2018 GL1 - Lesson 14
COLLECTION FROM DECEDENTS AND DECEDENTS' ESTATES
(February 2018)

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I. INTRODUCTION

The preceding lessons in the GL1 program cover many of the basic tools used by the Service to collect balance-due accounts involving federal income tax liabilities, e.g., federal tax liens and levies. However, it is usually an analysis of state law that is the first step in identifying what property is subject to the section 6321 federal tax lien (FTL) or other collection. This is because state law determines whether or not a taxpayer has an interest in specific property. Aquilino v. United States, 363 U.S. 509 (1960). Federal law then determines whether any state-created interests constitute "property" or "rights to property" to which the FTL lien may attach. See United States v. Bess, 357 U.S. 51 (1958). Moreover, it is not uncommon for a taxpayer to die before the Service finishes its enforced collection efforts, and the taxpayer's death can have a profound effect on the state-derived rights in and to the property from which the Service is seeking to collect. This lesson examines the common complications, both substantive and procedural, that arise when a taxpayer with a balance-due account dies. The Service refers to collection modules for taxpayers who have died as "Decedent Accounts."

Decedent Account liabilities may include all types of taxes for which an individual may be liable, including excise, employment, business taxes from a sole proprietorship, as well as interest and penalties. They include assessed tax deficiencies whether determined pre- or post-mortem. Decedent Accounts do not, however, include estate taxes, because the estate tax liability arises on death and, therefore, the decedent was never liable during life for paying taxes on his or her own estate. Accordingly, the special tools in section 6324 do not apply to Decedent Accounts; they are tools for transfer taxes (estate and gift) only.

A liability for a gift tax may be a Decedent Account. When a taxpayer-donor dies before paying a gift tax liability, the taxpayer-decedent's estate becomes liable for the gift tax. Treas. Reg. § 25.2502-2. The section 6324(b) gift tax lien is a special tool available to collect the gift tax against the particular property that was gifted, because this property typically would not be included in the donor's estate. The Service may also collect a gift tax liability in the same manner that it may collect other unpaid liabilities after a taxpayer dies, e.g., by looking to the estate, fiduciary, and estate assets to satisfy the liability. Moreover, in the absence of a qualified estate representative, the beneficiaries of the estate are liable for and required to pay the tax to the extent of the value of what they took from the estate. Treas. Reg. § 25.2502-2.

Accordingly, the primary focus of this lesson is on those federal tax liabilities other than estate tax liabilities. The taxpayer's death is not a special case for the estate tax, because an estate tax liability arises, by definition, only after the taxpayer has died. Indeed, many problems associated with Decedent Accounts that involve, for example, pre-mortem assessed income tax liabilities, would not arise in the estate tax context, precisely because a prerequisite to the estate tax lien regime is the taxpayer's death. See sections 6324[1] and 2033 (establishing an estate tax lien on a decedent's "gross estate" that both springs into existence on the date of death and that includes the decedent's property valued, generally, as of the date of death).

The Internal Revenue Manual addresses Decedent Estates in Part 5.5. You should review these provisions and be familiar with their scope. Publication 559, *Survivors, Executors, and Administrators*, provides information to stakeholders on preparing and filing returns.

II. OBJECTIVES

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

- Protect the Service's ability to collect when a taxpayer dies
- Explain the collection tools available to the Service when no federal tax lien arises on assessment because of the prior death of the taxpayer and transfer of the taxpayer's property to third parties
- Trace a federal tax lien that arose in property (or rights to property) of a taxpayer during the taxpayer's life, after the taxpayer dies
- Distinguish between probate and non-probate assets
- Explain the significance of a grantor trust

III. IMPACT OF TAXPAYER DEATH ON COLLECTION

A. Decedents' Estates and Probate

1. Estate

The decedent's estate is comprised of the property that an individual leaves after death. It includes the real and personal property that the individual possessed at the time of death as well as that which passes to his or her heirs or testamentary beneficiaries. *See* BLACK'S LAW DICTIONARY (9th Ed. 2009). A decedent's estate comes into being on the date of death of the individual and it exists until the final distribution of estate assets to the heirs, creditors, and other beneficiaries of the decedent. An estate is a "person" separate and apart from the decedent. Section 7701(a)(1). Accordingly, an estate may itself be a taxpayer. An estate is taxed like a trust, and the income earned on estate assets must be reported on its own Form 1041, U.S. Income Tax Return for Estates and Trusts, if the estate

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

earned more than the $600 exemption amount during a tax year. Schedule K-1 is filed with the return and provided to beneficiaries that receive income from the estate.

