals. Thus, if any partner is a pass-thru entity, then the partnership is subject to the TEFRA partnership procedures regardless of the number of partners. I.R.C. § 6231(a)(1)(B); Treas. Reg. § 301.6231(a)(1)-1(a)(2). A small partnership may also elect to be governed by the TEFRA partnership procedures. The Service generally determines, based upon the partnership's information return, whether the TEFRA partnership procedures are applicable to the reported tax year. §§ 6231(g) and 6233.

The Service must notify partners of when the audit of the partnership has begun by sending a Notice of Beginning of Administrative Proceeding ("NBAP"). It also must send a Notice of Final Partnership Administrative Adjustment ("FPAA") to propose adjustments to the partnership's information return. § 6223. During the ninety-day period after the mailing of the notice of FPAA, the tax matters partner ("TMP") may file a petition for judicial review. § 6226(a). If the TMP does not file a petition within that ninety-day period, any notice partner or any five percent group (section 6231(a)(11)) may, within sixty days after the close of the TMP's ninety-day period, file a petition for judicial review. § 6226(b). All partners are deemed to be "parties" who will be bound by the court decision.

After the completion of the partnership proceeding, the Service may directly assess tax for partnership items that flow computationally to the partner returns and may issue affected item notices of deficiency to partners for tax that requires additional partner-level factual determinations. Each TEFRA partner's section 6501 period for assessing tax attributable to "partnership items" or "affected items," as defined in section 6231, may be extended by the provisions of section 6229, and particularly section 6229(b)(3).

IX. Limited Liabilities Companies

A. Introduction

A limited liability company (LLC) is an entity created under state law that has characteristics of both a corporation and a partnership. LLCs are attractive because they can be treated as a pass-through (generally a partnership), avoiding the double-tax problem inherent in corporations, yet at the same time provide protection from liability similar to corporations. They have become the most commonly used entity for small businesses. According to the Resource Guide for Revenue Officers, during fiscal year 2009 there were more LLC entities established on master file than corporations and partnerships combined.

The equity owners of an LLC are generally referred to as members. Typically, there are no restrictions on who can be members of an LLC. Thus, a member of an LLC may be an individual, a corporation, a partnership, an association, an estate, a trust or another LLC. LLCs may have only one member. For the Service, much of the confusion over the treatment of LLCs has to do with single-member LLCs.

There are two significant developments that affect the federal tax treatment of LLCs. The first is the promulgation in 1997 of what are known as the check-the-box regulations. See Treas. Reg. §§ 301.7701-1, 301.7701-2, 301.7701-3, and 301.7701-4. The second significant development is the amendment in 2007 of Treas. Reg. § 301.7701-2 concerning employment and excise tax liabilities of disregarded single-member LLCs.

B. Limited Liability Companies

1. Classification of an LLC for Federal Tax Purposes

For federal tax purposes, there is no separate entity type for an LLC. An LLC may be classified in various ways. The scheme for classifying LLCs is established by the check-the-box regulations.

a) Three Alternatives

For federal tax purposes, an LLC can be classified in one of three different ways:

- (1) As an association taxable as a corporation
- (2) As a partnership
- (3) As a disregarded entity (in the case of single-member LLCs)

A single-member LLC that does not elect to be classified as a corporation will be disregarded as an entity separate from its owner. Treas. Reg. § 301.7701-2(c)(2)(i) (as amended in 2009). (New exceptions to this rule under section 301.7701-2(c)(2)(iv) and (v), applicable to employment taxes and excise taxes, are discussed below.) When an LLC is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner. Treas. Reg. § 301.7701-2(a) (as amended in 2009).

b) Classification Scheme

Under the check-the-box regulations, classification of an LLC depends on two factors:

- (1) Number of members (single-member or multi-member)
- (2) Election (Form 8832, Entity Classification Election)

Classification of an LLC for federal tax purposes is summarized in the following chart based on the presence or absence of an election and the number members in the LLC:

	Form 8832 Election	No election (default status)
Single-Member LLC	Corporation	Disregarded entity (exceptions: employment and excise taxes)
Multi-Member LLC	Corporation or Partnership	Partnership

Note, that where an LLC elects to be classified as a corporation, it can also make an S election (Form 2553, Election by a Small Business Corporation) if it meets the requirements for treatment as an S corporation. If an LLC files only the S election (Form 2553) and meets all the other requirements to qualify as an S corporation, it will be treated as having also made a Form 8832 election to be classified as a corporation.

