2018 GL1 - Lesson 9
JUDICIAL PROCEEDINGS RELATED TO COLLECTION
(June 2018)

CONTENTS

I. INTRODUCTION

There are a number of judicial proceedings available both to the Internal Revenue Service and to taxpayers. When the United States is the plaintiff seeking judicial assistance in the collection of taxes, Counsel sends a suit letter to the Tax Division of the Department of Justice based on information and evidence assembled by the Service. When the United States is named as a defendant in a lawsuit arising from a collection of tax liability, Counsel sends a defense letter to the Department of Justice. This lesson examines various types of judicial proceedings, both offensive and defensive, that are encountered in the course of collecting tax liabilities.

II. OBJECTIVES

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

- Understand the differences between a suit to reduce an assessment to judgment and a lien foreclosure suit.
- Identify the circumstances where a lawsuit is necessary to recover an erroneous refund.
- Explain the procedures for obtaining judicial approval of a personal residence seizure.
- Discuss the types of judicial proceedings that may be brought under 28 U.S.C. § 2410.

III. BACKGROUND

A. Sovereign Immunity of the United States

The United States, as a sovereign, is immune from suit unless suit is specifically authorized by federal statute. United States v. Shaw, 309 U.S. 495 (1940). The limitations and conditions by which the government consents to be sued must be strictly observed and exceptions are not to be implied. Soriano v. United States, 352 U.S. 270

(1957). "The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. . . ." Shaw, 309 U.S. at 501 (1940).

The Administrative Procedure Act (APA) (5 U.S.C. §§ 551- 706, 701) provides for judicial review of the actions of most federal agencies, unless a specific statute precludes judicial review or agency action is committed to agency discretion by law.

The APA (as amended by Pub. L. No. 94-574) broadens the scope of judicial review by providing:

> "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702 (emphasis added).

Examples of actions seeking "other than money damages," i.e., equitable remedies:

- Injunctions
- Declaratory Judgments
- Mandamus

See H.R. REP. NO. 94-1656, at 4, 11 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6124, 6131.

"The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . ." 5 U.S.C. § 702.

The amendments were not intended to affect or change defenses other than sovereign immunity. 5 U.S.C. § 702 provides:

> "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

Examples of defenses that are still valid:

- Adequate remedy at law
- Action committed to agency discretion
- Standing

- Ripeness
- Failure to exhaust administrative remedies
- Statute of limitations, but note that these suits are subject to the rebuttable presumption of equitable tolling that applies to private defendants. Irwin v. Veterans Administration, 498 U.S. 89, 96 (1990).

See H.R. REP. NO. 94-1656 at 3, 12, 15.

Thus, special doctrines favoring the United States as a litigant and statutory provisions denying specific relief were intended to remain unaffected. S. REP. NO. 94-996, 94th Cong., 2d Sess. 3, 11 (1976).

Most actions involving the Service are either allowed or prohibited by specific statutes. However, it is clear that the defense of sovereign immunity is no longer a reliable basis for defense of a suit against the United States in many cases. Wherever possible, reliance should be placed on specific statutes or rules of law that deprive courts of jurisdiction. Sovereign immunity should continue to be raised as a defense to actions against the United States commenced in a state court, or when money damages are sought.

B. Jurisdiction of the Courts

Jurisdiction is the authority of a court over the subject matter of the action, the parties to the action, and the kind and limits of the judgment rendered. Numerous statutes govern jurisdiction in civil federal tax cases. Jurisdiction must be established under one of the following statutes: 28 U.S.C. §§ 1331, 1340, 1345, 1346, 1361, 1491, 1503, 2410, 2463, or I.R.C § 7402. Section 7421, Prohibition of Suits to Restrain Assessment or Collection ("Anti-Injunction Act"), deprives a court of jurisdiction regardless of the above statutes. Section 7421(a) prohibits any suit to restrain the assessment or collection of any tax except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436. The Supreme Court held section 7421(a) applies unless the United States is incapable of winning under the most favorable view of the facts and the taxpayer does not have an adequate remedy at law. Enochs v. Williams, 370 U.S. 1, 7 (1962). See sec. V.A.1 for a full discussion of the Anti-Injunction Act.

28 U.S.C. § 1331 - District courts have jurisdiction over federal question cases.

28 U.S.C. § 1340 - District courts have original jurisdiction over any civil action arising under the internal revenue laws.

28 U.S.C. § 1345 - District courts have original jurisdiction over all civil actions commenced by the United States, or by an authorized agency or officer.

28 U.S.C. § 1346 - District courts and the United States Court of Federal Claims, have concurrent original jurisdiction over these actions brought against the United States:

1. Tax refund suits;

2. Any other civil action against the United States not exceeding $10,000, founded on federal law or regulations, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort;

3. An action involving the right of setoff and counterclaim against the plaintiff;

4. Civil actions under --

    a) Sections 6226 and 6228(a) (review of final partnership administrative adjustments and review where administrative adjustment request is not allowed in full) [concurrent jurisdiction with the Tax Court];

    b) Section 7426 (wrongful levies and erroneous liens, etc.);

    c) Section 7428 (declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.) [concurrent with Tax Court];

    d) Section 7429 (review of jeopardy levy or assessment procedures) [concurrent jurisdiction with the Tax Court].

5. 28 U.S.C. § 2409a (quiet title action if U.S. claims other than lien interest); and

6. Tort suits for money damages.

28 U.S.C. § 1361 - District courts have original jurisdiction over actions to compel an officer or an employee of the United States or any agency to perform a duty owed the plaintiff.

28 U.S.C. § 1491 - Section 1491 is similar to 28 U.S.C. **§** 1346 and defines the jurisdiction of the U.S. Court of Federal Claims. In the Court of Federal Claims, there is no dollar limitation on any action against the United States.

28 U.S.C. § 1503 - The U.S. Court of Federal Claims has jurisdiction over set-off or demand against the plaintiff.

28 U.S.C. § 2410 - Section 2410 applies to foreclosure, quiet title, partition, condemnation, and interpleader actions where the United States claims a lien interest. If the plaintiff complies with the specific requirements of section 2410, sovereign immunity of the United States is waived and jurisdiction over the United States is obtained. However, subject matter jurisdiction of the state or federal court must exist

independently. See Wells v. Long, 162 F.2d 842, 844 (9th Cir. 1947).

28 U.S.C. § 2463 - All property taken or detained under any revenue law shall not be repleviable but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the United States Courts having jurisdiction thereof.

I.R.C. § 7402 - Section 7402 is a general jurisdictional statute relating to the enforcement of internal revenue laws.

C. Venue

28 U.S.C. § 1391 - Venue in district courts is governed by 28 U.S.C. **§** 1391. Subsection (e) of **§** 1391 provides that when a defendant is an officer or employee of the United States or of one of its agencies acting in his official capacity or under color of legal authority, or is an agency, a civil action may be brought in a judicial district where:

1. a defendant in the action resides;
2. the cause of action arose;
3. any real property involved in the action is situated; or
4. the plaintiff resides, if no real property is involved in the action.

28 U.S.C. § 1396 - Under 28 U.S.C. **§** 1396, a civil action for the collection of federal tax may be brought in the:

1. District where the liability accrued;
2. District of the taxpayer's residence; or
3. District where the return was filed.

If the action is in rem (e.g., a lien foreclosure action), venue lies in the district where the property is located. United States v. Dallas National Bank, 152 F.2d 582, 586 (5th Cir. 1946).

28 U.S.C. § 1402 - Under this section, any civil action brought against the United States under 28 U.S.C. **§** 1346(a) may be brought only in - -

1. District court where the plaintiff resides;

2. In the case of refund suits by a corporation, in the - -

   a) Judicial district of the principal place of business or the principal office or agency of the corporation;

   b) If no such place exists, in the judicial district of the office of the Service where the return was filed; or if no return was filed, in the judicial district of the District of Columbia.

c) Note: For the convenience of the parties and witnesses and in the interest of justice, the court may transfer the case to any other district where it might have been brought. See also 28 U.S.C. **§** 1404.

Any civil action on a tort claim against the United States under 28 U.S.C. § 1346(b) may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

Any civil action brought against the United States under 28 U.S.C. § 1346(e) may be prosecuted only in the district where the property was situated at the time of levy, or if no levy was made, in the judicial district in which the event occurred.

Any civil action under section 7426 may be brought only in the judicial district where:

1. The property is situated at the time of levy, or
2. If no levy was made, where the event occurred that gave rise to the cause of action.

Any civil action under 28 U.S.C. **§** 2409a to quiet title to an estate or interest in real property in which certain interests (other than a security interest or water rights) are claimed by the United States shall be brought in the district:

1. Where the property is located; or
2. If located in different districts, in any of such districts.

I.R.C. § 7410 - This section furnishes cross references for venue in a civil action for the collection of any tax under 28 U.S.C. **§** 1396 and for venue in a proceeding for the recovery of any fine, penalty, or forfeiture under 28 U.S.C. **§** 1395.

28 U.S.C. § 1404 - For the convenience of parties and witnesses and in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

I.R.C. § 7701(a)(39) - Under this section, any citizen or resident of the United States who does not reside in, or who cannot be found in any United States judicial district, shall be treated as residing in the District of Columbia for the purposes of any Code provision relating to the jurisdiction of courts or enforcement of summonses.

D. Service of Process and Answers

FED. R. CIV. P. 4(e)-(h), (j) details the manner and method of service upon various classes of defendants other than the United States. With respect to service upon the United States and its agencies, corporations or officers, the manner and method of service of a summons and complaint is set forth in FED. R. CIV. P. 4(i). FED. R. CIV. P. 4(i) requires

that service shall be made upon the United States by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought, or to an assistant United States attorney or designated clerical employee, or by sending copies of the summons and complaint by registered or certified mail both to the civil-process clerk at the office of the United States attorney and to the Attorney General of the United States at Washington, D.C. See also 28 U.S.C. § 2410(b). Further, FED. R. CIV. P. 4(i) requires that, in any action attacking the validity of an order of an officer or agency of the United States not made a party, service shall also be made by sending a copy of the summons and complaint to such officer or agency by registered or certified mail.

A party may send a notice of action to an individual, corporation, or association asking the defendant to waive service. FED. R. CIV. P. (4)(d). The notice must be made by first-class mail, be addressed to the defendant, be accompanied by a copy of the complaint, inform the defendant of the consequences of compliance and of a failure to comply with the request, state when the request was sent, name the court where the complaint was filed, and allow a reasonable time to respond. If the defendant agrees to the request, the defendant waives the right to a formal summons. Section 4(d) also applies to individual Service employees sued under Bivens and to covered parties sued by the United States. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (An agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own).

Under FED R. CIV. P. 4(m), if service of a summons and complaint is not made upon a defendant within 90 days after the filing of the complaint (except when service must be made in a foreign country pursuant to FED. R. CIV. P. 4(f) or (j)(1)), the action may be dismissed as to that defendant without prejudice, upon motion or upon the court's own initiative.

