2018 GL1 - Lesson 1
ASSESSMENT
(June 2018)

CONTENTS

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, including interest, additional amounts, additions to tax, and penalties. I.R.C. § 6201.[1] An assessment is a bookkeeping entry recording a taxpayer's liability as 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.

[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 (i.e., the "recordation"). 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)

Note: An assessment can be made against a corporate taxpayer that has been dissolved or had its corporate status voided under state law. Section 6212(b); see Bloomington Transmission Services, Inc. v Commissioner, 87 T.C. 586 (1986).

- 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. See Brafman v. United States, 384 F.2d 863, 867 (5th Cir. 1967) (the assessment officer must actually sign the record of assessments in order for it to constitute an assessment.); but see United States v. Scott, 290 F.Supp.2d 1201, 1208 (S.D.Cal. 2003) (declining to follow Brafman and holding that Form 4340 provides a rebuttable presumption that assessment was properly made). 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. In Roberts v. Commissioner, 118 T.C. 365, 371-72 (2002), the Tax Court explicitly approved of the migration of the assessment function from the manually prepared Forms 23C to the computer and RACS 006, finding that the new system complies with the requirements of both section 6203 and Treasury regulation section 301.6203-1.

An assessment that substantially, but not strictly, complies with the above requirements may nevertheless be valid as long as the taxpayer is not misled. See Paisner v. O'Connell, 208 F. Supp. 397, 400 (D.R.I. 1962) (finding that an assessment was valid even though the record of assessment erroneously referenced an excise tax different than the one for which the taxpayer was liable); Wood Harmon Corp. v. United States, 206 F. Supp. 773, 777 (S.D.N.Y. 1962) (finding that an assessment for a full calendar year was valid even though the record of assessment referred to a year ending on July 30).

While many liabilities have a distinct taxable period, most notably the income tax that is assessed on the basis of the taxpayer's taxable year, some liabilities need not be assessed with reference to a discreet taxable period. In the context of the Trust Fund Recovery Penalty (TFRP), section 6672 provides that a responsible person shall be "liable to a penalty equal to the total amount" of the unpaid withholding taxes, rather than distinct, separate amounts based upon particular tax periods. The Service may make a lump sum assessment for TFRP liabilities spanning several periods. Taylor v. I.R.S., 69 F.3d 411, 419 (10th Cir. 1995); Stallard v. U.S., 12 F.3d. 489 (5th Cir. 1994). Similarly, section 6700 penalties for promoting abusive tax shelters do not require an assessment based on a specific taxable period. In re MDL-731 Tax Refund Litig. of Organizers & Promoters of Inv. Plans Involving Book Props. Leasing, 989 F.2d 1290, 1300-02 (2d Cir. 1993); Sage v. U.S., 908 F.2d 18, 22 (5th Cir. 1990); Planned Invs. Inc. v. U.S., 881 F.2d 340, 344 (6th Cir. 1989); Gates v. U.S., 874 F.2d 584, 588 (8th Cir. 1989); see also Gardner v. Commissioner, 145 T.C. 161, 180-183 (2015). Other liabilities that need not be assessed on the basis of a distinct taxable period include, *inter alia*, section 6701 penalties for aiding and abetting the understatement of a tax liability, section 6702 frivolous submission penalties, and section 48D recapture liabilities.

B. *Assessment Provisions*

- **Section 6201** Assessment authority
- **Section 6202** Establishment by regulations of mode or time of assessment
- **Section 6203** Method of assessment
- **Section 6204** Supplemental assessments
- **Section 6205** Special rules applicable to certain employment taxes
- **Section 6206** Special rules applicable to excessive claims under certain sections
- **Section 6207** Cross references
- **Section 6213** Restrictions applicable to deficiencies; petition to Tax Court
- **Section 6215** Assessment of deficiency found by Tax Court
- **Section 6225** Assessments made only after partnership level proceedings are completed
- **Section 6229** Period of limitations for making assessments [attributable to partnership item]
- **Section 6342(a)(2)** [Assessment following] Application of proceeds of levy
- **Section 6501** Limitations on assessment and collection
- **Section 6502** Collection after assessment
- **Section 6503** Suspension of running of period of limitations