2. Probate

"Probate" is the legal mechanism for processing and closing a decedent's estate. Probate proceedings are governed by state law. The purpose of the proceeding is to gather, account for, and distribute the decedent's assets. Probate proceedings may either be formal or informal. In informal proceedings, estate assets are not considered to be under control of the court. If there is no formal probate proceeding underway, the Service generally is free to engage in administrative collection, although it is always prudent to check local law. In a formal probate proceeding, however, estate assets are considered to be under the control or custody of the state probate court. The Service may not levy assets that are under the control or custody of a court without court permission unless the proceedings have progressed to such a point that the levy would not interfere with the work of the court. Treas. Reg. § 301.6331-1(a)(3). Section 6503(b) tolls the collection period while assets are under court control, plus 6 months.

State-law periods of limitation and "non-claim" statutes generally limit the time during which a decedent's creditors may file claims against an estate. Such provisions are ineffective against the federal government. United States v. Summerlin, 310 U.S. 414 (1940). However, as a practical matter, collection might (and often is) hampered when the government sits on its rights, because property distributions may be blessed by a court and there will not always be a lien for use in administrative collection. Accordingly, it is nearly always advisable to file a claim in a state probate court proceeding to preserve the government's best shot at reaching estate assets before they are dissipated. See I.R.M. 5.17.13.6. Because state probate courts may not be the ideal venue in which to raise collection controversies, tax claims may be removed to federal court. See IRM Part 5.5.2.10(4)(i), *Referral to Area Counsel for Judicial Action,* and IRM Part 25.3.3.3, *Removal of Action from State Court.* Notice of removal of a dispute over a federal tax assessment must generally be filed within 30 days of the Service's receiving a pleading raising the issue. Additionally, when the Service files a claim, it serves to puts the administrator, executor, or other fiduciary on notice of the government's claim, which is a prerequisite to collecting against the fiduciary personally under the personal liability provision of the federal priority statute (should the fiduciary then make a distribution in violation of the federal priority statute). See, 31 U.S.C. § 3713(b).

See the GL1 lesson on Transferee and Other Third Part Liability for a thorough discussion of the operation of the federal priority statute.

3. Probate Assets

Probate assets are those assets included in the gross estate by section 2033. In general, the probate estate includes any property that passes by will or by the laws of intestacy, and it also includes income or property paid to the decedent after death (e.g., a final paycheck). The probate estate does not include property that passes outside of probate, including: (1) survivorship property; (2) property placed in trust pre-mortem; and (3) property with contractually named beneficiaries (e.g., insurance contracts, brokerage and bank accounts, retirement accounts, etc.).

B. *Distinguishing Death from Timing-of-Death Issues*

The death of a taxpayer will affect the collection process in many ways. Many issues arise when a taxpayer dies regardless of when the taxpayer dies. For example, court rules generally provide for the proper captioning and re-captioning of docketed matters. See, e.g., T.C. Rule 63(a), *Death* (providing for substitution of the proper parties); Fed.R.Civ.Pro. 25(a), *Death* (providing that the court may order substitution of the proper party upon timely motion or else the matter must be dismissed). There are other collection issues that may or may not arise depending on when, during the collection process, the death occurs. For example, the assortment of property and rights to property to which a FTL may attach might vary based on when during the collection process a taxpayer dies. Fundamentally, however, the focus of collection is always on property. Because the death of a taxpayer affects the ownership and characterization of property, it is important to first understand how these attributes of property change when a taxpayer dies.