This 90-day period may be enlarged pursuant to FED. R. CIV. P. 4(m). Under FED. R. CIV. P. 4(m), a court, on its own motion or where a party moves for dismissal of a complaint for failure to comply with the 90-day limit, may direct that service be effected within a specified time, provided that the plaintiff demonstrates good cause for failure to effect service timely, in which instance a court shall extend the time for service for an appropriate period of time. See also FED. R. CIV. P. 6(b). A dismissal pursuant to FED. R. CIV. P. 4(m) is "without prejudice," but its entry may cause an action to be barred by the expiration of limitations on bringing suit.

This result occurs because the filing date of the suit, and not the service date, is the appropriate date for computing whether a suit has been timely initiated with respect to the statute of limitations.

FED. R. CIV. P. 12(a) requires that answers by the United States or an officer or agency thereof shall be made within 60 days from service of the summons on the United States

attorney (as contrasted with the 21 days permitted for others). In state court proceedings, the United States also has 60 days to answer, notwithstanding any state law provisions to the contrary. 28 U.S.C. **§** 2410(b).

FED R. CIV. P. 81(c) requires that after removal of a case from state court, an answer must be made within 21 days of receipt of service of a copy of the initial pleading, within 21 days of service of the summons upon the initial pleading, or within 7 days after the filing of the removal petition, whichever period is longest. The United States Attorney normally makes a general denial within the 7-day period, since it is not clear whether the United States is entitled to the full 60 days it would have been entitled to had there been no removal.

IV. SUITS BY THE UNITED STATES (OFFENSIVE PROCEEDINGS)

The Service requests the Department of Justice to bring actions to collect tax liabilities. These are usually a last resort. The administrative collection methods discussed earlier are more efficient and less expensive. The two most common types of offensive actions are suits to foreclose on federal tax liens (FTLs) and suits to reduce tax assessments or liabilities to judgment. We will also discuss twelve other types of offensive litigation.

A. Types of Offensive Proceedings

1. Suits to Reduce Liabilities or Assessments to Judgment

a) Authority – I.R.C. § 7401. Assessments must be made within the three-year period prescribed by section 6501(a).

b) Principal purpose for instituting suit -- To extend the time allowed for collection beyond the normal ten-year section 6502 period. The period for collection by levy does not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable, if a timely proceeding in court for the collection of a tax is commenced within the ten-year period. See I.R.C. § 6322.

c) Considerations for instituting suit --

(1) The statutory period for collection will shortly expire.

(2) All administrative remedies available have been exhausted or their use would prove ineffective.

(3) There is reason to believe that the Service will be able to collect in the future, e.g., with after-acquired assets or good earning capability. The suit letter should name the assets that the

Service believes will be available for collection if the action is successful. Exceptions are made where such suits might be helpful in handling other similarly situated taxpayers, such as racketeers and drug traffickers, who become aware of enforced collection.

(4) Sometimes in a collection suit (e.g., to enforce a tax lien) or as a counterclaim in a refund suit, DOJ will also seek a judgment against the taxpayer even though the statutory period is not expiring. This eliminates the need to bring the action against the taxpayer in the future.

(5) The tax liability and the amount expected to be recovered should be substantial enough to justify the cost of suit, i.e., the minimum amount set forth in the Law Enforcement Manual.

(6) An assessment is not necessary for a suit to reduce a liability to judgment. If there is no assessment, the suit must be brought within the applicable section 6501 or 6901 limitations period.

d) Effect of judgment on tax lien and levy

(1) I.R.C. § 6322 -- When a tax assessment is reduced to judgment, the tax liens do not merge into the judgment or judgment lien; they continue to exist independently. I.R.C. § 6322; United States v. Overman, 424 F.2d 1142 (9th Cir. 1970); United States v. Hodes, 355 F.2d 746 (2d Cir. 1966). It is important to remember that once the United States obtains a judgment, three different vehicles for collecting the tax exist. They are: (1) the judgment, (2) the judgment lien and (3) the FTL.

(2) The life of the tax lien is extended beyond the initial ten year period by virtue of the judgment. See §§ 6322 and 6502(a); Hector v. United States, 255 F.2d 84 (5th Cir. 1958); United States v. Ettelson, 159 F.2d 193 (7th Cir. 1947). The judgment also extends the enforceability of the liability and thus, the life of the tax lien. Even though the life of the tax lien is extended, the tax lien must be refiled to maintain its priority under state law.

(3) The entry of a judgment alone does not create a judgment lien. A judgment lien comes into existence only when a certified copy of the abstract of judgment is properly filed. 28 U.S.C. § 3201. Unlike a tax lien, which attaches to all of the taxpayer's property, a judgment lien attaches only to real property of the judgment debtor. Section 3201(a) requires the filing to be made in the same manner as a notice of tax lien is filed under sections 6323(f)(1) and

(2). Thus, a certified copy of the abstract of judgment should be filed in the appropriate locations(s) where all real property of the judgment debtor is located. For tangible and intangible personal property, a judgment lien can be obtained only by seizing the property under the judgment enforcement procedures. A judgment lien is effective for 20 years, and with the court's approval, may be renewed once for an additional 20 years. 28 U.S.C. § 3201(c).

(4) The judgment itself is not subject to limitation and is enforceable at any time. United States v. Hannon, 728 F.2d 142, 145 (2d Cir. 1984); United States v. Overman, 424 F.2d 1142, 1147 (9th Cir. 1970). It was noted above that the tax lien does not merge with the judgment or into the judgment liens, but the underlying liability has been merged into the judgment.

(5) The government's right to foreclose the tax lien is not curtailed as a result of reducing the assessment to judgment. The government may bring a lien foreclosure suit because the judgment continues the enforceability of the liability, thus keeping the lien alive.

(6) The government's right to collect taxes by administrative levy is not affected by reducing the assessment to judgment. The Technical and Miscellaneous Revenue Act of 1988 provides that a judgment for a tax liability may now be collected by administrative levy. Pub. L. 100-647, Title I, § 1015(u)(1); I.R.C. § 6502(a). Previously, all collection action was to be taken by the United States Marshal once the statute of limitations on collection had expired.

2. **Lien Foreclosure**

The FTL is the basis of virtually all enforced collection since it attaches to all of a taxpayer's property and rights to property, both real and personal. I.R.C. § 6321. The effect of a FTL is to tie up the taxpayer's property so that it may be subjected to the payment of his or her outstanding liability.

a) Authority -- Section 7403 provides authority for bringing a civil suit to enforce a FTL (also known as a lien foreclosure suit) or to subject property in which the taxpayer has an interest to the payment of the tax liability.

b) Principal purpose for instituting suit -- to convert specific property in which the taxpayer has an interest to cash and to apply the proceeds to his or her tax liability.

c) Considerations for instituting a suit –

(1) Administrative remedies have been exhausted or are unavailing.

(2) The property involved is encumbered by other liens which make it difficult to determine interests or priorities. Therefore, seizure would be ineffective.

(3) There is a cloud on the title or title is contested by third parties.

(4) A business is to be sold as a going concern.

(5) A lien foreclosure action is necessary to reach any equity the taxpayer may have in term and extended term insurance. (To reach the taxpayer's cash surrender value in an insurance contract).

(6) Since the court will determine priorities, sell the property at private or public sale free and clear of all liens and encumbrances, and distribute the proceeds in accordance with its priority findings, a judicial sale of the property will, in most circumstances, result in greater proceeds being realized than at an administrative sale. Further, since the taxpayer has no right of redemption at such sale, the selling price is somewhat enhanced.

(7) Section 7403(c) provides that the government may bid on property where it holds a first lien. The bid is limited to the amount of the tax lien plus selling expenses. Whether the government bids on the property is at the Service's discretion. The government may bid on the property to prevent its sale at distressed prices.

(8) In United States v. Rodgers, 461 U.S. 677 (1983), the Supreme Court held that under section 7403, when a court orders a sale of property in which a taxpayer has an interest following a foreclosure of the FTL, the sale is of the entire property rather than merely the taxpayer's interest in the property, as is the case when the Service administratively sells property pursuant to section 6331(b). But when a non-delinquent third party has an interest in property subject to the FTL, the court has limited discretion to refuse to sell the entire property, considering such factors as: the financial prejudice to the government should only the taxpayer's partial interest be sold; the extent to which the third party's interest would normally not be subject to forced sale by the delinquent

taxpayer or the taxpayer's creditors; financial and non-financial prejudice to the third party; and the relative character and value of interests held in the property of the taxpayer and other parties. The Court cautioned district courts to exercise this jurisdiction sparingly, taking into account the government's paramount interest in collecting taxes.

(9) A lien foreclosure action is generally more appropriate than a suit to enforce a levy where the party levied upon retains the property under a good faith belief that there may be a claim against the property superior to the FTL. The lien action determines the interests of all persons in the property. (Note, however, that any party in possession of property or rights to property who surrenders property pursuant to a levy shall be discharged from any obligation or liability to the delinquent taxpayer or any other person.)

(10) The tax liability and the amount expected to be recovered should be substantial enough to justify the cost of suit.

d) Distinction between lien foreclosure suit and suit to reduce tax liability or assessment to judgment -- Foreclosure is directed against a presently existing source of collection whereas a suit to reduce a tax claim to judgment is primarily resorted to for the purpose of extending the collection period. The extended period is sought to subject later-acquired assets to payment of the tax liability. A count to reduce a liability to judgment is often added to a lien foreclosure case where the asset involved will not fully satisfy the tax liability.

e) Receivership - § 7403(d)

(1) If the purpose of instituting suit is to foreclose the tax lien against an active business, an ancillary step that should be considered is the appointment of a receiver to prevent waste or fraud by the taxpayer or others and to prevent, if possible, the insolvency of the business.

(2) A receiver with all the powers of a receiver in equity has the power to:

i. Conduct the business of the taxpayer.
ii. Safeguard the taxpayer's assets.
iii. Liquidate the business to pay the creditors.

(3) A receiver may also be appointed for the purpose of enforcing the lien. For example, if the property consists of numerous

securities, the receiver may negotiate their sale rather than attempting to sell them at auction. The United States Attorney, on behalf of the government, requests that a receiver be appointed to negotiate the sale of the property. See United States v. Ross, 196 F. Supp. 243 (S.D.N.Y. 1961), aff'd, 302 F.2d 831 (2d Cir. 1962); United States v. O'Connor, 291 F.2d 520 (2d Cir. 1961). In Ross, the court directed the taxpayer, over whom it had personal jurisdiction, to transfer foreign corporation stock certificates located outside the U.S. to a receiver appointed by the court.

(4) A receiver is compensated for his or her efforts by payment from the assets of the taxpayer against whom the tax lien is being enforced. Since these expenses are usually substantial, the suit letter should contain documentation to show how the taxpayer's assets will produce sufficient funds to cover these expenses.