- **Section 6601(e)(1)** Interest on underpayment, nonpayment, or extensions of time for payment, of tax [treated as, and assessable as tax]
- **Section 6665** Applicable rules [additions to tax treated as tax]
- **Section 6671(a)** Rules for application of assessable penalties
- **Section 6851** Termination assessments of income tax
- **Section 6852** Termination assessments in case of flagrant political expenditures of section 501(c)(3) organizations
- **Section 6861** Jeopardy assessments of income, estate, gift, and certain excise taxes
- **Section 6862** Jeopardy assessments of tax other than income, estate, gift and certain excise tax
- **Section 6863** Stay of collection of jeopardy assessments
- **Section 6867** Presumptions where owner of large amount of cash is not identified
- **Section 6871** Claims for income, estate, gift, and certain excise taxes in receivership proceedings, etc.
- **Section 6872** Suspension of period on assessment
- **Section 6901** Transferred Assets
- **Section 7429** Review of jeopardy levy or assessment procedures
- **Section 7501** Liability for taxes withheld or collected
- **Section 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 section 6213. Section 6201(e). Generally, the Service must mail the taxpayer a notice of deficiency (as defined in section 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. The Service can also make an immediate assessment of tax in cases involving flagrant political expenditures of section 501(c)(3) organizations. Section 6852. 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. Section 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. Any such assessment, however, must be made within the period of limitations provided in in section 6501(a).

Although section 6201(a)(3) permits the assessment of the full amount of overstated prepayment credits, if a refund has not been paid to the taxpayer at the time the Service discovers the overstatement, the Service may instead adjust the taxpayer's account by simply reversing the overstated prepayment credit, even if the applicable period of limitation has lapsed. This reversal corrects the Service's records to reflect the remaining balance due that is subject to the administrative collection mechanisms that stem from the initial valid assessment. If a refund has been issued to the taxpayer, however, the Service may only adjust the taxpayer's account by reversing the overstated prepayment credits to the extent of any valid assessment previously made that has not yet been collected. Any overstated prepayment credits that have been erroneously refunded to the taxpayer <u>must</u> be timely assessed pursuant to section 6201(a)(3) before the Service may use its administrative collection powers to collect the improperly claimed credits.

3. **Restitution**

In criminal cases, under 18 U.S.C. § 3556, the defendant may be ordered to pay restitution to the Internal Revenue Service for a tax-related loss, or the defendant may agree to pay restitution as part of a plea deal. Under section 6201(a)(4)(A), the Service may assess and administratively collect the amount of restitution under an order of restitution for failure to pay any tax imposed under Title 26, as if the amount of restitution were a tax. The restitution-based assessment cannot be made until the appeal period for the restitution order expires. Section 6201(a)(4)(B). The statute of limitations on assessment does not apply to restitution-based assessments. Section 6501(c)(11). Once the restitution amount is assessed, the 10-year statute of limitations on collection applies pursuant to section 6502(a). The restitution-based assessment is not subject to deficiency procedures. Section 6213(b)(5). The existence or amount of the assessed restitution may not be challenged. Section 6201(a)(4)(C). For more information on restitution-based assessments, see Chief Counsel Notices CC-2013-012 and CC-2011-018.

4. Math or Clerical Errors

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

- An addition, subtraction, multiplication or division error 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 entry on a return claiming a credit under sections 24, 25A, or 32 for a taxable year for which the credit is disallowed under sections 24(g)(1), 25A(i)(7)(A), or 32(k)(1);
- 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.
- An omission of information which is required to be supplied on the return to substantiate an entry on the return; and
- An omission of a correct taxpayer identification number under sections 21, 24(e), 25A(g)(1), or 32 that is required to be included on a the 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).

5. 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. Section 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), 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.

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 of those liabilities subject to those procedures. Transferee and fiduciary liability is discussed in Lesson 19.

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 n.6 (1999) (citing Midland Mortg. Co. v. Commissioner, 73 T.C. 902, 907 (1980); 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). Any tax owing but unreported after the Service makes a termination assessment under section 6851(a) is also a deficiency. Laing v. United States, 423 U.S. 161 (1976). Note that 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 payment, 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 assessment and 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 the taxpayer 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. <u>Scar v. Commissioner</u>, 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. <u>See</u> section 6212; IRM 4.8.9.15.3(4).