C. *Issues Common in all Decedent Cases*

Many issues arise that affect the service's ability to collect administratively when a taxpayer with a balance due account dies. Generally, this is because the object of collection – the taxpayer's property and rights to property - often will be subject to court administration. If a formal probate proceeding is commenced, the Service must honor the probate court's custody and control over the decedent's assets. For example:

a. Probate court approval is required for the distribution of assets.
b. Section 6332(a) provides that property subject to attachment or execution under any judicial process need not be surrendered to an IRS levy.
c. Permission of the probate court may be sought and obtained to permit enforcement action against estate property. Treas. Reg.

§ 301.6331-1(a)(3) generally requires a showing that administrative collection would not interfere with the court's administration of the estate.

d. Absent court approval, administrative collection (levy) should not proceed.
e. Section 6503(b) extends the CSED for the period that the Service is prohibited from collecting because assets are *in custodia legis*, plus 6 months.
f. DOJ may still begin an action in federal district court to reduce an assessment to judgment, but it may not execute that judgment against any undistributed probate assets without the consent of the probate court.

With respect to any pending non-administrative (i.e., court-involved) matters, the death of a taxpayer will affect the actions in other ways. For example, as mentioned in the preceding section, the substitution of parties may be required to avoid the dismissal of the matter. In pre-assessment litigation, e.g., involving a deficiency, TFRP, or other pre-assessment determination, the death of a taxpayer might have a profound effect on the taxpayer's property, which may affect the ultimate collection potential of the matter. For example, a grantor trust might become irrevocable, and significant assets might pass by operation of law to successors in interest. It is important to identify and develop collection issues early in a controversy to better be able to make informed decisions regarding litigation strategy, settlement negotiations, and case theories.

D. Issues that are Time-of-Death Specific

1. Where was the Liability in the Collection Process?

When a taxpayer dies before enforced collection can resolve a balance-due account, the first investigation should be to determine precisely where the liability was in the collection stream when the taxpayer died. Recall that the FTL does not arise until the date of assessment. Section 6321. Accordingly, a critical inquiry will be whether the liability was assessed pre- or post-mortem. In general, under state law, a taxpayer will cease to own property as of the date of his or her death. As a result, a lien resulting from a post-mortem assessment might not attach to any property because the assessment identifies a taxpayer who already is deceased.

The following discussion addresses collection issues that are implicated by the relative timing of the death of a taxpayer vis-à-vis the assessment of the taxpayer's tax liability. But keep in mind the death of a taxpayer does not impact liability. This concept extends to deficiencies, as well. A taxpayer's death does not extinguish liability for any deficiency arising with respect to a return. See Estate of Kahr v. Commissioner, 414 F.2d 621 (2d Cir. 1969). The service may still examine all of the decedent's tax returns and assert deficiencies until barred by any applicable statute of limitations. See I.R.C. § 6201. In addition, the representative of a decedent's estate may request a prompt assessment of the decedent's tax liability pursuant to section 6501(d).

2. Pre-Mortem FTL Attachment

The FTL arises pursuant to the occurrence of several different events that typically span several days or weeks (i.e., the making of an assessment, the issuance of notice and demand, and the neglect or refusal to pay). This is empirically true, regardless of the fact that the period of the lien begins retroactively on the date of assessment. See section 6322. Accordingly, it is worth examining the consequences of a taxpayer dying within each relevant time period. We will begin with the simplest cases in which the assessments are made and the FTLs have attached before the taxpayers have died.