(5) Other factors -- Under section 6012, a receiver in equity proceedings operating the property or business of a partnership, corporation, or individual must make all applicable tax returns for such entities.

f) Estate and Gift Tax Liens

(1) The automatic estate and gift tax liens under section 6324 do not arise upon assessment but arise automatically on the date of death and upon the making of a gift, respectively. The automatic estate and gift tax liens are enforceable only by judicial action. Administrative enforcement is not taken without an assessment. There may be certain circumstances where the automatic estate or gift tax liens may be available for action or as a basis for action when the assessment or general lien is not applicable or is not entitled to priority.

(2) Where the assessment lien arises under section 6321 after intervening rights come into play, reliance may be placed upon the earlier arising automatic estate or gift tax liens. In any suit seeking to enforce or foreclose the automatic estate or gift tax liens, an analysis should be made as to the circumstances under which the lien arises, the property subject to the lien, and how the lien can achieve priority over any intervening lien.

(3) The ten-year period of limitations on automatic estate and gifts tax liens is absolute. Any enforcement action on the lien must be complete before the ten year period expires.

3. Fraudulent Conveyance Suits

a) Authority – The United States can use state or federal fraudulent conveyance laws (28 U.S.C. § 3301, the Federal Debt Collection Procedures Act) to set aside the conveyance, thus subjecting the assets to collection. [A more detailed discussion will follow in Lesson 17: Transferee Liability and Other Third-Party Liability.]

b) Principal purpose for instituting suit -- A lien foreclosure suit is instituted to enforce a lien against property to which it attached. However, if assets are fraudulently disposed of by the taxpayer before an assessment is made against him or her, a lien foreclosure suit will not be successful.

4. Action to Enforce a Levy

a) Authority – I.R.C. § 6332

b) Principal purpose for instituting suit – to require any person who is in possession of or obligated with respect to property or rights to property that is subject to levy, upon which a levy has been made, to surrender such property upon demand (except for any part that, at the time of levy, was subject to an attachment or execution under judicial process).

c) Considerations for instituting suit –

(1) Collectability from a third party is a factor in recommending suit because the government is seeking a personal judgment.

(2) If it is merely a matter of seeking to collect from the taxpayer's other property, the Service should do so, particularly if administrative remedies are available.

(3) The amount involved should warrant the institution of a suit.

(4) Reasons for failing to honor levy -- If there is open defiance to the United States, a failure to follow up may be detrimental to future collection activity.

(5) As a general rule, resort to this type of suit is made when the party in possession of the taxpayer's property disposes of it subsequent to the levy.

(6) If the property is still in the possession of the levied party, a lien foreclosure action under section 7403 should be considered, particularly if there is a question of title. However, a levy action

has the advantage of not having the taxpayer as a necessary party and the merits of the tax cannot be raised.

d) Person defined -- A "person" under section 6332(a) includes an officer or employee of a corporation or a member or employee of a partnership. This has been held to also include a state and its officers. Sims v. United States, 359 U.S. 108 (1959). Though the definition of "person" in section 7701 does not include state, it does not exclude state either. Because of the broad intent of the levy statute, person, as used in section 6332, includes a state and its employees.

e) Extent of liability -- Section 6332(d)(1) provides that any person failing or refusing to surrender property subject to levy shall be liable in his own person and estate to the U.S. in a sum equal to the value of the property not so surrendered, not exceeding the amount of the taxes, together with costs and interest from the date of such levy (or in the case of a levy described in section 6331(e) [continuing levy on salary and wages] from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). The amount recovered (other than costs) is credited against the tax liability.

f) Penalty -- Section 6332(d)(2) provides that in addition to the personal liability imposed under section 6332(d)(1), if the failure or refusal to surrender the property was without "reasonable cause," the person not surrendering the property shall be liable for a penalty equal to 50 percent of the amount recoverable under section 6332(d)(1). The 50 percent penalty is not credited against the underlying tax liability.

(1) With respect to "reasonable cause," the regulations promulgated under section 6332(d)(2) state that the penalty "is not applicable in cases where bona fide dispute exists concerning the amount of the property to be surrendered pursuant to a levy or concerning the legal effectiveness of the levy." Treas. Reg. § 301.6332-1(b)(2). However, the same regulation further states that "if a court in a later enforcement suit sustains the levy, then reasonable cause would usually not exist to refuse to honor a later levy made under similar circumstances."

(2) The general rule in Treas. Reg. § 301.6332-1(b)(2) is that a person acts with reasonable cause if there was a bona fide dispute concerning the amount of property to be surrendered pursuant to a levy or the legal effectiveness of the levy. See United States v. Philadelphia Yearly Meeting of the Religious Society of Friends, 322 F. Supp. 2d 603 (E.D. Pa. 2004); United States v. Citizens and

Southern Nat'l Bank, 538 F.2d 1101 (5th Cir. 1976), cert. denied 430 U.S. 945 (1977) (court found a bona fide dispute over whether the levied deposit constituted the taxpayer's property or right to property; therefore, the penalty was not applied); United States v. Sterling National Bank & Trust Co. of New York, 494 F.2d 919 (2d Cir. 1974); see LGM GL-9, Fifty-Percent Penalty for Failure to Honor Levy, 1994 WL 1724891. Reasonable cause does not include a clearly erroneous view of the law stubbornly adhered to after investigation should have disclosed the error. State Bank of Fraser v. United States, 861 F.2d 954 (6th Cir. 1988).

g) Situations that may warrant asserting the 50% penalty:

(1) The fear of liability to the taxpayer based on the taxpayer's claim, dispute or protest does not constitute reasonable cause because section 6332(e) discharges the person served with the levy from any obligation or liability to the taxpayer or a third party arising from the surrender of the property levied upon. As to a third-party claim, section 6332(e) only protects the levied-upon party if that party determines in good faith that it is turning over the taxpayer's property or rights to property. See Treas. Reg. § 301.6332-1(c)(2). If the levied-upon party has serious questions concerning whether it has property of the taxpayer, the party may interplead the funds and have the court decide the rights to the property.

(2) Where the refusal is arbitrary or capricious, as where the party levied upon recognizes he has no defense but nevertheless insists on a court determination.

h) Defenses --

(1) Only two defenses are available to a defendant in a suit for failure to honor a levy, see United States v. National Bank of Commerce, 472 U.S. 713 (1985):

i. The defendant is not in possession of or obligated with respect to property or rights to property belonging to the taxpayer that is subject to levy, or

ii. The property is subject to a prior judicial attachment or execution.

(2) The defendant is not permitted to raise defenses ordinarily available in actions directly instituted against the taxpayer for

collection of the tax which go to the question of whether the taxpayer in fact owes the tax.

i) Statute of Limitations --

If the Notice of Levy was duly served within the applicable statutory collection period, the personal liability arising from a dishonor of the Notice of Levy may be enforced at any time without limitation, notwithstanding the expiration of the statutory period of limitations on collection against the taxpayer. I.R.C. § 6502(a)(1); United States v. Atlantic Richfield, 1973 WL 540, 73-1 U.S.T.C. P 9437 (E.D. Pa. 1973).

5. Action on a Bond

a) Authority – bond instrument

b) Principal purpose for instituting suit -- An action on a bond could arise when the Service has accepted a bond to stay the collection of taxes or to release a FTL and the taxpayer fails to comply with the terms of the obligation that the bond secures. An action on a bond may also be available in insolvency proceedings when the executor, administrator, or other fiduciary is required to have a bond.

c) Considerations for instituting suit -- There must be a default of the terms of the obligation that the bond secures and administrative collection action is unavailing.

6. Erroneous Refund Suits

a) Authority –

(1) Section 7405 recognizes the right of the government to bring an action to recover erroneous refunds.

(2) The government may proceed with suit under section 7405 without an assessment.

(3) The government may proceed against transferees of the recipient where tracing is possible.

b) Principal purpose for instituting suit -- Generally, an erroneous refund includes any receipt of money from the Service to which the recipient is not entitled regardless of whether the recipient is the taxpayer or a third party. See United States v. Steel Furniture, 74 F.2d 744 (6th Cir. 1935); deRochemont v. United States, 91-1 U.S.T.C. P 50,237, 23 Cl.Ct. 80

(1991).

The refund may be caused by a mistake of law or fact or both. Fraud or misrepresentation of a material fact by the taxpayer is not a required element for bringing an action within the 2-year limitations period, but is a required element for bringing an action under the 5-year period. I.R.C. § 6532(b).

c) Considerations for instituting suit --

(1) Suit is instituted in a similar manner as a judgment suit, after authorization and recommendation to DOJ by the Chief Counsel.

(2) Section 7405 does not provide that recovery by suit is the exclusive method of recovering erroneous refunds.

d) Erroneous abatement differentiated -- An erroneous abatement (generally referred to in the past as rebate) occurs when the Service reduces or abates the taxpayer's liability on the basis that the correct liability is less than the amount previously assessed or reported on the return. See I.R.C. § 6211(b)(2) for the definition of a rebate.

(1) An erroneous abatement may be recovered by:

i. Following administrative deficiency procedures, if the tax is subject to deficiency procedures;

ii. Following administrative assessment procedures, including notices and appeal rights, if the tax is a non-deficiency tax;

iii. Instituting a suit to reduce the liability to judgment; or

iv. Instituting an erroneous refund suit.

(2) With the exceptions noted below, an unassessable error (generally referred to in the past as non-rebate erroneous refund), one resulting not from a redetermination of a taxpayer's liability but rather from a clerical or ministerial error, must be recovered through voluntary repayment or an erroneous refund suit. The Service cannot "revive" previously paid assessments. See Bilzerian v. United States, 86 F.3d 1067 (11th Cir. 1996), acq. in result, AOD 1998-002 (July 31, 1998); Clark v. United States, 63 F.3d 83 (1st Cir. 1995); O'Bryant v. United States, 49 F.3d 340 (7th Cir. 1995).

(3) A tax liability that has been reduced as a result of a clerical or ministerial error can be reinstated after the erroneous abatement or credit has been reversed if no refund has been issued and the taxpayer will not be harmed. This may be done even if the period of limitations for assessment has run. See In re Bugge, 99 F.3d 740 (5th Cir. 1996) (assessment mistakenly abated because revenue officer believed duplicate assessments had been made when in fact there was only one assessment); Clark v. United States, 63 F.3d 83 (1st Cir. 1995) (taxpayer's designated payment mistakenly applied to another tax period); Crompton-Richmond v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1970). Examples of clerical errors include a dishonored check or an erroneous credit of Taxpayer A's payment to Taxpayer B's account. 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.