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 on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*, may be signed by the taxpayer as a matter of right at any time. Section 6213(d). Interest stops 30 days later, <u>if</u> notice of the deficiency and demand for payment have not been made. <u>See</u> 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); Rolfs v. Commissioner, 135 T.C. 471, 482-484 (2010).
>
> 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 with respect to the liability of an **individual**, the Service must initially produce evidence with respect to the penalty before the general burden of proof rules apply (the "burden of production"). Section 7491(c). The Service is not able to rest on the presumption of correctness if it does not provide sufficient evidence relating to penalties. See Higbee v. Commissioner, 116 T.C. 438, 446 (2001).

The burden of proof is imposed on the Service on a new factual 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 was engaged in an activity which is otherwise illegal." Weimerskirch v. Commissioner, 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, and 4.15.1 through 4.15.7, 5.1.4.

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) Presumptions under section 6867. For termination and jeopardy assessments in respect of income tax under sections 6851 and 6861, it shall be presumed that cash in the amount of more than $10,000 is the gross income of a single individual for the taxable year in which the cash is discovered when an individual is in physical possession of more than $10,000 in cash but does not claim the cash as his and does not claim the cash as belonging to another person whose identity the Service can readily ascertain and who acknowledges ownership. It shall also be presumed that collection of the tax will be jeopardized by delay.

(3) See Lesson 11 (Levy, Seizures and Sales) for a further discussion of jeopardy and termination assessments and levy.

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*, 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. <u>See</u> <u>United States v. Janis</u>, 428 U.S. 433 (1976). Generally, the Service can use such evidence when the Service did not initiate or participate in the illegal search. <u>See, e.g.</u>, <u>id.</u> 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. <u>See</u> 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. CCDM 35.4.8.4; CCDM 34.5.2.4.2.5(4); I.R.M. 9.4.2.5.8, 8.1, and 8.2.

(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. See CCDM 30.3.2.2.3(1)(f) (authorizing Division Counsel to approve jeopardy and termination assessments and levies or to re-delegate no lower than Associate Area Counsel).

(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 approve the termination or jeopardy assessment recommendation. 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 Service determines a full tax year deficiency, or

iii. The Service terminates again before the full year return due date.

c) **Deficiency Procedures.** If a statutory notice of deficiency or liability is applicable but not previously sent:

(1) With respect to jeopardy assessment, a notice of deficiency must be issued within 60 days from the section 6861 assessment date. Section 6861(b).

(2) 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).

d) **Late Statutory Notice of Deficiency**.

i. The purpose of requiring a notice of deficiency within the time periods described in sub-paragraph (c) is to afford the jeopardy and termination assessed taxpayer the same pre-payment forum as a regular deficiency taxpayer. Revenue Act of 1926, § 279(b); H.R. REP. NO. 69-356, at 42; Laing v. United States, 423 U.S. 161 (1976).

ii. A notice of deficiency issued after the 60 days remains valid. Teitelbaum v. Commissioner, 40 T.C. 223 (1963). As long as a notice of deficiency is mailed during the section 6501 assessment period, the taxpayer will have an opportunity to litigate the deficiency. Even if the notice of deficiency is mailed after the section 6501 period, as long as the assessment itself is made within the section 6501 period, taxpayer may challenge the deficiency in Tax Court, so long as the notice of deficiency is mailed within 60 days of the assessment. See Gatto v. Commissioner, 20 T.C. 830, 833 (1953) (citing Commissioner v. Angier Corp., 50 F.2d 887, 891 (1st Cir. 1931)).

iii. The consequence of a late notice of deficiency on the validity of the underlying jeopardy or termination assessment is not entirely clear. There is no direct authority that invalidates an otherwise valid jeopardy assessment because the notice of deficiency was mailed late as long as one was mailed. The Revenue Act of 1926, § 279(b) established the requirement to mail a deficiency notice within 60 days after a jeopardy assessment, if one had not already been mailed . The legislative history suggest that as long as the taxpayer is afforded the opportunity to have the correct amount of tax determined in a deficiency proceeding, the Service may pursue collection of a jeopardy assessment unless the taxpayer files a bond. H.R. REP. NO. 69-356, at 42. Deficiency notices after a termination assessment developed differently. Before 1976, there was no statutory requirement to mail a notice of deficiency after a termination assessment. After the Supreme Court decided Laing, Congress added section 6851(b), which requires the Service to issue a notice of deficiency for termination assessments. However, a line of cases leading up to and including Laing, suggests that injunctive relief under section 6213(a) is the sole consequence of sending a late notice of deficiency. See Laing v. United States, 423 U.S. 161, 185 n. 27 (1976); Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974); Schreck v. United States, 301 F.Supp. 1265 (D. Md. 1969). Under 6851(b), a failure to issue a notice of deficiency does not necessarily entitle the taxpayer to injunctive relief. Perlowin v. Sassi, 711 F.2d 910 (9th Cir. 1983) (while termination assessment was invalid because Service did not issue a notice of deficiency where taxpayer failed to file a return, to be entitled to injunctive relief, taxpayer must additionally prove irreparable injury and an absence of adequate legal remedy). In light of these considerations, even if late, the best practice is to issue a notice of deficiency as soon as possible.