a. **All 6321 Elements Occur Before Death**

If all of the 6321 elements are satisfied before a taxpayer dies, then the FTL will already be attached to all of the taxpayer's property and rights to property as of the taxpayer-decedent's date of death. In these instances, the death of a taxpayer will have less of an effect on the Service's ability to collect administratively. Transferred property to which a FTL has attached remains subject to collection in the hands of the transferee, regardless of the transferor's liability. See United States v. Bess, 357 US 51 (1958); United States v. American Caramel, 172 F.Supp. 95 (E.D. Pa. 1959). However, several consequences of a taxpayer's dying during this period following the creation of the FTL may be significant and are worth examining. The most notable is what happens to a taxpayer's interest in jointly titled property. Most jurisdictions recognize tenancies by the entirety and treat "entireties properties" as being owned by the unity of a husband and wife (as opposed to each spouse individually owning overlapping interests). Historically, these entireties interests were beyond the reach of the creditors of either (individual) spouse, including the federal government. See, e.g., Moore v. Glotzbach, 188 F.Supp. 267 (E.D. Va.1960), abrogation recognized by United States v. Bowser, 768 F.Supp.2d 846 (E.D. Va. 2011). On April 17, 2002, the Supreme Court in United States v. Craft, 535 U.S. 274 (2002) held that the section 6321 FTL attaches to the rights of a taxpayer in property held as a tenancy by the entirety, even though local Michigan law insulated entireties property from the claims of creditors of only one spouse. The Court stated that while state law determines what rights a taxpayer has in property, federal law determines whether the state-defined rights are "property" or "rights to property" for purposes of section 6321.

Following the decision in Craft, the Service issued IRS Notice 2003-60 to announce how the decision would be implemented. The notice explains that if a taxpayer's interest in entireties property is extinguished by operation of law at the death of the taxpayer, then there is no longer an interest of the taxpayer to which the federal tax lien attaches. When a taxpayer dies, the surviving non-liable spouse takes the property "unencumbered by the federal tax lien." If, however, state law provides for the continuation of liens on property after the death of a debtor joint tenant, then a pre-mortem attached FTL would remain on such property after the death of the taxpayer-joint-tenant. See, e.g., United States v. Librizzi, 108 F.3d 136 (7th Cir. 1997). In Librizzi, the section 6321 FTL arose and the Service filed notices of federal tax liens, before the taxpayer died. The taxpayer's wife had held real property with her husband as joint tenants with rights of survivorship. She conceded that the FTL attached to her husband's one-half interest in the property and that, when he died, she acquired the property subject to the FTL. The controversy was whether the value of the FTL interest should be calculated as of the date of the taxpayer's death or the time of the suit (the fair market value of the property had substantially appreciated during the interim).[2]

Importantly, the converse is also true. When a non-liable-spouse predeceases a taxpayer-spouse, the property ceases to be held in a tenancy by the entirety and the taxpayer takes the entire property in fee simple. The FTL attached to the taxpayer's interest in the property would then be attached to the entire property. Recall that the FTL attaches to after-acquired property.

The rule that the FTL does not survive the death of the taxpayer does not apply if the entireties estate terminated before the taxpayer-spouse died. For example, if the married couple conveyed the entireties property to a third party, then the FTL would continue to encumber a one-half interest in the hands of the transferee and would not be affected by the subsequent death of the taxpayer spouse (or, indeed by the death of either spouse).

It is important to know how the death of a taxpayer affects a NFTL and section the 6320-lien CDP provisions. In Estate of Brandon, 133 T.C. 83 (2009), the Service properly assessed a section 6672 trust find recovery penalty against the petitioner a few months before the petitioner died in a motorcycle accident. After the executrix informed the RO of this event, the RO issued to petitioner a Letter 3172, *Notice of federal Lien Filing and Your Right to a Hearing* (a section 6320 CDP-lien notice), and then properly recorded a NFTL on petitioner's property. The petitioner's estate timely filed a CDP hearing request and argued that petitioner no longer had any property interests after the date of his death and, accordingly, the post-mortem-filed NFTL was invalid. The Tax Court disagreed. It recognized that once the FTL attaches to property or rights to property, it remains attached even after a taxpayer dies. The opinion explains the validity of a NFTL depends solely on satisfaction of the requirements in section 6323(f). The Tax Court further held that a section 6320 CDP-lien notice does not need to be received to be valid. Accordingly, the NFTL was valid and the lien notice complied with section 6320(a).

b. Not All 6321 Elements Occur Before Death

The period of the FTL begins on the date of assessment. Section 6322. But the elements necessary to give rise to the FTL span the period of time that begins on the date of assessment and that does not end until after the taxpayer neglects or refuses to