(4) Overstated income tax prepayment credits (withholding and estimated tax payments) may be immediately assessed and collected without bringing suit and without providing administrative notices and appeals. However, any such assessment must be made within the period of limitations on assessment. I.R.C. § 6501(a). Such amounts are assessed in the same manner as mathematical or clerical errors and the taxpayer may not have the assessment abated pending the issuance of a statutory notice of deficiency. I.R.C. § 6201(a)(3). If a refund has not been paid to the taxpayer, the Service may adjust the taxpayer's account by reversing the overstated prepayment credit. If a refund has been issued to the taxpayer, 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 must be assessed under section 6201(a)(3) within the applicable period of limitations on assessment before the Service may use its administrative collection powers to collect the improperly claimed credits.

(5) The Service may assess and administratively collect an amount that it erroneously refunded to the taxpayer as a result of an underassessment as long as the assessment is within the period of limitations on assessment under section 6501. Brookhurst, Inc. v. United States, 931 F.2d 554 (9th Cir. 1991).

(6) If, pursuant to section 6343, the Service returns funds collected as a result of a levy and the liability to which the funds had been applied is not satisfied, the Service can continue to collect that liability based on the original assessment.

e) Burden of Proof –

(1) The Service has the burden of proof on all elements of an erroneous refund. Soltermann v. United States, 272 F.2d 387 (9th Cir. 1959). Therefore, the Service must show:

i. That an erroneous refund was made;
ii. The amount of the erroneous refund; and
iii. That the limitations period has not expired.

(2) It is not enough for a taxpayer to show that he or she is entitled to a refund on the merits if the suit is to recover a refund made after the expiration of the refund limitations period. I.R.C. § 6514.

f) Period of limitations --

(1) Generally, two years after the making of the erroneous refund. I.R.C. § 6532(b).

(2) Five years, if any part of the refund is induced by fraud or misrepresentation of a material fact. I.R.C. § 6532(b). The misrepresentation does not need to be knowing and intentional. A grossly negligent misrepresentation, without proof of an intentional deception, will extend the statute of limitations; it is unclear if anything less is also sufficient. Estate of Powell v. United States, 271 F. Supp. 2d 880 (W.D. Va. 2001), aff'd in part, rev'd in part sub nom. Lane v. United States, 286 F.3d 723, 731-32 (4th Cir. 2002) (On appeal, the Fourth Circuit held that extension of the period of limitations is not limited to intentional or knowing representations of material fact and that the Government need not demonstrate more than gross negligence in order to avail itself to the five-year extension. The court rejected the government's argument that misrepresentation includes mere negligence or innocent mistakes, concluding that "the statutory term 'misrepresentation' in section 6532(b) lies somewhere in between the words 'misstatement' and 'fraud' on a scale of increasing culpability."); see also United States v. Northern Trust, 372 F.3d 886 (7th Cir. 2004); Merlin v. Sanders, 243 F.2d 821 (5th Cir. 1957) (statute of limitations extended because of

"misrepresentation of a material fact" when taxpayer claimed estimated tax credits that had previously been refunded). The intentional filing of false claims in own name and in the name of an acquaintance is fraud. deRochemont v. United States, 91-1 U.S.T.C. P 50,237, 23 Cl. Ct. 80 (1991).

(3) Although section 6532 does not specifically provide for waiver, the limitations period may be waived. United States v. National Steel, 75 F.3d 1146 (7th Cir. 1996).

(4) The period for bringing suit begins the day after the date the refund is made. Two circuits have held that this means the date a refund check clears the first Treasury review or the date of ACH final crediting of funds; it is not when the determination to pay a refund is made or when steps are taken to process the refund. United States v. Wurts, 303 U.S. 414 (1938); United States v. Greene-Thapedi, 398 F.3d 635 (7th Cir. 2005); United States v. Commonwealth Energy, 235 F.3d 11 (1st Cir. 2000). Nevertheless, there are hazards that a court could hold that the date the refund is made means the date the Service issues the check. Accordingly, every effort should be made to file suit within two years of the day after the refund check was issued.

7. Extraordinary Writs and Procedures

a) Writ of ne exeat republica -- an order restraining a defendant from leaving the country. The purpose in tax cases is to make the taxpayer stay in the country's jurisdiction so that collection may be effectuated.

(1) Authority -- Section 7402(a) and 28 U.S.C. § 1651 (the "All Writs Statute") provide authority for writs of ne exeat republica.

(2) Principal purpose for instituting suit -- a temporary remedy not intended to operate as a perpetual restriction upon a defendant's freedom of movement. A writ can only authorize a brief initial restraint on the taxpayer's departure from the United States during which the government has the burden of proving in an evidentiary hearing probable success on the merits of its underlying claim by evidence other than a mere jeopardy assessment. The government must also show that the taxpayer's departure will frustrate the collection of the amount due, such as expatriation of assets within the country, and the government bears the burden of showing that the taxpayer has no significant personal business ties which would require him to return to the United States and that there are no other sources of collection available to satisfy the liability. United

States v. Shaheen, 445 F.2d 6 (7th Cir. 1971) (this case was decided prior to the enactment of section 7429. See IRS LGM 1990 LGM GL-7, 1990 WL 1086225 (April 17, 1990) for a discussion of post-section 7429 allocation of burden of proof). This burden is analogous to that required to obtain injunctive relief.

(3) Considerations for instituting suit --

i. Since the nature of the writ is to protect the power of the court to give equitable relief to an injured party, it is necessary that an action for judgment or other relief must have already been started or is commenced simultaneously with the application for the writ. An appropriate civil action would be a suit to foreclose the government's tax lien. An action to enforce a Service collection summons is also an appropriate civil action. Although a suit to reduce the government's tax claim to judgment may be appropriate, a writ ne exeat republica has been denied where a party is merely seeking to extend the statute of limitations.

ii. It must be shown that the defendant intends imminent departure from the United States with no intent to return or satisfy the tax liability and is in the process of liquidating, or removing his assets from the United States and beyond the reach of the court or has already done so.

iii. It must also be shown that the departure would defeat the court's power to give effective relief.

iv. If a taxpayer has transferred all or most of his assets outside of the country, the government should request that a receiver be appointed under section 7403(d) to repatriate assets sufficient to allow the court to give relief. United States v. McNulty, 446 F. Supp. 90 (N.D. Cal. 1978).

v. In personam jurisdiction is required.

(4) Pleadings required --

i. Motion for Writ of Ne Exeat;

ii. Affidavit(s) containing facts to establish a prima facie case for issuance of a writ of Ne Exeat;

iii. Writ of Ne Exeat;

iv. Order for Writ of Ne Exeat;

v. Bond.

b) Notice of lis pendens --

(1) Principal purpose for instituting suit -- to give notice to possible purchasers of the pendency of a suit affecting the property.

(2) Considerations for instituting suit – suit is especially appropriate where a Notice of Federal Tax Lien (NFTL) would not alert a potential purchaser of the tax lien. The United States might use a notice of lis pendens in a fraudulent conveyance suit.

(3) Notice -- notice is generally given by filing a memorandum or statement containing information about the property and the suit with the appropriate recorder of deeds. Look to state law for procedures to follow.

8. Injunctions and Temporary Restraining Orders

a) Authority – I.R.C. § 7402. The United States as a plaintiff in an action has the same rights and access to the same remedies, such as restraining orders and injunctive relief, as any other party to a proceeding. In United States v. Ernst & Whinney, 735 F.2d 1296 (11th Cir. 1984), the court held that section 7402 gave the district courts broad powers to grant injunctive and other equitable relief necessary to enforce the internal revenue laws even without a showing that a particular Code section has been violated. See also United States v. Landsberger, 692 F.2d 501 (8th Cir. 1982); United States v. Hart, 701 F.2d 749 (8th Cir. 1983); United States v. Sifuentes, 96 A.F.T.R.2d (RIA) 2005-7492 (W.D. Tex. 2005); United States v. May, 555 F. Supp. 1008 (E.D. Mich. 1983).

b) Principal purpose for instituting suit -- Injunctions or Temporary Restraining Orders (TRO's) can be used to assist with collecting taxes, for example, to prevent the taxpayer from disposing of negotiable securities or other property, which in the hands of a bona fide purchaser would be immune to the FTL.

c) Considerations for instituting suit -- To get injunctive relief, the United States generally must show that it has an interest to protect or defend.

United States v. Republic Steel, 362 U.S. 482 (1960). This interest may be pecuniary, proprietary, or public. To obtain an injunction under section 7402, the United States may be required to show that it has or will suffer irreparable harm, for which it has no adequate legal remedy. United States v. Ernst & Whinney, 735 F.2d 1296 (11th Cir. 1984).

(1) Injunctive relief has been used effectively to prevent tax protestors from harassing government officials with frivolous suits. See Clark v. McGovern, 77-1 USTC P 9207 (W.D. Wash. 1976). Courts have enjoined the filing of frivolous liens against the Service and its employees. United States v. Ekblad, 732 F.2d 562 (7th Cir. 1984); United States v. Hart, 701 F.2d 749 (8th Cir. 1983). The United States District Court for the Southern District of California gave the government injunctive relief requiring the taxpayer to make all monthly federal tax deposits due from its restaurant. United States v. Lopez, 88 AFTR 2d (RIA) 2001-5131 (S.D. Cal. 2001).

(2) Statutory injunctions to enforce statutory obligations have less onerous showings. In a section 7407 action to enjoin an income tax return preparer, or a section 7408 action to enjoin a promoter of an abusive tax shelter, the government must simply show that the person to be enjoined has engaged in one of the enumerated unlawful actions and that an injunction is necessary to prevent a recurrence of the improper conduct.

(3) In United States v. Landsberger, 692 F.2d 501 (8th Cir. 1982), the court affirmed entry of a permanent injunction under section 7408 against the promoter of a "foreign tax haven double trust" under which a taxpayer purportedly sold personal service income for $l.00 plus "economic justifications" and expected "gifts."

(4) Suit authorization and settlement letters in cases where the Service seeks to obtain an injunction solely under section 7402 must be pre-reviewed by Procedure and Administration, Branches 3 or 4, prior to referral to DOJ unless special arrangements have been made as to a case or type of case. All such cases, regardless of the dollar amount involved, are to be classified as Standard.

(5) The evidence to show that injunctive relief is necessary must be available at the time the suit letter is forwarded to DOJ.

(6) Sections 7407 and 7408 are within the assigned expertise of the Associate Chief Counsel (P&A, Branches 1 or 2).

9. Intervention

a) Authority -- I.R.C. § 7424. The United States as a creditor of the taxpayer may use any state proceeding available to a creditor. If there is a lawsuit affecting the taxpayer's property to which the United States is not a party, the United States may move to intervene in the proceeding and to foreclose the FTL on the property which is the subject matter of the action.

b) Principal purpose for instituting suit -- If the United States is not a party to a civil action or suit, it may intervene to assert any FTL on the property that is the subject of such action or suit. See Distributor Products v. Enourato, Inc., 1974 WL 656, 74-2 U.S.T C. P 9697 (D. N.J. 1974). If intervention is denied, the adjudication will not affect the FTL.

c) Consideration for instituting suit -- State or federal rules of practice applicable to the court in which intervention is sought control procedures for intervention.