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.

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. Section 7429(a)(2).

Under section 7429(a)(3), upon a taxpayer's request for review, the Service must determine whether:

a) making the assessment is reasonable under the circumstances; and

b) the amount so assessed is appropriate under the circumstances.

A request for administrative review is a prerequisite to later judicial review. Section 7429(b)(1). 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 taxes and 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. United States, 62 F.3d 667, 672 (5th Cir. 1995) ("[T]he district court determined correctly that it had jurisdiction only to the extent provided for in § 7429(b)—

to review whether the making of the assessment was reasonable and the amount assessed was appropriate."). The court's determination is non-reviewable. Section 7429(f). Twenty days are allowed for the court determination. Section 7429(b)(3). The taxpayer may upon reasonable grounds get an extension of not more than 40 days. Section 7429(c).

Burden of Proof

a) With respect to reasonableness of making the assessment, the burden of proof is on the government. Section 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. Section 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 incomplete.

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 section 7429(a)(1). See Morgan v. United States, 958 F.2d 950, 952 (9th Cir. 1992).

V. STATUTE OF LIMITATIONS ON ASSESSMENT[2]

A. *General*

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

B. *Extension*

The assessment period may be extended by agreement. Form 872, *Consent to Extend the Time to Assess Tax*, 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

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

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. Section 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. Section 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, 394 (1984).

2. **Willful Attempt to Defeat or Evade Tax**
"[T]he tax may be assessed ... at any time." Section 6501(c)(2).

3. **No Return**.
"[T]he tax may be assessed . . . at any time." Section 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 section 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). Prior to Beard, courts generally held that a Form 1040 showing all zeros does not contain information upon which a taxpayer's liability can be calculated and is not a return within the meaning of the Code. U.S. v. Mosel, 738 F.2d 157, 158 (6th Cir. 1984) (all-zero Form 1040 not a return for purposes of section 7203); United States v. Gabrinski, 727 F.2d 681, 687 (8th Cir. 1984); United States v. Smith, 618 F.2d 280, 281 (5th Cir. 1980); United States v. Moore, 627 F.2d 830, 835 (7th Cir. 1980); United States v. Rickman, 638 F.2d 182, 184 (10th Cir. 1980); United States v. Edelson, 604 F.2d 232, 234 (3d Cir. 1979); but see United States v. Long, 618 F.2d 74 (9th Cir.

1980) (Form 1040 showing zeroes on every line conveyed information from which tax liability could be computed and was therefore a valid return for the purposes of section 7203). Applying Beard outside the criminal context, the Tax Court has held that an all-zero Form 1040 is not a return. Cabirac v. Commissioner, 120 T.C. 163, 169-170 (2003); Coulton v. Commissioner, T.C. Memo. 2005-199, at *2-4 (distinguishing Long and applying Beard in a case appealable to the Ninth Circuit). The litigating position of Counsel is that an all-zero Form 1040 is not a return for the purposes of section 6501. See, e.g., IRS CCA 200651015. To guard against the possibility that a court might follow Long, however, the Service may process all-zero Forms 1040 as if they are returns that start the assessment limitations period. See, e.g., IRS SCA 200028033.

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 Income or Other Items**

A tax may be assessed at any time within 6 years after the return was filed if there has been a substantial omission from the return. Section 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, which are amounts that exceed 25 percent of the amount stated on the return, 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).

In United States v. Home Concrete & Supply, LLC, 132 S.Ct. 1836 (2012), the Supreme Court held that overstatements of basis, and the resulting understatement of gross income, do not trigger the extended limitations period of section

6501(e)(1)(A) (reversing the IRS's longstanding position that an overstatement of basis could trigger the extension).