Note also, that a change in ownership during the taxable year can change whether the LLC is a single-member LLC or a multi-member LLC, and thus change the LLC's classification. See Rev. Rul. 99-5, 1999-1 C.B. 434; Rev. Rul. 99-6, 1999-1 C.B. 432.

In general, if the sole owners of the LLC are a husband and wife, the LLC will be regarded as a multi-member LLC, and may elect to be treated as corporation or a partnership. If no election is made, special rules apply where the sole owners of an LLC are husband and wife *and* their ownership interests are community property. See Rev. Proc. 2002-69, 2002-2 C.B. 831.

2. Tax Reporting by LLCs

An LLC reports income tax, employment tax, and excise tax according to its classification as a corporation, partnership, or disregarded entity.

a) As a Corporation

When the LLC is classified as a corporation, all income taxes are reported on a Form 1120 under the TIN of the LLC, the same as with traditional corporations (or on Form 1120S if an S election is in place). Employment and excise taxes are reported under the name and TIN of the LLC, the same as with corporations.

b) As a Partnership

When the LLC is classified as a partnership, all income taxes are reported on a Form 1065 under the TIN of the LLC, the same as with partnerships. Employment and excise taxes are reported under the name and TIN of the LLC, the same as with partnerships.

c) As a Disregarded Entity

When the LLC is disregarded for federal tax purposes, the LLC does not file an income tax return. Because the LLC is disregarded for federal tax purposes, its income is reported by the single-member owner of the LLC whether the single member owner is an individual, a corporation, or a partnership.

With respect to employment and excise taxes, the treatment of a disregarded LLC is more complicated. Prior to amendments in 2007, regulations provided that the disregarded status of a single-member LLC applied to employment taxes and excise taxes as well as to income taxes. However, under Notice 99-6, 1999-1 C.B. 321, the Service temporarily permitted employment taxes of a disregarded LLC to be reported under either the name and TIN of the single-member LLC or the name and TIN of the single member. As will be discussed below, this caused considerable confusion in collecting such employment taxes.

In 2007, the regulations were amended to provide that a disregarded single-member LLC will not be disregarded for employment taxes and excise taxes. The amendments were effective for excise taxes for periods beginning on or after January 1, 2008. The amendments were effective for employment taxes for periods beginning on or after January 1, 2009. After the effective date of the amendments, all employment tax and excise tax liabilities will be reported only under the name and TIN of the LLC and Notice 99-6 will be obsolete for such periods. IRS CCA 200840001; 2008 IRS CCA LEXIS 86.

3. Enforced Collection with Respect to LLCs

The enforced collection tools available to the Service with respect to LLCs vary, somewhat, depending on how the LLC has been classified.

a) LLC Classified as a Corporation

When the LLC is classified as a corporation, the LLC is the taxpayer for all purposes. The Service can collect taxes assessed to the LLC against the assets of the LLC. The Service can pursue third parties as alter egos, nominees, and transferees. And, with respect to employment and excise taxes, the Service can pursue Trust Fund Recovery Penalties against responsible persons.

b) LLC Classified as a Partnership

When the LLC is classified as a partnership, the Service can collect employment and excise taxes assessed to the LLC against the assets of the LLC. The Service can also pursue third parties as alter egos, nominees, and transferees. And, with respect to employment and excise taxes, the

Service can pursue Trust Fund Recovery Penalties against responsible persons.