[2] Although the Service concedes the "disappearing" interest theory for entireties property (and, perhaps, all survivorship property), this is not the case with the section 6324 estate tax lien, which attaches to all property included in the federal estate tax gross estate irrespective of whether there is a residual interest requiring probate. Section 2040 explicitly includes the value of joint interests in the estate. The only disappearing interest, therefore, is a pre-mortem FTL interest and only when there is a non-liable surviving joint owner.

pay. Accordingly, there will be situations in which there is a pre-mortem assessment but a post-mortem neglect or refusal to pay. This means that during the days that follow assessment but that predate the date of the taxpayer's death, there would be no FTL. But, following the neglect or refusal to pay, there would be a FTL and such FTL would be treated as having arisen on the (pre-mortem) date of assessment. The death of a taxpayer during this gap period (between assessment and the neglect or refusal to pay) may present complicated FTL issues because property might be transferred (as a matter of law) to third parties on the date of death. The position of the Service is that the FTL arises as of the date of assessment and that this presents no more of a challenge than the existence of the "secret" section 6321 lien in a non-decedent situation. The problems that third parties might encounter on account of the non-public nature of the section 6321 FTL are addressed and mitigated by the statute (e.g., the section 6323(a) horsemen and 6323(b) superpriority provisions) and it is there that such persons need to find relief.

The section 6303 notice and demand required under section 6321 may be satisfied (after a taxpayer has died) by filing a proof of claim with the probate court. United States v. Ettelson, 159 F.2d 193, 196 (7th Cir. 1947). A proof of claim may be filed by using a Form 4490. See I.R.M. 5.5.2.3.3. A state "nonclaim" statute establishing the period of time in which creditors of a decedent must file a claim or be barred from proceeding against either the fiduciary or any beneficiaries does not apply to the government with respect to tax claims against a decedent. United States v. Summerlin, 310 U.S. 414 (1940).

3. Post-Mortem FTL Attachment

On the death of a taxpayer, a decedent's probate estate comes into being. Accordingly, although dead people do not own property, there often will be property that formerly belonged to the deceased taxpayer and that has not (yet) been transferred to a creditor, beneficiary, or other person. Such property will comprise the decedent's probate estate. Moreover, the estate will "step into the decedent's shoes" for many purposes. Consequently, estates may often exercise the decedent-taxpayer's rights to bring other property into the estate (and these rights are also considered to be "property or rights to property" to which the FTL may attach).

The Service may always act as any other creditor of a deceased taxpayer and participate in any probate proceeding whether formal or not. Because of the limitations on administrative collection when assets are in the control or custody of a court, the preferred method for collection usually will involve participation in some court proceeding. However, as for administrative collection, if a FTL arises after the death of a decedent, it should attach to whatever property is in the estate as of the date of assessment. Accord, *Legal Reference Guide for Revenue Officers*, IRM Part 5.17.13.9.1(5). Accordingly, it is important to distinguish:

- the decedent's gross estate (an estate tax concept that encompasses all property the decedent owned or had certain interests in or control over at the time of his death; the gross estate includes both probate and non-probate property), from
- the decedent's probate estate (which is any property in which the decedent had an interest at death where the death did not extinguish that interest; for example, by immediately vesting ownership in an heir or other beneficiary).

For probate property, the analysis of post-mortem FTL attachment is straightforward. An estate is a person (section 7701(a)(1)) that (under state law) is liable to pay the debts of the decedent. Accordingly, a section 6321 assessment made against the estate will give rise to an assessment lien that will attach to all of the property and rights to property of the person (the estate) liable to pay the tax.[3] Subsequent recording is required to defeat most transferees and creditors. Cf. AOD -1975-15, In Re: Plumb, Deceased (recognizing that "[s]ince the taxes were not assessed until after the taxpayer's death, there is [sic] no tax lien priority rights since the taxpayer at death ceased to have property or property rights to which a lien could attach….").

This is why the timing of tax assessment becomes critical in identifying the assets to which the section 6321 FTL will attach. A post-mortem assessed FTL will attach only to those assets in the probate estate at the time of assessment; i.e., it would not attach to any non-probate assets or any probate assets that the estate properly distributed before the date of assessment. If the decedent planned well and left no probate assets, there may be nothing left to which the FTL may attach. Accordingly, the investigation becomes whether there remained property in the probate estate as of the date of assessment (whether or not there is a formal probate proceeding).