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. Section 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).

7. **TEFRA Partnership**

Section 6229(a) provides a minimum period in which a subset of taxable items (taxes attributable to partnership items and affected items) may be assessed. It may extend a partner's section 6501(a) assessment period, which generally is three years from the date on which the partner's tax return is filed, to three years from the date on which the partnership's information return is filed. <u>See</u> section 6501(n)(2); <u>Kligfeld Holdings v. Commissioner</u>, 128 T.C. 192 (2007); <u>Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner</u>, 114 T.C. 533 (2000); <u>see also</u> <u>Curr-Spec Partners, L.P. v. Commissioner</u>, 579 F.3d 391 (5th Cir. 2009); <u>AD Global Fund, LLC v. United States</u>, 481 F.3d 1351, 1354-55 (Fed. Cir. 2007); <u>Andantech LLC v. Commissioner</u>, 331 F.3d 972, 976-77 (D.C. Cir. 2003). The section 6229(a) "minimum" assessment period is subject to many of the same exceptions, extensions and suspensions as the general section 6501(a) period. For example, the mailing of an FPAA will suspend a section 6229(a) period (or a section 6501(a) period, but only for taxes attributable to partnership or affected items) similar to the way the mailing of a SNOD will suspend a section 6501(a) period. Section 6229(d). Section 6229(b) allows an extension by agreement, similar to section 6501(c)(4) (meaning in writing and executed before the ASED). Section 6229(c) has rules for false returns, unfiled returns and substantial omissions that parallel section 6501(c)(1), (c)(3) and (e), respectively.

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 if the taxpayer is in the country or 150 days if the taxpayer is out of the country) after mailing of a notice of deficiency and, if a proceeding in respect of the deficiency is placed upon the docket of the Tax Court, until the decision of the court becomes final), plus 60 days. An assessment in contravention of section 6213 is void. For a discussion of the meaning of "proceeding in respect of the deficiency," see Shockley v. Commissioner, 686 F.3d 1228 (11th Cir. 2012).

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 Code 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 for 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 plain-language 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 plain-language transcript 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 (*e.g.*, CC TAXMOD-A or 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 (Form 4340)*

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(d) provides that "[f]or electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information."

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. United States v. Jimenez, 513 F.3d 62, 79-80 (3d Cir. 2008); United States v. Bisbee, 245 F.3d 1001, 1006 (8th Cir. 2001); Hughes v. United States, 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. Hefti v. Commissioner, 8 F.3d 1169, 1172 (7th Cir. 1993); Long v. United States, 972 F.2d 1174, 1181 (10th Cir. 1992); United States v. McCallum, 970 F.2d 66, 71 (5th Cir. 1992); Geiselman v. United States, 961 F.2d 1, 6 (1st Cir. 1992); United States 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. United States, 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 of tax or any liability in respect thereof (including interest) 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). Counsel has previously advised against adopting the Bugge standard citing vagueness regarding the types of abatements that would be considered unauthorized. IRS SCA 200113002; IRS FSA 200010005.

B. ***Section 6404(b)***

A taxpayer is not permitted to file a claim for abatement in respect of an assessment of any income, estate, or gift tax. Nevertheless, such claims are sometimes submitted and the Service may consider a request to abate an unpaid amount instead of requiring that the taxpayer pay the tax and file a claim for credit or refund when such a claim would clearly be allowed.

C. ***Section 6404(c)***

Section 6404(c) permits the Service to abate assessments of "small tax balances" 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.

D. ***Section 6404(e)***

Section 6404(e) authorizes the Service to abate interest resulting from "unreasonable error or delay" on the part of a Service employee performing a "ministerial or managerial act" if no significant part of the error or delay is attributable to the taxpayer. Section 6404(e) provides a limited exception to the general prohibition against claims for abatement of income, estate or gift taxes that is set forth in section 6404(b). See Treas. Reg. § 301.6404-2 for a description of interest abatement rules under section 6404(e).

E. ***Section 6404(g)***

Section 6404(g)(1) "suspends" the accrual of interest and time-sensitive penalties if the Service does not provide notice to the taxpayer specifically stating the amount due and basis for the liability within 36 months of the later of the due date of the return (without regard to extensions) or the date on which the return was filed. Section 6404(g) relates to interest **suspension**, not interest abatement. See IRM 20.2.7.