(1) Failure to intervene may result in property or rights to property being distributed to claimants with junior interests. Although the United States may have a right of action against the distributees or distributed property, as a practical matter, collection is jeopardized.

(2) A suit may have been instituted in which the United States has an interest but could not be named or the suit could have been one under 28 U.S.C. § 2410, but the United States was not named or properly served. In these instances, intervention should be considered. Counsel may hear of these proceedings through DOJ or through administrative sources.

(3) The United States may have been named a party to a suit where no authority exists for it to be joined but in which it has an interest to protect. Consider intervention.

d) Procedure --

(1) Intervention is generally accomplished by timely filing a motion with the court for leave to intervene.

(2) If the motion is granted, the United States intervenes as a party plaintiff and files a petition of intervention requesting a determination of the conflicting claims and liens and, if necessary, an order directing the sale of the property. The procedural rules provided in 28 U.S.C. § 2410 apply as if the United States had initially been a party to the action.

(3) Intervention must be authorized or sanctioned by Counsel and directed by the Attorney General under sections 7401 and 7403. The underlying tax must have been assessed within the three-year assessment period. Section 6501(a). Section 7424 does not confer authority on the United States to intervene. The procedure for intervention is controlled by the state or federal rules of practice applicable to the court in which intervention is sought.

(4) If the motion to intervene is denied, the proceedings have no effect on the FTL. The United States can levy or foreclose its lien against the property. This is the same result as where the government is not joined as a party.

e) Removal -- If the government intervenes, it has the same right of removal as if it had originally been named a defendant. I.R.C. § 7424. Thus, the United States has the same right of removal to the federal courts when it intervenes as it has in any action brought against it under 28 U.S.C. § 2410. The right to removal is absolute upon timely petition to the federal district court.

f) State court and substantive tax issues –

(1) Where litigation between private litigants in a state court proceeding in which the United States is not a party has a direct bearing on the construction of a federal internal revenue statute or upon a lien or other interest, the Service should consider whether or not to intervene.

(2) The CCDM contains specific guidelines for actions the government should take when the Service is erroneously named as a party defendant in a state court proceeding concerning a tax issue and when intervention in the proceeding is unnecessary or undesirable. Normally, the government files a disclaimer and a motion to dismiss if service has been made on the United States. If the United States is only given notice but is not served with process, no action is necessary. CCDM 34.6.2.6.

10. **Forfeiture Cases**

a) Authority and principal purpose -- Most states have laws providing that property used in connection with the commission of a crime shall be seized and if the accused is convicted of the criminal charge the property is to be forfeited to the state or a political subdivision thereof.

b) Considerations for instituting suit –

(1) It is important to establish whether the seized property was owned by the taxpayer at the time of its seizure. The property may not be subject to a lien against the taxpayer if it was used in the commission of a crime and the wrongdoer acquired no property interest in property unlawfully acquired. A state may resist levy action on this premise.

(2) It is important to determine in cases where the taxpayer owned the seized property whether the federal tax was assessed before the earliest date on which title to the seized property could pass from the taxpayer to the state or local government. Section 6323(i)(3) provides that, for purposes of lien priority, a forfeiture under local law of property seized by a local law enforcement agency of a state shall relate back to the time of the seizure, except to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the local government in the property.

(3) These cases may require a suit letter authorizing a suit to enforce the tax lien or one authorizing intervention to assert the lien. It is also possible that the property involved may be the subject of an interpleader action.

11. Proceedings in Aid of Execution

a) Principal purpose -- After a judgment is obtained, DOJ is concerned with its collection. If Counsel learns that a final judgment has been obtained against a taxpayer and DOJ has not already requested the Service's collection assistance, the assigned attorney should send a memorandum to the appropriate Service official informing him or her of the judgment and requesting the official to ascertain whether the judgment debtor has assets out of which the judgment may be satisfied. The Service official should then report the findings directly to the attorney who tried the case for DOJ for collection efforts.

b) Considerations --

(1) Rule 69(a), Federal Rules of Civil Procedure -- provides that:

i. Process to enforce a judgment obtained by the United States for the payment of money is normally a writ of execution.

ii. Proceedings on and in aid of execution are normally governed by the practice and procedure of the state in

which the district court proceeding was held.

iii. Discovery in aid of execution is available to enable the government to determine the existence and location of the taxpayer's assets.

(2) An administrative summons issued under section 7602(a)(2) may also be used to require testimony.

12. **Appointment of an Agent to Bid at Sale**

a) Authority -- 31 U.S.C. § 3715 and I.R.C. § 7403. The procedure may also apply in 28 U.S.C. § 2410 cases.

b) Principal purpose -- Cases arise that necessitate the appointment by the Commissioner or the Chief Counsel (Treas. Reg. § 301.7403-1) of an agent with authority to act for the United States in bidding at certain execution sales of property when the United States, usually the plaintiff in the action, has a first lien for taxes. United States v. Peelle Co., 224 F.2d 667 (2d Cir. 1955).

13. **Procedures for Seizures of Residences**

Under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 ("RRA 98"), the Service may not seize any real property used as a residence by a taxpayer or any real property (other than rented property) of a taxpayer that is used as a residence by another person to satisfy a tax liability due from a taxpayer in the amount of $5,000.00 or less. See section 6334(a)(13)(A).

Under section 6334(e)(1)(A), in the case of a taxpayer's principal residence, the Service may seize a residence only if a judge or magistrate of a United States district court approves of the levy. See Treas. Reg. § 301.6334-1 for the regulations under section 6334 for property exempt from levy, particularly Treas. Reg. § 301.6334-1(d) regarding levy on a principal residence. For purposes of this provision, the meaning of "principal residence" of the taxpayer is governed by I.R.C. § 121.

a) Authority -- Section 6334(e)(1)(B) provides that exclusive jurisdiction to approve principal residence levies lies with the United States district courts.

(1) Background and Applicability --

i. Before July 22, 1998, the principal residence of a

taxpayer was generally exempt from levy, unless a levy was personally approved in writing by a District Director or Assistant District Director or there was a jeopardy determination. In July, 1998 Congress enacted section 3445 of RRA 98, Procedures for Seizure of Residences and Businesses. This provision created new judicial approval requirements for seizures of certain principal residences (hereinafter the "section 6334(e)(1) proceeding"). The new approval requirements are effective for principal residences seized on or after July 22, 1998, the date RRA 98 was enacted.

ii. Under section 6334(a)(13)(B)(i) the taxpayer's principal residence, as defined in section 121, is exempt from levy. The only exception to this rule is that the principal residence is not exempt from levy if a federal district judge or magistrate approves of the levy in writing. I.R.C. § 6334(e). An approval within the Service, regardless of the level, is not sufficient to authorize a levy on a taxpayer's principal residence. In addition, there is no longer a jeopardy exception to the principal residence exemption.

b) Principal purpose for instituting suit -- A proceeding should ordinarily be brought under section 6334(e)(1) whenever the Service would have otherwise sought administrative seizure of a principal residence under prior law. However, suits should still be brought to foreclose the FTL and reduce the tax liability to judgment in lieu of bringing a section 6334(e)(1) proceeding whenever it is determined that such suits would be optimal. For example, a lien foreclosure suit may be preferable to a section 6334(e)(1) proceeding when there are questions regarding title or lien priority that create an unfavorable market for an administrative sale. A lien foreclosure suit may also be a specific option when the collection statute of limitations is about to run. Bringing a lien foreclosure suit is consistent with the policy underlying section 6334(e)(1) of assuring that the disposition of principal residence property is sanctioned by a court.

c) Considerations for instituting suit --

(1) Pursuant to section 6334(a)(13)(A), if the amount of a taxpayer's liability does not exceed $5,000, any real property used as a residence by the taxpayer or by any other person (except with respect to rental property) is exempt from levy. This provision does not expressly provide for any exception to this exemption.

However, the legislative history seems to provide for a judicial exception. The conference report provides:

No seizure of a dwelling that is the principal residence of the taxpayer or the taxpayer's spouse, former spouse or minor child would be allowed without prior judicial approval. Notice of the judicial hearing must be provided to the taxpayer and family members residing in the property. At the judicial hearing, the Secretary would be required to demonstrate (1) that the requirements of any applicable law or administrative procedures relevant to the levy have been met, (2) that the liability is owed, and (3) that no reasonable alternative for the collection of the taxpayer's debt exists. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, H.R. REP. NO. 105-599, at 267 (Conf. Rep.), reprinted in 1998 U.S.C.C.A.N. 288. See also United States v. Rodgers, 461 U.S. 677 (1983).

(2) Based upon the language of section 6334(e)(1) and this legislative history, judicial approval is specifically required before seizing the principal residence of the taxpayer, the taxpayer's spouse, former spouse or minor child. It has been determined, after consultation with DOJ, that the section 6334(e)(1) proceeding will be a plenary hearing involving the participation of the taxpayer, consistent with this legislative history.

d) Interaction with Due Process Procedures, RRA 98 Section 3401 --

(1) Section 6320, effective January 19, 1999, provides that a taxpayer is entitled to written notification after the filing of an NFTL. The section 6320 notice provides the taxpayer with the right to request a hearing before the IRS Office of Appeals. The taxpayer is entitled to request one section 6320 due process hearing per tax period to which the unpaid tax specified in the section 6320 notice relates.

(2) Section 6330, also effective January 19, 1999, similarly entitles a taxpayer to notice of a right to a hearing before levy is made on any property or rights to property belonging to that taxpayer. The section 6330 notice describes the taxpayer's right to request a hearing within 30 days. The taxpayer is entitled to request only one section 6330 due process hearing per tax period to which the unpaid tax specified in the section 6330 notice relates.

(3) Section 6330 hearings will be held in conjunction with section 6320 hearings to the extent practicable. At either hearing, the

taxpayer may raise any relevant issue pertaining to the unpaid tax specified in the notice, including appropriate spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives. The taxpayer may also raise challenges to the underlying tax liability if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have a prior opportunity to dispute such liability. The taxpayer is precluded from raising any issue that has been raised at any previous administrative or judicial proceeding in which the taxpayer "participated meaningfully." The taxpayer may seek judicial review in either Tax Court or a district court, as appropriate, of the determination made by Appeals on or before October 17, 2006. The Pension Protection Act of 2006 amended section 6330(d)(1) to eliminate district court review of Appeals determinations. For Appeals determinations made after October 17, 2006, the Tax Court has exclusive jurisdiction over all CDP cases, regardless of the underlying tax. The Tax Court has held, however, that it does not have "authority" to consider section 6330(c)(2) "issues" that had not been raised before the Appeals Office. Giamelli v. Commissioner, 129 T.C. 107 (2007). See CC Notice 2009-010 for additional information on Collection Due Process cases.