Note, however, even though the LLC is classified as a partnership for federal tax purposes, the Service cannot pursue collection against members, even managing members, in the same manner as it might against a general partner of a partnership. The Service can pursue a general partner for employment and excise taxes without making a separate assessment because, typically, under applicable state law, a general partner is liable for all partnership debt, including federal taxes. (see, e.g., United States v. Galletti, 541 U.S. 114 (2004)). However, state law does not afford creditors this option in the case of an LLC. To the contrary, the liability of all members, even managing members, is limited. Rev. Rul. 2004-41, 2004 C.B. 845. The Service must assess the Trust Fund Recovery Penalty to pursue collection against individual members.

c) LLC Classified as a Disregarded Entity

When an LLC is disregarded for federal tax purposes, its income is included in the income of the single-member owner and the income tax is assessed against the owner, which is collected against assets of the single-member owner, and not the assets of the LLC.

The proper approach to enforced collection of employment or excise taxes turns on whether the taxes arose prior to or after the application of the 2007 amendments.

(1) Prior to the 2007 Amendments

Where the LLC is classified as a disregarded entity, the Service's position is that employment and excise taxes for periods prior to application of the 2007 amendments can be collected from the assets of the single-member owner, even where the tax has been reported and assessed under the LLC's TIN. The name of the single-member owner is added to the assessment under the name and TIN of the disregarded LLC. The Service's position is that the name of the owner can be added to the assessment against the LLC without a supplemental notice of assessment being issued to the owner. The assessment in the name and TIN of the disregarded LLC is, in substance, an assessment of the owner's liability. IRS CCA 200235023, 2002 IRS LEXIS 66.

This practice (making the tax assessment under the name and TIN of the LLC, but collecting the assessment against assets in the name of the single-member owner) results in the Service issuing some odd-looking documents. For example, the Service might levy a bank account identified under the TIN of the single-member

owner, but show the taxes being collected as taxes assessed under the name and TIN of the LLC. IRM 5.1.21.9.3.1. This mismatch between the name and TIN of the LLC in which the assessment is made and the name and TIN of the liable single-member owner creates confusion in numerous collection procedures, including the following:

- i. Notice of levy
- ii. Notice of federal tax lien
- iii. Proof of claim in bankruptcy and insolvency proceedings
- iv. CDP Notice
- v. Installment Payment Agreement
- vi. Offer in Compromise
- vii. Collection Summons

Regardless of any confusion, where the LLC is disregarded for employment and excise tax purposes, the Service takes the position that the employment and excise taxes cannot be collected from the assets of the LLC. The theory is that where the LLC is disregarded for employment and excise tax purposes, the owner of the LLC is the proper taxpayer, not the LLC. And, although the LLC is disregarded for purposes of determining who is the taxpayer, property rights are a matter of state law and the LLC must be regarded for purposes of determining the property of the taxpayer subject to enforced collection. Thus, the lien that arose upon assessment of the employment or excise taxes attached only to the property and rights to property of the taxpayer (the owner), but not to the property and rights to property of the LLC. IRS CCA 200235023, 2002 IRS LEXIS 66.

(2) After the 2007 Amendments

By providing that single-member LLCs will no longer be disregarded for purposes of employment and excise taxes, the 2007 amendments to the regulations eliminated this confusion with respect to periods after the effective date of the amendments. For excise tax liabilities for periods after 2007 and for employment tax liabilities for periods after 2008, the liabilities will be reported and assessed under the name and TIN of the single-member LLC and collection will be enforced against the assets of the LLC. Of

course, third parties can still be pursued as alter egos, nominees, and transferees and the Service can pursue Trust Fund Recovery Penalties against responsible persons, the same as with partnerships and corporations.

d) Series LLCs

Treasury published proposed regulations in September 2010 regarding series organizations, including series LLCs. Series LLCs and Cell Companies, 75 Fed. Reg. 55699 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301).