Consider United States v. Ritter, 558 F.2d 1165 (4th Cir. 1977). In Ritter, the government sought to foreclose the FTL attached to the taxpayer's interest in the corpus of a testamentary trust settled by the taxpayer's grandparents. The Service assessed the taxpayer's tax liabilities post-mortem, and therefore no FLT attached to the taxpayer's rights to property before his date of death. The issue was whether the taxpayer's interest in the trust (his "rights to property") had passed automatically to the taxpayer's heirs as of the date of the taxpayer's death, or whether the property instead had become probate estate property subject to the demands of the taxpayer's creditors. The court looked to the operation of West Virginia state law and held that the interest in the trust became property of the estate upon the death of the taxpayer and did not pass to the taxpayer's heirs automatically on the taxpayer's death. The opinion makes clear that the FTL existed even though the Service assessed years after the taxpayer died (the Service made post-mortem assessments of income tax liabilities for which the taxpayer had failed to file returns). The government sought to reduce the assessments

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[3] As a technical matter, it is a liability that is assessed, not a taxpayer. Accord United States v. Galleti, 541 U.S. 114 (2004). When a taxpayer dies, module identifiers may be amended to include "DECD" as an indicator that the taxpayer is deceased. For a more thorough discussion of the taxpayer "identification" requirement for assessment purposes, see the GL1 lesson on Assessments.

to judgment and to foreclose the FTL against the taxpayer's proportional share of the trust assets as property "belonging to (him)," though the court explicitly recognized that the property technically belonged to the administratrix of the taxpayer's estate.

a. Special Issues Involving Trusts

For the estate tax, although not a Decedent Account, a common issue is whether or not trust assets (meaning assets that the taxpayer-decedent contributed to a trust) may be included in the taxpayer-decedent's "gross estate" on the estate tax return or after examination. The "grantor" trust is an income tax concept. If a grantor retains powers, described in sections 671 through 677, over the trust or the trustee, the grantor is treated as the owner of the trust. The income tax effect of this is that the grantor must include the trust's income, deductions and credits on the grantors tax returns. The types of powers described in sections 671 through 677 include, for example, the power to revoke the trust, the power to act as the trustee, and the power to borrow money from the trust for less than adequate consideration. Even if a trust, by its terms, is not revocable, retention of these other powers make the trust a grantor trust.

Trusts revocable by the decedent and trusts in which the decedent retained certain interests at the date of death are included in the gross estate for purposes of calculating the estate tax and for purposes of the section 6324(a) estate tax lien. Generally, if the decedent retained a right to revoke the trust or retained any powers or economic interests in an irrevocable trust before death, then under sections 2036-2038, all of the trust's assets (not just the decedent's interest in the trust) are included in the gross estate and are subject to the section 6324(a) estate tax lien. The trustee of a trust included in a decedent's gross estate is personally liable under section 6324(a)(2) for up to the amount of the trust's assets that are included in the gross estate. While assets transferred to an irrevocable trust in which the decedent retained no interest are not included in the gross estate and thus are not subject to the section 6324(a) estate tax lien, the contribution of assets to such trusts may have given rise to a gift tax liability, so the section 6324(b) lien may attach. The terms of many estate planning documents require trusts to contribute to or to cover the debts, taxes, and final expenses of the decedents. Such provisions may provide another collection avenue.

For non-estate tax collection, the critical question, as usual, is whether an assessment lien attached to the trust assets. For pre-mortem assessments, if the taxpayer had a present interest in the trust at the time of assessment, it should qualify as property or rights to property, and the section 6321 assessment lien should attach. This would apply to grantor trusts, living trusts, and revocable trusts (a species of grantor trust), and certain irrevocable trusts that meet the grantor trust definitions. For post-mortem assessments, however, a trust by definition is not part of the decedent's probate estate, and the FTL would not attach to any trust assets.[4] Living trusts often include language

[4] In rare cases (usually mistakes), the probate estate will be the beneficiary of the decedent's trust, and the FTL would attach to the trust assets. The same result applies to life insurance proceeds, retirement accounts, and other assets that typically transfer automatically by contract – if the estate is the

obligating the trustee to pay the decedent's last debts (which would include income, employment, and gift taxes) as well as any estate or gift taxes that may arise on death. These obligations are enforceable and can be very helpful in collecting non-estate taxes from trusts.