F. ***Section 6404(h)***

If the Service denies a taxpayer's request for abatement of interest, and the taxpayer meets certain net-worth requirements, section 6404(h) allows the taxpayer to obtain Tax Court review of the denial. Petitions challenging interest-abatement determinations can be filed at any time after the earlier of the date the Service mails its final determination not to abate interest or the date that is 180 days after the date the taxpayer files an interest-abatement claim. If the Service mails a notice of final determination, petitions cannot be filed more than 180 days after the date of mailing. See Chief Counsel Notice 2016-006. The judicial review procedures generally do not apply where the Service has failed to "suspend" interest under section 6404(g). See Rev. Proc. 2005-38, 2005-28 I.R.B. 81 (July 11, 2005); but see Corbalis v. Commissioner, 142 T.C. 46 (2014) (Tax Court has jurisdiction over denial of interest suspension since interest "abatement" under section 6404 includes interest "suspension.").

VIII. CENTRALIZED PARTNERSHIP AUDIT REGIME/TEFRA

A. ***Partnership Considerations - General***

The assessment of partners in partnerships presents problems for the Service because partnerships generally are not taxpayers (a partnership would be the taxpayer with respect to, *e.g.*, employment taxes and some excise taxes). Although items of income, gain, and loss, etc., "flow-thru" to the partners, the assessment of partners often presents logistical challenges given that there may be many partners, who may have different assessment periods, who reside in different jurisdictions, and who treat what is reported differently on their individual Forms 1040 (or other appropriate return, *e.g.*, Form 1120). Accordingly, the Code imposes a partnership assessment and collection regime that affects the mechanism by which the Service may (and sometimes, must) make assessments of persons who are partners in partnerships.

B. ***New Legislation - Bipartisan Budget Act of 2015***

1. BBA - General

As part of the Bipartisan Budget Act of 2015 (Pub. L. No. 114-74, § 1101) ("BBA"), Congress enacted the centralized partnership audit regime for tax years beginning after December 31, 2017 (or, in certain circumstances, for taxable years beginning after November 2, 2015 and before January 1, 2018 if the partnership elects into the regime). The centralized partnership audit regime applies to all partnerships, unless the partnership, if eligible, makes an election out of the regime. Under the new regime, any adjustment to a partnership's items of income, gain, loss, deduction, credit or any partner's distributive share thereof for a particular year will be determined, and any tax attributable to such adjustments is assessed and collected, at the partnership level. The applicability of any penalty, addition to tax, or additional amount is also determined at the partnership level. Only the partnership, through an appointed partnership representative, would participate in an administrative proceeding of the partnership, and its partners would be bound by the actions taken by the partnership and the partnership representative.

2. Partnership-Level Proceedings

The Service must notify the partnership and partnership representative of when the audit of the partnership has begun by sending a Notice of Administrative Proceeding ("NAP"). When an adjustment is made, the partnership must pay any imputed underpayment with respect to such adjustment, or, if the adjustment does not result in an imputed underpayment, take the adjustment into account on the partnership's return for the taxable year in which the adjustments are determined (the adjustment year, see below).

After the NAP, the Service must send a Notice of Proposed Partnership Adjustment ("NOPPA") to the partnership and partnership representative. The NOPPA starts a 270-day period in which a partnership may request modification of the imputed underpayment that was calculated on the partnership adjustments determined during the exam. The imputed underpayment is calculated using the highest tax rate in effect under sections 1 or 11 of the Code. During modification, the partners from the year under exam ("reviewed year partners") may voluntarily file amended returns accounting for their allocable share of the adjustments. If a partner files an amended return to take into account the partner's share of the adjustments, the partner must amend all returns affected by the adjustments. The partner must include payment of any tax due with the amended return. Other types of modifications include modifying for adjustments allocable to tax-exempt entities and requesting to modify the rate used in calculating the imputed underpayment based on specified types of adjustments allocable to specified types of partners (e.g., adjustments to capital gains allocable to individuals). Requested modifications of the imputed underpayment must be approved by the Service. If modifications are approved by the Service, the imputed underpayment will be calculated without regard to the portion of adjustments accounted for in the amended returns filed by the reviewed year partners or the portions attributable to tax-exempt partners. Similarly, if modification of the rate used in calculating the imputed underpayment is approved by the Service, the portions of the imputed underpayment attributable to those modified rates are calculated using the modified rates instead of the highest rate under sections 1 or 11.