(4) Taxpayers whose residences are subject to a section 6334(e)(1) proceeding after January 18, 1999 will, in most instances, have received a section 6330 notice (and possibly a section 6320 notice) with respect to the tax periods for which the Service seeks to effect collection via seizure of a principal residence. When the taxpayer has had a previous section 6320 or section 6330 hearing, a close examination of the issues raised in the prior hearing is required. If a taxpayer seeks judicial review of an Appeals determination in a section 6320 or section 6330 hearing, the taxpayer may be precluded from raising issues in a subsequent section 6334(e)(1) proceeding that were raised or could have been raised in the earlier court proceeding. Accordingly, it is important that Counsel carefully review what has occurred in any previous section 6320 or section 6330 proceeding and make an analysis with respect to issue preclusion in the section 6334(e)(1) proceeding. This information must be clearly set forth in the section 6334(e)(1) suit letter.

(5) With respect to any section 6320 or section 6330 hearing that may take place after a section 6334(e)(1) proceeding, the express statutory language precludes reconsideration in a section 6320 or section 6330 hearing of issues raised in a prior administrative or judicial proceeding where the taxpayer "participated

meaningfully." The taxpayer would thus be precluded from raising for reconsideration in a section 6320 or section 6330 hearing any issues pertaining to the principal residence seizure addressed in the prior section 6334(e)(1) proceeding.

V. SUITS AGAINST THE UNITED STATES (DEFENSIVE)

As a Counsel field attorney, you will also be responsible for coordinating the defense of the Service when legal actions are filed against it.

A. Types of Defensive Proceedings

1. Injunctions against the United States

a) Authority – I.R.C. § 7421.

(1) Section 7421(a) prohibits any suit by any person to restrain the assessment or collection of any tax except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436. Section 7421 is based upon the general rule of equity that when a person has an adequate remedy at law, he or she may not seek equitable relief. The remedy to be used is to pay the tax and file a refund suit, or in the case of income, estate or gift tax, to litigate, prior to assessment, the merits of the tax in the United States Tax Court. See also the discussion of Anti-Injunction Act in lesson on Collection Due Process.

(2) Section 7421(b), containing language similar to that in section 7421(a), extends the restrictions against enjoining assessment and collection activity to transferee and fiduciary liabilities.

Note: An employer's act of withholding taxes from its employee's wages pursuant to section 3402 is a method of "collection of taxes" within the meaning of section 7421(a). Thus, an action to enjoin an employer from collecting federal taxes is barred by section 7421(a). See United States v. American Friends Service Committee, 419 U.S. 7, 10 (1974).

Also Note: How broadly the Anti-Injunction is applied has been called into question in recent cases. See Direct Marketing Association v. Brohl, 135 S. Ct. 1124 (2015) (suit to enjoin enforcement of State law requiring certain retailers to report tax-related information to their customers and to the State Department of Revenue not barred by the Tax Injunction Act [similar to the Anti-Injunction Act] as injunction would only inhibit assessment, levy or collection); Z St. v. Koskinen, 791 F.3d 24, 30-31 (D.C. Cir. 2015) (opining that it is not clear whether injunction against

delay of consideration of an application for tax exemption would restrain assessment or collection). But see Florida Bankers Ass'n and Texas Bankers Ass'n v. United States Department of Treasury, et al., 799 F.3d 1065 (D.C. Cir. 2015) (suit challenging regulation barred by AIA as it "would invalidate the reporting requirement and restrain (indeed eliminate) the assessment and collection of the tax paid for not complying with the reporting requirement").

b) Principal purpose for suit -- An injunction is a request to a court to prevent a defendant from doing an act or to compel the defendant to initiate some action. See FED. R. CIV. P. 65. In federal tax cases, the injunction usually seeks to have an assessment declared invalid or to enjoin collection activity. In Spicer v. Jensen, 210 F.3d 385 (9th Cir. 2000), the court used section 7421 to bar Spicer's suit charging that the revenue officers had failed to provide to him the statutory authority for his liability. See also Sokolow v. United States, 169 F.3d 663 (9th Cir. 1999) (suit to enjoin collection of taxpayer's unpaid liability barred by section 7421).

c) Statutory Exceptions --

(1) Sections 6212(a) and (c) require that a statutory notice of deficiency be sent to a taxpayer when the Service determines that a taxpayer has a deficiency with respect to the year in question. The issuance of a second statutory notice may be enjoined if a petition for the first statutory notice has been filed in the Tax Court. A second notice could probably be enjoined if issued within the 90-day period before a petition is filed. See Philadelphia & Reading Corp. v. Beck, 676 F.2d 1159 (7th Cir. 1982). The granting of injunctive relief following an assessment made in violation of the restrictions contained in section 6212(a) is not mandatory. A petitioner must show irreparable harm or lack of an adequate remedy at law. Id. at 1163.

(2) Section 6213(a) prescribes restrictions on the assessment of a deficiency. Assessment and collection may be enjoined if attempted prior to: (1) the issuance of a notice of deficiency; or (2) before 90 days after the issuance of a notice of deficiency, including the time that a case is pending in the Tax Court, if any.

(3) Section 6330(e)(1) provides that a levy may be enjoined if it occurs during the suspension period during which a hearing on the levy, and appeals therein, are pending.

(4) Section 6694(c) provides that injunctions can be issued against collection activity where an income tax return preparer pays 15% of the penalty under sections 6694(a) or (b) and files a claim for refund within 30 days of notice and demand of such penalty.

(5) Sections 7426(a) and (b)(1) provide that a wrongful levy and/or sale may be enjoined.

(6) Section 7429(b) provides that, where appropriate, injunctions may be issued against jeopardy and termination assessments.

(7) The prohibition against injunctive relief also applies to penalties, interest, and the trust fund recovery penalty. However, see I.R.C. §§ 6672(c) and 6694(c) where collection may be enjoined when taxpayers file refund suits and have furnished suitable bonds.

d) Judicial Exceptions --

(1) In Miller v. Standard Nut Margarine, 284 U.S. 498 (1932), a federal oleomargarine excise tax was assessed. Based on prior court decisions and a letter from the Deputy Commissioner, the product of Standard Nut was not subject to the tax. The company would have been ruined if collection had been made. The court granted the injunction.

(2) In Enochs v. Williams Packing and Navigation, 370 U.S. 1, rehearing denied, 370 U.S. 965 (1962), the issue was whether fishermen were employees subject to social security tax. The Supreme Court dissolved an injunction issued by a lower court. It set forth a new two-pronged test for the issuance of an injunction:

i. The United States must be incapable of prevailing under the most favorable view of the facts. In other words, the illegality of the tax must be absolutely clear on its face.

ii. Special circumstances must exist indicating that the taxpayer does not have an adequate remedy at law (e.g., a refund suit), with the result that the taxpayer will suffer irreparable injury. In other words, "equity jurisdiction" must be shown. Mere hardship is simply not a basis for issuing an injunction. California v. Latimer, 305 U.S. 255 (1938).

(3) In Bob Jones University v. Simon, 416 U.S. 725 (1974), the

university brought an action to enjoin the revocation of a ruling letter, declaring the university qualified for tax-exempt status. The Supreme Court held that no injunction should be allowed. Williams Packing controlled and the two-pronged test had not been met by the university. The Court voiced its dissatisfaction with Standard Nut to the extent it might be viewed as permitting injunctions solely on the basis of irreparable harm. The Court viewed Standard Nut as a situation where the Service had no chance of success on the merits.

(4) In Alexander v. "Americans United," Inc., 416 U.S. 752 (1974), a non-profit, educational corporation and two of its benefactors sought injunctive relief that would have required the Service to reinstate a ruling letter that the corporation qualified as a tax-exempt organization. The Supreme Court held that the objective of the suit was to restrain the assessment and collection of taxes from the corporation's contributors by restoring advance assurance that donations to the corporation would qualify as charitable deductions. Thus, the action was barred by section 7421. The tests from Williams Packing were not met. The Court looked at the substance of the matter rather than the form since assessment and collection of the tax were not immediately involved.

(5) In Commissioner v. Shapiro, 424 U.S. 614 (1976), a jeopardy assessment was made against the taxpayer. Levies were served on that same day against various bank accounts of the taxpayer. Within one week, the taxpayer sued for an order directing the Service to remove its levies on the ground that he owed no taxes for the years in question. The Service defended on the grounds that the suit was barred by section 7421.

The Court denied the government's request for dismissal. Applying the rules of Williams Packing, the Court first determined that the taxpayer would be irreparably harmed by the Service's action. The funds were needed to post bail in Israel, to which the taxpayer was to be extradited. His loss of freedom would have been irreparable harm. The Court then held that unless the government disclosed the basis for its assessment, the taxpayer would have never been able to show that the government could not ultimately prevail on the merits. The Court suggested that the information could be supplied to the taxpayer by affidavit. Oral testimony and cross-examination were not to be required. A written statement setting forth the basis for the government's jeopardy determination now must be sent to a taxpayer by the

Service within five days of the making of the assessment. I.R.C. § 7429(a)(1).

(6) In South Carolina v. Regan, 465 U.S. 367 (1984), South Carolina brought suit to challenge the constitutionality of TEFRA section 310(b)(1). That section generally requires that bonds issued by a state be in registered rather than coupon form in order to exempt the interest thereon from federal income taxation under section 103(a). South Carolina alleged that the amendment interfered with its sovereign rights under the Tenth Amendment to borrow funds by requiring it to pay increased costs either through bond registration or through issuing non-exempt coupon bonds at a higher stated rate of interest. South Carolina also alleged that by imposing a tax upon the income from coupon bonds issued by a state, Congress was violating the doctrine of intergovernmental tax immunity. The Supreme Court held that the purpose of section 7421(a) and the circumstances attending its enactment indicated that Congress did not intend the section to apply to actions brought by parties aggrieved by a tax law for whom it has not provided an alternative remedy. The aggrieved party could not be required to depend on the mere possibility of persuading a third party to assert its claim. However, the Court reaffirmed the strict judicial exception to the section enunciated in Williams Packing and the principle that, for a taxpayer, a refund action is an adequate remedy to challenge a disputed tax liability.

Note: Substance, not form, controls when determining whether an injunction can be brought against the United States. The plaintiff might not categorically ask for an injunction. To illustrate, some taxpayers have attempted to thwart a levy by having a receiver appointed under state law to take over property already under levy.

2. Review of Jeopardy Levy or Assessment under § 7429

a) Principal purpose -- Under the RRA 98 amendments to section 7429, no jeopardy or termination assessment or jeopardy levy may be made without prior written review and approval by the Chief Counsel or his delegate. Section 7429(a)(1)(B) further provides that, within five (5) days of the making of a jeopardy or termination assessment or a jeopardy levy, the Service must furnish the taxpayer with a written statement detailing the basis upon which the Service relied in making the assessment or levy. See Assessment Lesson Part IV.C for additional discussion of jeopardy and termination assessments.

b) Considerations --

(1) The Senate Committee Report relating to the RRA 98 amendments to section 7429 states that if the required Chief Counsel approval is not obtained in advance, a taxpayer is entitled to an abatement of the jeopardy or termination assessment or to a release of the jeopardy levy made by the Service.