E. Gift Taxes

As discussed in the introduction, above, a taxpayer-decedent's estate becomes liable for any gift tax liability of the decedent. As is the case with other liabilities, if the Service makes a pre-mortem assessment of a gift tax liability, the section 6321(a) assessment lien will attach to all of the donor's property and rights to property. If the Service makes a post-mortem assessment, the section 6321 lien would attach only to the assets of the estate that remain in the estate (the probate assets) as of the assessment date. Additionally, the section 6324(b) gift tax lien will attach to the gifted property, which typically would not be included in the estate. This additional potential source of collection, as well as any potential collection of a donee's personal liability, should be considered when determining the best method for applying other non-designated payments that properly may be applied to other (non-gift tax) accounts. Donees are liable for the entire gift tax (up to the value of the gift, including appreciation), not just the gift tax due on their particular gift. La Fortune v. Commissioner, 263 F.2d 186, 194 (10th Cir. 1958). Gift tax liabilities present special application of payment issues (the Service may and will apply undesignated payments in the order that best maximizes collection) because the government need not pursue a donor before collecting against a donee. Moreover, the government is not required to pursue multiple donees in any particular order (or, indeed, to pursue all of them). United States v. Davenport, 484 F.3d 321, 325 (5th Cir. 2007). See also, United States v. Botefuhr, 309 F.3d 1263, 1281, n.13 (10th Cir. 2002). See the GL1 lesson on Special Tax Liens for a thorough discussion of the gift tax lien, a donee's personal liability, and the "like" lien that may attach to all of a donee's property and rights to property (other than that which represents the gift).

IV. COLLECTING FROM DECEDENT'S ESTATES

A. Probate Documents

Below is a list of common probate documents identified in IRM Part 5.5.1.4 that the Service reviews for information regarding the decedent, the fiduciary, and the distribution of assets that may be useful for assessment and collection:

1. Death Certificate - provides date of death, where taxpayer died, cause of death and other data pertaining to the deceased.
2. Will - a document containing instructions and wishes as to how property and assets are to be distributed after death.

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beneficiary.

3. Letters Testamentary - a document issued by the probate court that gives an executor the power to take control of and distribute a deceased person's property.
4. Inventory and Appraisement - a listing and valuation of properties owned by the decedent.
5. Annual Accounting - a document that lists assets and liabilities, it reflects the condition of the estate as time progresses.
6. Status Reports - show claims and distributions. Claims filed by creditors can be a source of information about insolvency or encumbrances against property.
7. Bond - a probate bond is a bond issued on the performance of an administrator or executor. Its purpose is to protect heirs and creditors from being harmed by the negligence or malfeasance of the administrator or executor. Depending on circumstances, a bond may be levied if the executor pays lower priority creditors ahead of federal taxes due.

B. *Probate Assets*

If a FTL encumbers probate assets and is not discharged or released, then it generally remains attached after distribution or sale and the Service may administratively collect against the property in the hands of the beneficiary or purchaser in accordance with section 6323 (providing that the lien may not be valid as against (1) the four parties listed in section 6323(a) unless and until the Service files notice of the FTL in accordance with section 6323(f) and (2) the various superpriorities). Accord United States v. Bess, 357 U.S. 51 (1958). It is common for real estate to be distributed to an heir and then sold. An assessment lien may be traced to such property through the chain of title and will prime the interest of a purchaser as long as the Service filed a NFTL before the new owner became a purchaser.[5]

The most common probate property for collection is cash and securities distributed to beneficiaries. Because cash and securities are fungible, it is often necessary to obtain a transferee assessment under section 6901 against the beneficiary before taking administrative enforcement action. Levy is only permissible on the specific assets to which a FTL is attached (i.e., only if the cash or securities are readily identifiable).