If the Service makes adjustments to the partnership's return, it must send a Notice of Final Partnership Adjustment ("FPA") to propose adjustments to the partnership's return. Section 6231. The Service must issue the FPA within the period to make adjustments to the partnership's return for the year under audit and may not issue the FPA for 270 days following the issuance of the NOPPA. Sections 6231, 6235. The Service must issue the FPA within the later of: 1) three years from the later of the filing of the partnership return, the due date of the partnership return, or the filing of an Administrative Adjustment Request ("AAR"); 2) 270 days (plus the number of days in any extension of time to submit information) from the date all information required to be submitted to the Service to request modification of the imputed underpayment is submitted (if modification of the imputed underpayment is requested by the partnership); or 3) 330 days from the date the NOPPA is mailed by the Service (plus the number of days in any extension of the time period to submit information in modification). Section

6235(a). The period to make adjustments to the partnership return may be extended by agreement between the partnership and the Service. Section 6235(b).

The partnership, under certain circumstances, may elect not to pay the imputed underpayment determined in the FPA, and instead issue statements and push the adjustments out to its reviewed year partners. The partnership must make any such election within 45 days of the date on which the FPA is mailed by the Service. Section 6226. If the partnership makes an election to push out the adjustments, the partnership is no longer liable for the imputed underpayment. Additionally, during the ninety-day period after the mailing of the FPA, the partnership representative may file a petition for judicial review on behalf of the partnership. Section 6234.

3. Post-Proceeding Assessment

After the partnership adjustments become final, either as a result of a final court decision or if the FPA is defaulted, the partnership pays the imputed underpayment as if it were a tax under subtitle A for the adjustment year, unless the partnership elected to push out the adjustments. Section 6232. The adjustment year is the partnership taxable year in which the court's decision becomes final (if a petition is filed), the FPA is mailed (if no petition is filed), or when an AAR is filed. If the partnership elected to push out the adjustments to its reviewed year partners, the partnership furnishes the statements to its reviewed year partners. Section 6225(d)(2). The reviewed year partners then must take the adjustment into account in the year the statement was furnished by the partnership. Section 6226(b)(1). For a reviewed year partner that is not itself a pass-through partner, the reviewed year partner takes into account the adjustments by paying an additional tax in the year the statement was furnished. The additional tax is equal to the amount by which the reviewed year partner's chapter 1 tax would have increased in the taxable year that corresponds to the partnership taxable year under audit if the adjustments had been taken into account during that year plus the amount by which the reviewed year partner's chapter 1 tax would have increased in any intervening year as the result of any changes to tax attributes resulting from the adjustments. Section 6226(b). In addition to calculating this tax, the partner is also liable for any penalties determined to be applicable during the partnership-level proceeding and must pay interest calculated from the taxable year of the partner that corresponds to the partnership taxable year under audit calculated at a rate that is two-percent higher than the underpayment rate under section 6621(a)(2). Section 6226(c).

Accordingly, all amounts assessed following a partnership-level proceeding under the centralized partnership audit regime are assessed and collected not in the year for which the adjustments relate but in a current year (the adjustment year if the partnership pays the imputed underpayment or for the taxable year in which the statements are furnished if the partnership elects to push out the adjustments to its reviewed year partners).

C. *Prior Law – TEFRA (and continuing effect)*

1. TEFRA - General

For cases arising before the new rules take effect, the partnership procedures enacted as part of the Tax Equity and Fiscal Responsibility Act ("TEFRA") apply. See Sections 6221–6234 (enacted by Pub.L. No. 97-248, § 401, 96 Stat. 324, 648 (1982)). The TEFRA partnership procedures provide a single unified approach for determining the tax treatment of "partnership items" at the "partnership level." The procedures removed the substantial administrative burden occasioned by duplicative audits and results of multiple partners and provided consistent treatment of partnership tax items among partners in the same partnership.