At least eight states have enacted statutes providing for the creation of entities that may establish series, including limited liability companies (series LLCs). In general, series LLC statutes provide that a limited liability company may establish separate series. Although series of a series LLC generally are not treated as separate entities for state law purposes and, thus, cannot have members, each series has "associated" with it specified members, assets, rights, obligations, and investment objectives or business purposes. Members' association with one or more particular series is comparable to direct ownership by the members in such series, in that their rights, duties, and powers with respect to the series are direct and specifically identified. If state statutory requirements are satisfied, the debts, liabilities, and obligations of one series generally are enforceable only against the assets of that series and not against assets of other series or of the series LLC.

C. Guidance

Treas. Reg. § 301.7701-1(a)(4) (as amended in 2009).

Provides that certain single-owner organizations may be disregarded as entities separate from their owners.

Treas. Reg. § 301.7701-2 (as amended prior to 2007).

Previously provided that single-member LLCs that do not elect to be taxed as a corporation will be disregarded for all federal tax purposes.

Treas. Reg. § 301.7701-2 (as amended in 2007).

Provides that disregarded single-member LLCs will no longer be disregarded for excise taxes (effective for tax periods after January 1, 2008) or for employment taxes (effective for tax periods after January 1, 2009).

T.D. 9356, 2007-2 C.B. 675.

Amended Treas. Reg. § 301.7701-2 to provide that single-member LLCs will no longer be disregarded for excise taxes (effective for tax periods after January 1, 2008) or for employment taxes (effective for tax periods after January 1, 2009).

Treas. Reg. § 301.7701-3 (as amended in 2006).

Implements the election process under the check-the-box regulations. It specifies the default status where an election is not made by an LLC (the default status being partnership classification in the case of a multi-member LLC and disregarded entity status in the case of a single-member LLC).

Rev. Rul. 99-5, 1999-1 C.B. 434

Describes the federal income tax consequences of conversion from a disregarded entity to a partnership.

Rev. Rul. 99-6, 1999-1 C.B. 432

Describes the federal income tax consequences of conversion from a partnership to a disregarded entity.

Rev. Proc. 2002-69, 2002-2 C.B. 831.

Provides guidance on the classification for federal tax purposes of LLCs that are wholly-owned by a husband and wife as community property.

Rev. Rul. 2004-41, 2004-1 C.B. 845.

Provides that even though a multi-member LLC is classified as a partnership for federal tax purposes, the Service may not rely on state partnership law to pursue the members for the excise or employment tax incurred by the LLC. In pursuing general partners for partnership liabilities, the Service relies on state law concerning the liability of general partners for partnership debts. State laws governing LLCs specifically state that members are not liable for debts of the LLC.

Notice 99-6, 1999-1 C.B. 321 (obsoleted by T.D. 9356, 2007-2 C.B. 675 for tax periods after January 1, 2009).

Allowed the employment taxes of disregarded LLCs to be reported under either the name and TIN of the LLC or the name and TIN of the owner. The notice, however, made clear that the single-member owner remained liable for the employment taxes.

IRS CCA 200235023, 2002 IRS LEXIS 66

Determined that an assessment against a disregarded LLC is a valid assessment against the owner. It further determined that where the LLC is disregarded and the owner is treated as the taxpayer, only the owner's assets, and not the LLC's assets, can be pursued in collection of the tax.

IRS CCA 200216028, 2002 IRS CCA 21

Determined that where the Service makes an assessment in the name and TIN of a disregarded LLC and issues a CDP notice to the LLC, the Service should issue another notice to the single-member owner.

IRS CCA 200840001, 2008 IRS CCA LEXIS 86.

Discusses the 2007 amendments to the regulations in the context of analyzing the doctrine of successor liability and states that Notice 99-6 is obsolete for employment taxes for periods after January 1, 2009.

IRM 5.1.21 General Collecting Procedures—Collecting from Limited Liability Companies.

Limited Liability Companies for Revenue Officers—Resource Guide (Rev. 12-09), Catalog Number 40922H.