C. *Non-probate assets*

As discussed above, non-probate assets are assets that are included in the federal estate tax gross estate by sections 2034-2042, but that do not require probate because legal title transfers irrespective of whether there is a will or probate. The section 6321

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[5] Note that the section 6324(a) “secret” estate tax lien may also encumber such property, even though it’s not apparent in the title records. Caveat emptor, as the Service may collect against the property, even in the hands of a bona fide purchaser. A section 6324(a) lien interest even primes a later-created security interest (for example, the purchaser’s lender’s mortgage interest), if the section 6324(a) lien interest arose first. As discussed above, these types of collection issues should be considered when making decisions regarding the application of undesignated payments.

assessment lien attaches to all of a taxpayer's property or rights to property as of the date on which the FTL arises, which would be the date of assessment. This will include all of the decedent's property and rights to property if the assessment is made pre-mortem. Indeed, this will include all of the decedent's property and rights to property as of the later date of death that may not even have existed as of the date of the pre-mortem assessment, because the FTL attaches to after-acquired property. If the assessment is made post-mortem, however, then the assessment lien will not attach to non-probate assets because the decedent (and more technically, the estate, which would then be the taxpayer) would no longer have a property interest such non-probate property. This is also true for the assessment of an estate tax liability.[6]

V. Other considerations

A. Transferee liability

Section 6901 provides the procedure for making transferee assessments against the transferee/beneficiary of an estate. Section 6901(a)(1)(B) covers fiduciary liability for tax due from the estate of a taxpayer, decedent, or donor. Note that it does not extend to the trustee of a trust. The Service may only collect from a trustee as a transferee, not as a fiduciary (which makes sense when you consider that a trustee is not a fiduciary of a decedent's estate, at least not by virtue of the assumption of the role of trustee). If the executor and trustee happen to be the same person, different liabilities may attach to the different roles filled by the same individual.

Section 6324(a)(2) provides that when estate taxes are not paid when due, any person who receives a nonprobate asset (any transferee) becomes personally liable for the taxes to the extent of the value of the transferred assets at the time of the decedent's death. Notice and demand should be given to the transferee.

B. Fiduciary liability

Under the federal insolvency statute, 31 USC § 3713(b), a fiduciary is personally liable to the extent of payments or distributions made in violation of federal priority. Fiduciary liability extends to Decedent Accounts (income, gift, TFRP, etc.), the estate's income tax liability, and estate taxes. "Neither a discharge of an executor of an insolvent estate, an approval of his account, nor the distribution of assets, relieve[s] him from liability for debts due to the United States." U.S. v. Weisburn, 48 F.Supp. 393, 397 (E.D. Pa. 1943). However, certain distributions are permitted by administrative grace and judicial decisions, including reasonable administrative expenses, funeral expenses, and family

[6] It is important to distinguish the assessment lien that arises on assessment of an estate tax liability from the estate tax lien that arises on death to secure the estate tax liability. It is only the assessment lien (the section 6321 lien) that fails to attach to non-probate property because the estate tax assessment lien only attaches to property that remains in the estate; it does not attach to property that the estate already transferred or that transferred by operation of law or contract before the assessment. The section 6324(a) estate tax lien will attach to the decedent's entire federal estate tax gross estate, including non-probate assets that are included in that gross estate. The estate tax return, Form 706, should identify whether there are non-probate assets.

allowances. See the GL1 lesson on Transferee and Other Third Part Liability for a thorough discussion of both transferee and fiduciary liability.

C. Probate bonds

A bond may be issued to secure the performance of an administrator or executor. The bond requirement is intended to protect heirs, beneficiaries, and creditors from harm from the negligence or malfeasance of the fiduciary. Under certain circumstances, a bond may be levied if the fiduciary pays lower priority creditors ahead of higher priority debts, like federal taxes. In a supervised probate administration, after final distribution of the estate's assets, the fiduciary files an affidavit of closing with the probate court. When the estate is closed, the probate court notifies the surety company that the fiduciary has complied with court orders, and the bond is terminated. Cases may be referred to DOJ to file suit under state law to enforce a fiduciary's surety bond.

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