Under TEFRA, before assessing the tax liability of a partner, the Service determines the tax treatment of partnership items in a partnership-level proceeding. Sections 6221, 6225. Determinations at the partnership level generally are binding upon all direct and indirect partners of the partnership. Sente Inv. Club P'ship of Utah v. Commissioner, 95 T.C. 243, 247-50 (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. Commissioner, 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 partners. 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. Section 6231(a)(1)(B); Treas. Reg. § 301.6231(a)(1)-1(a)(2). A small partnership may also opt into TEFRA. Section 6231(a)(1)(B)(ii); Treas. Reg. § 301.6231(a)(1)-1(b)(1). The Service generally determines, based upon the partnership's information return, whether the TEFRA partnership procedures are applicable to the reported tax year. Sections 6231(g), 6233.

2. Partnership-Level Proceedings

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. Section 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. Section 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. Section 6226(b). All partners (direct and indirect) are generally deemed to be "parties" who will be bound by the court decision. Section 6226(c). To challenge the status of "party" to the proceeding (including to raise the argument that the partner's ASED expired prior to the issuance of the FPAA), a partner must participate in an action (or otherwise begin an action) for this purpose. See section 6226(d); Chief Counsel Notice 2016-007.

3. Post-Proceeding Assessment

After the proceeding, the Service directly assesses tax (against a partner/taxpayer) that is attributable to "partnership items" and that flows-thru (computationally) to the partner's return or it issues an "affected item" notice of deficiency to a partner if the assessment requires additional partner-level factual determinations. Section 6229(a) may extend a partner's individual section 6501 assessment period for any tax which is attributable to "partnership items" (see section 6231 for definition of "partnership item"). See Rhone-Poulenc Surfactants & Specialties, LP v. Commissioner, 114 T.C. 533, 541-42 (2000), holding that section 6229(a) is a "minimum" assessment period with respect to partnership items. Under section 6229(a), a partner's section 6501 period shall not expire before the date which is 3 years after the later of (1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing such return for such year (determined without regard to extensions). As discussed above, the section 6229(a) "minimum" assessment period is subject to many of the same suspensions as the general section 6501(a) period. For example, the mailing of an FPAA will suspend a section 6229(a) period (or a section 6501(a) period, but only for taxes attributable to partnership or affected items) similar to the way the mailing of a SNOD will suspend a section 6501(a) period. Section 6229(d). The duration of the suspension is during the 150 day period in which an action in the Tax Court or a district court may be brought and for one year after the FPAA is defaulted or is redetermined by a court. Because section 6229(d) affects a suspension, there is tacking at the end of the suspension of any unexpired time that remained from either the section 6501(a) or 6229(a) periods, whichever was applicable.

For the proper verification of TEFRA-related assessments in CDP cases, see Lesson 12 (Section VI(B) and CC Notice 2016-007 (Application of the Results of TEFRA Partnership Procedures in Collection Due Process Cases)).

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.

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, 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 may be treated for tax purposes 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)

Generally, the default is that a single-member LLC that does not otherwise elect to be classified as a corporation is disregarded for tax purposes as an entity separate from its owner. Treas. Reg. §§ 301.7701-2(c)(2)(i), (iv), and (v) (discussed below). When an LLC is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division. Treas. Reg. 301.7701-2(a).

b) Classification Scheme

Under check-the-box regulations, LLC classification depends on:

(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.

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 from 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 from 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, 2004-1 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 from 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. CCA 200235023 (June 28, 2002).

This practice (making the tax assessment under the name and TIN of the LLC, but collecting the assessment from assets in the name of the single-member owner) results in the Service issuing some odd-looking documents. 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 5.1.21.6.3.1. This mismatch 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 the taxpayer is, 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. CCA 200235023 (June 28, 2002).

(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 from 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 ten states have enacted statutes providing for the creation of entities that may establish series, including LLCs (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).
Certain single-owner organizations may be disregarded as separate entities.

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 provides default status if an election is not made by an LLC (*e.g.*, partnership in the case of a multi-member LLC and disregarded entity in the case of a single-member LLC).

Rev. Rul. 99-5, 1999-1 C.B. 434
Has tax consequences of conversion from disregarded entity to 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.
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.

CCA 200235023 (June 28, 2002)
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.

CCA 200216028 (Mar. 20, 2002)
If the Service assesses in the name/TIN of a disregarded LLC and issues a CDP notice to the LLC, the Service should issue another to the single-member owner.

CCA 200840001 (Aug. 28, 2008)
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 LLCs.

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

2018 GL-1 Instruction Assigned to Christopher Jones (CC:PA)

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