(2) A taxpayer may request an administrative review by the Service after a jeopardy or termination assessment or jeopardy. I.R.C. § 7429(a)(2). The Service may consider information subsequently obtained in determining the propriety of the jeopardy action. Treas. Reg. § 301.7429-2(b). This review must be requested by the taxpayer within thirty (30) days after the later of: (1) the date on which the Service furnished to the taxpayer the written statement detailing the basis for the jeopardy or termination assessment or jeopardy levy action; or (2) the date on which the five-day period for the furnishing of such written statement expired. On review, the Service shall determine whether the assessment or levy is reasonable.

(3) Jeopardy will be presumed where an individual is in physical possession of cash in excess of $10,000 and does not claim the money as his or hers or as belonging to another person whose identification is ascertainable and who claims the money. I.R.C. § 6867. See Matut v. Commissioner, 858 F.2d 683 (11th Cir. 1988); Peoples Loan & Trust Co. v. Commissioner, 89 T.C. 896 (1987), rev'd sub nom. Commissioner v. Hendrickson, 873 F.2d 1018 (7th Cir. 1989).

(4) Determination by a court under section 7429(b) has no effect on a determination of correct liability in a later proceeding.

c) Judicial review –

(1) The reviewing court must decide these issues within 20 days unless additional time (maximum of 40 additional days) is requested by the taxpayer. I.R.C. §§ 7429(b)(3) & (c). There is no appeal from the court's decision. I.R.C. § 7429(f); see Meadows v. U.S., 665 F.2d 1009 (11th Cir. 1982); Freistak v. Egger, 551 F. Supp. 238 (M.D. Pa. 1982); but see Hiley v. U.S., 807 F.2d 623 (7th Cir. 1986), Hall v. Commissioner, 805 F.2d 1511 (11th Cir. 1986) where appeals were allowed because the district court failed to make a determination as to the reasonableness of the jeopardy and appropriateness of assessment. Section 7429(a)(1)(B) requires the Service to provide the taxpayer with a written statement setting forth the factual basis for making a jeopardy assessment. See IRM

4.15.4.2.1. Inadequate notice can be held to violate due process and the court will abate the assessment. See Walker v. U.S., 650 F.Supp. 877 (E.D. Tenn. 1987).

(2) A taxpayer is entitled to *de novo* review of a jeopardy or termination assessment or jeopardy levy and may institute judicial review by filing suit in district court. In some instances, the suit may be commenced in the Tax Court, where the tax at issue in the jeopardy assessment is subject to the deficiency procedures and a petition for redetermination of the subject tax liabilities has been filed with the Tax Court. I.R.C. § 7429(b)(2)(B). A request for administrative review is a prerequisite to suit. The taxpayer must file suit within 90 days of the day the Secretary notifies the taxpayer of the Secretary's determination in the administrative proceedings or beginning the 16th day after the request for administrative review is made, within 90 days thereafter, whichever is earlier. Treas. Reg. § 301.7429-3(a).

(3) Facts discovered subsequent to the jeopardy assessment will be considered by the district court in its determination. Perillo v. U.S., 1986 WL 10101, 86-2 USTC P 9638 (E.D.N.Y. 1986). Chief Counsel should consider not defending a section 7429 action if potential sources of collection are later discovered which make it clear that collection is not in jeopardy.

d) Issues for determination by the district court are --

(1) Reasonableness of the jeopardy or termination assessment or jeopardy levy action (burden of proof on government per section 7429(g)(1)).

(2) Appropriateness of the amount of the assessment (burden of proof on taxpayer, per section 7429(g)(2)). The court may reduce or abate the assessment, remand the action for redetermination, or take such other action as may be appropriate. I.R.C. § 7429(b)(4).

3. **28 U.S.C. § 2409a**

a) Principal purpose - The United States may be a named party defendant in a civil action over a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

b) Considerations -- 28 U.S.C. § 2409a requires that the United States have a present interest in the property. The statute does not apply if the government purchased the property at a tax sale and resold it prior to the

suit. See Curtis v. United States, 1976 WL 917, 77-1 USTC P 9138 (M.D. Tenn. 1976).

4. 28 U.S.C. § 2410 Actions

a) Principal Purpose

Though the United States is technically a defendant in these suits, they are considered collection suits in that, unlike other suits in which the United States is a defendant, the United States does not face the prospect of paying damages. Rather, the government may only receive funds in a 2410 action.

b) Jurisdiction

28 U.S.C. § 2410 does not confer jurisdiction upon any court to foreclose a lien, quiet title to property, partition or condemn property or entertain an interpleader action. Section 2410 is a consent statute only; it merely waives sovereign immunity in these specified actions. There must be an independent basis for jurisdiction apart from section 2410.[1] Wells v. Long, 162 F.2d 842 (9th Cir. 1947). The court in which the suit is brought must have authority to conduct the type of proceeding instituted independent of section 2410. In addition, there is no waiver of sovereign immunity where the claim of the United States is based upon title as opposed to a claim based upon a mortgage or other lien. Lewis v. Hunt, 492 F.3d 565, 572 (5th Cir. 2007); Bertie's Apple Valley Farms v. United States, 476 F.2d 291 (9th Cir. 1973).

c) Five Types of 28 U.S.C. § 2410 Actions

(1) Actions to Quiet Title –

i. A proceeding instituted by persons claiming some interest or title in the property and seeking to remove a cloud from their title. United States v. Coson, 286 F.2d 453, 457 (9th Cir. 1961).

ii. A judgment or decree in such action has the same effect respecting the discharge of the government's interest in the property as applicable local law provides with respect to

[1] 28 U.S.C. § 2410 cases may be brought in federal court if there is an independent basis for jurisdiction. E.g., 28 U.S.C. § 2361 (jurisdiction for federal interpleader actions). See FED. R. CIV. P. 22.

other liens. Thus, it is not necessary to request a judicial sale to discharge the interest of the United States.

iii. The United States has the right to bring an action to quiet title to property it has acquired through the enforcement of a tax lien. I.R.C. § 7402(e).

(2) Foreclosure Actions

i. The party requesting the foreclosure of a mortgage or other lien where the United States is named a party under 28 U.S.C. § 2410 must seek a judicial sale. § 2410(c). This is not necessary in the other actions under section 2410. See I.R.C. § 7425(a) and implementing regulations, Treas. Reg. § 301.7425-1, with respect to the discharge of a FTL where the United States is not joined as a party in an action or suit described in section 2410(a). If a lienholder fails to comply with either 28 U.S.C. § 2410 or section 7425, and its implementing regulations under Treas. Reg. § 301.7425, the FTL remains undisturbed after the execution sale. See Southern Bank of Lauderdale County v. United States, 770 F.2d 1001 (11th Cir. 1985). Neither the language nor the purpose of section 7425 supports a claim that failure to comply with the notice provisions automatically elevates junior tax liens to priority status. By making property sold without notice "subject to" the lien of the United States, section 7425 merely preserves FTLs from being extinguished through sale of the underlying collateral; it does not otherwise alter the federal priority rules of section 6321. United States v. State of Colorado, 872 F.2d 338 (10th Cir. 1989). A junior FTL could be elevated in cases where the doctrine of merger (a merger always takes place when a greater estate and lesser estate coincide and meet in one and the same person, in one and the same right, without any intermediate estate, unless a contrary intent appears) shows that the intent of the senior purchaser was to have its lien merge with fee title to the property. In such a case, the junior FTL's priority is elevated because the senior lien has been extinguished. Whether a senior lien merges with fee title is decided under state law. Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991); United States v. State of Colorado, 872 F.2d 338 (10th Cir. 1989); First American Title Insurance v. United States, 848 F.2d 969 (9th Cir. 1988); but see Southern Bank of Lauderdale County v. United States, 770

F.2d 1001 (11th Cir. 1985) (Under Alabama law, the purchasing lienor's lien was automatically extinguished when it merged with the lienor's newly-acquired title, making the FTL senior in priority.).

ii. Effect of a judicial sale of an encumbrance prior in right to the government's lien.

- The junior FTL would be wiped out as would any other junior liens under the local law of the place where the property is situated.
- The government has protection under these circumstances by virtue of the right of redemption [discussed in Redemption Lesson]. See 28 U.S.C. § 2410(c).

iii. If a judicial sale occurs following a foreclosure action by a lienholder whose lien is inferior to that of the government's FTL, the FTL is undisturbed unless the government consents to the sale free and clear of its liens with the proceeds distributed according to preexisting lien priorities. See I.R.C. § 6325(b)(3).

(3) Partition Suits

i. Partition means a division between two or more persons of real or personal property owned as joint heirs, joint tenants or tenants in common. A partition may be voluntary or by suit.

ii. In a partition suit, the court will determine the interests of the various parties in the co-tenancy and cause the undivided interest in the whole to be divided into separate interests in portions of the parcel of property.

iii. Generally, the purchaser in a partition suit takes subject to liens and outstanding interests unless the sale was made free and clear of such encumbrances. State law governs whether an interested third party such as the United States may be satisfied out of the property partitioned or must be satisfied from the proceeds of sale of the property.

(4) Condemnation Suits

i. A suit to set apart or expropriate land for public use in

the exercise of eminent domain.

ii. A condemnation action is a proceeding in rem against the land or property itself. All previously existing estates or interests in the land are appropriated. Thus, the condemnation award stands in lieu of the land, and the rights of all persons, including tax liens, may be treated as though transferred from the land to the award.

(5) Interpleader

i. Proceedings to enable a person, from whom the same debt, duty or thing is claimed adversely by two or more parties, to compel the claimants to litigate the right or title between themselves and thereby relieve that person from the suits which they might otherwise have against him.

ii. On occasion, a party upon whom the Service has levied to reach the taxpayer's property will attempt to interplead the funds, claiming the government and the taxpayer have adverse interests because the Service claims the property through a third party, recognizing that it belongs to the taxpayer. In such cases, the government argues that the stakeholder cannot honestly fear suit by the taxpayer because he or she has complete immunity from suit by honoring the levy per section 6332(e).

iii. Generally, a court has the discretion to award attorneys' fees to a stakeholder in an interpleader case. However, the existence of prior FTLs gives the government a statutory priority over the plaintiff's right to diminish the fund by an award of fees. Abex Corp. v. Ski's Enterprises, 748 F.2d 513 (9th Cir. 1984); Bank of America Nat'l Trust and Savings Assn. v. Mamakos, 509 F.2d 1217 (9th Cir. 1975).

d) Rights of the United States in 28 U.S.C. § 2410 Cases

(1) Purchase of property by United States

i. In any case in which a debt owing the United States is due (when a FTL is involved, the amount is always due), the United States may ask by way of affirmative relief for a foreclosure of its lien. 28 U.S.C. § 2410(c).

ii. When the lien involved is a first lien, the government

may bid at the sale an amount equal to its claim plus the expenses of sale. I.R.C. § 7403(c).

iii. Specific authorization by the General Counsel of the Treasury, or his delegate, is required. This is given in the same manner as collection suits are authorized.

(2) Removal – 28 U.S.C. § 1446

i. When a 28 U.S.C. § 2410 action is brought in a state court and the United States is named a party, or intervenes in the action, the United States has the option to remove the case to United States District Court. 28 U.S.C. § 1444. A petition for removal must be filed within 30 days after receipt by the United States of a copy of the initial pleading, through service or otherwise, setting forth the claim for relief. If the 30-day deadline passes, and the state court has jurisdiction over the United States (as where the conditions of 28 U.S.C. § 2410 have been complied with), the United States loses the right to remove. 28 U.S.C. § 1446.

ii. The right to remove is absolute.

iii. The U.S. removes by filing a petition in district court.

iv. The removal petition for a civil action must be filed within 30 days after the receipt by the United States, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. The removal petition in a criminal action may be filed at any time before trial.

v. Before 1986, the jurisdiction of the federal court on removal was derivative. In other words, there must have been state court jurisdiction for the federal court to have jurisdiction. Pennsylvania Turnpike Commission v. McGinnes, 179 F. Supp. 578 (E.D. Pa. 1959), aff'd, 278 F.2d 330 (3d Cir. 1960), cert. denied, 364 U.S. 820 (1960). If the state court lacked jurisdiction, the federal court did too, even though it would have had jurisdiction had the action originally been filed in federal court. Lambert Run Coal Co. v. Baltimore & Ohio R.R., 258 U.S. 377 (1922). This was true even where federal jurisdiction was exclusive. Minnesota v. United States, 305 U.S. 382

(1939). The doctrine of derivative jurisdiction was overruled by Congress with the Judicial Improvements Act of 1985, Pub. L. 99-336. 28 U.S.C. § 1441(e); see State of North Dakota v. Fredericks, 940 F.2d 333, 336-38 (8th Cir. 1991); Beighley v. FDIC, 868 F.2d 776, 780 n.8 (5th Cir. 1989) superceded by statute on other grounds as stated by Dendlinger v. First Nat'l Corp., 16 F.3d 99 (5th Cir. 1994); Morda v. Klein, 865 F.2d 782, 783 (6th Cir. 1989). The change applies to actions commenced in state court after June 19, 1986. Now, federal courts can hear a case removed from state court even when the state court did not have jurisdiction over the claim.

vi. Removal of an action by the United States does not constitute a waiver of sovereign immunity. The United States may still be dismissed from the suit by the district court. S. & E. Building Materials v. Joseph P. Day, Inc., 188 F. Supp. 742 (E.D.N.Y. 1960). After the United States is dismissed, the case is remanded to state court. See Curtis v. United States, 1976 WL 917, 77-1 USTC ¶ 9138 (M.D. Tenn. 1976) and cases cited therein.

vii. As a general rule, the Service should request removal:

- if there is reason to believe the United States will not be treated fairly in the state court,
- if an important legal or factual principle is involved.

(3) United States' Right of Redemption

i. When a judicial sale of real property is made to satisfy an encumbrance prior in right to the junior FTL, the United States still has the right of redemption. 28 U.S.C. § 2410(c).

ii. The principal consideration in determining whether to invoke the right of redemption is whether the value of the property sold in foreclosure is substantially in excess of the amount required to redeem, so that the property might be resold with a benefit to the government.

iii. The provisions granting a period of time in which to redeem provides time for the Service to investigate and determine whether it would be in the government's best interest to redeem.

iv. When a lien arises under the Code, the redemption period is 120 days or the period allowable for redemption under state law, whichever is longer. 28 U.S.C. § 2410(c).

v. Amount to redeem

- 28 U.S.C. § 2410(d) provides a uniform method for determining the amount to be paid by the United States when it redeems real property, whether the redemption is made under the authority of 28 U.S.C. § 2410(c) or section 7425(d)(1) (relating to real property sold at nonjudicial sales). See Equity Mortgage Corp. v. Loftus, 504 F.2d 1071 (4th Cir. 1974); Bain v. United States, 1973 WL 678, 74-1 USTC P 9114 (E.D. Tex. 1973).
- The amount paid by the purchaser at the foreclosure sale plus 6% per annum from date of sale, plus the excess, if any, of expenses incurred after the sale to maintain the property, over the income from the property during this period. If the property is used by the purchaser, the income includes the reasonable rental value of the property.
- When the purchaser at the sale is the person whose lien is foreclosed, the amount paid includes the amount of the debt underlying that person's lien to the extent the lien is satisfied by the sale. When the lien is fully satisfied, the purchaser is not to receive less than the amount due him or her at the time of sale. The amount paid does not include any unpaid balance.

vi. The right of redemption may be released. See Treas. Reg. § 301.7425-4(c)(4). The authority for granting a release of the right of redemption has been vested in DOJ and redelegated to the U.S. Attorney with respect to (1) real property on which is located only one single-family residence, and (2) all other real property having a fair market value not exceeding $200,000.

vii. Application is made to the U.S. Attorney. The U.S. Attorney refers the application to the Service for investigation. The Service is not required to notify Counsel of their determination regarding the release of the right of redemption before transmitting their recommendation to the U.S. Attorney. CCDM 34.5.6.5.1(3).

viii. Any payment made is credited to the taxpayer. If the Service determines that the right of redemption of the US is without value, no amount shall be required to be paid with respect to the release of the right of redemption. Treas. Reg. § 301.7425-4(c)(4). DOJ, however, generally will not release a right of redemption without receiving consideration, even if the right is valueless.

(4) Discharge

Applications for discharge of property from tax liens while United States is a party to a pending proceeding--

i. The U.S. Attorney will send the application to the Service. An application made without consideration after commencement of a proceeding will be rejected. The Service takes this position because the mortgagee could simply apply for and obtain a conditional discharge letter before instituting a foreclosure proceeding. These letters state that, upon a finding that the FTL interest is valueless, and upon the conclusion of a foreclosure proceeding divesting the taxpayer of all interest in the property, a certificate of partial discharge will be issued.

ii. A primary benefit of this procedure is that the mortgagee does not have to make the United States a party to the foreclosure suit if the mortgagee applied for an administrative discharge and eliminates the statutory right of redemption, which would otherwise cloud the title passed at the foreclosure sale.

5. **Mandamus**

District courts have original jurisdiction to compel an officer or employee of the United States or any of its agencies to perform a duty owed the plaintiff.

However, relief in the nature of mandamus is not available:

a) To compel the performance of a discretionary (as opposed to a ministerial) act or the manner in which a discretionary act is to be performed. Stern v. South Chester Tube, 390 U.S. 606 (1968); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); or

b) When the plaintiff has an adequate remedy at law. United States, ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937).

6. **Declaratory Judgments**

a) Authority – 28 U.S.C. § 2201.

b) Principal purpose – this is a request for a court to declare the rights of parties, without ordering anything to be done.

c) Considerations -- Federal tax questions are exempt from the jurisdiction of the district courts to render declaratory judgments. In Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), rev'd on other grounds, 426 U.S. 26 (1976), the court held that a party whose tax liability was not directly in dispute could maintain a declaratory judgment action where there was no adequate remedy at law and where a judgment would not have the effect of restraining assessment or collection of taxes. See also Rodriguez v. United States, 629 F.Supp. 333 (N.D. Ill. 1986).

d) I.R.C. § 7428 provides that the district court of the United States for the District of Columbia, the United States Court of Federal Claims, and the Tax Court may render declaratory judgments concerning charitable organizations seeking an exemption under section 501(c)(3) and/or seeking to avoid private foundation status.

e) See sections 7476, 7477 and 7478 regarding the jurisdiction of the Tax Court to render declaratory judgments on the qualification of retirement plans, the value of certain gifts, and the status of certain governmental obligations, respectively. Declaratory judgment suits under sections 7428, 7476, 7477 and 7478 may only be brought by persons affected by the Service's decision and not by third parties.

f) I.R.C. § 7479 -- For estates of decedents dying after August 5, 1997, section 7479 authorizes the Tax Court to render a declaratory judgment with respect to the Commissioner's determination (or failure to make a determination) regarding whether an estate is eligible to make an installment payment election under section 6166 and whether the extension of time for payment under section 6166 has ceased to apply. Because section 6166 is a relief provision, the Tax Court has taken the position that it has broad jurisdiction under section 7479 to handle all matters relating to a denial or termination of a section 6166 election. See Estate of Roski v. Commissioner, 128 T.C. 113 (2007).

7. **Probate Proceedings**

Probate Proceedings in which the government has a claim against the estate:

a) Authority -- 31 U.S.C. § 3713(a) provides an absolute priority

(regardless of whether a lien is filed) for debt owed the government for an insolvent estate when the estate in the hands of the executor or administrator is insufficient to pay the debts of a decedent. If the fiduciary of the estate does not pay the government first, the fiduciary will be liable under section 3713(b).

b) Principal purpose -- The Service may file claims in state court probate and insolvency cases instituted by other parties. Counsel becomes involved if a dispute arises.

c) Considerations -- priority of the FTL vis-à-vis competing creditors.

(1) Despite this apparent absolute priority, the U.S. normally does not assert priority over:

i. Administrative expenses incurred for the general welfare of creditors.

ii. Family allowances (if the U.S. is relying solely on 31 U.S.C. § 3713 for priority).

(2) The 31 U.S.C. § 3713 priority is superseded by interests that would prevail over the FTL under section 6323. United States v. Estate of Romani, 523 U.S. 517 (1998). If a creditor would prevail against the Service under section 6323(a) outside of insolvency, it will also prevail in insolvency.

(3) Once the government submits a claim in the probate proceeding, it may be bound by the state probate court's decision. See United States v. Pate, 47 F.Supp. 965, 968 (W.D. Ark. 1942).

8. Wrongful Levy Actions

a) Authority -- Section 7426(a)(1) provides that any person other than the taxpayer may bring a suit against the United States for wrongful levy. Doan Resources Corp. v. United States, 1981 WL 1828, 81-2 USTC P 9523 (E.D. Mich. 1981). Additionally, a civil action may be commenced by a third-party owner of property to seek a refund relating to an erroneous FTL. This latter action, at section 7426(a)(4), represents a codification of United States v. Williams, 514 U.S. 527 (1995), where the Supreme Court held that a third party who pays the tax of another party for the purpose of having an erroneously-placed lien removed may file a refund action against the United States.

b) Burden of Proof when Government Alleges the Third Party is the Taxpayer’s Alter Ego --

In Oxford Capital Corp. v. United States, 211 F.3d 280 (5th Cir. 2000), the Fifth Circuit considered a claim of wrongful levy where the Service had levied on property ostensibly belonging to a third party. The Court vacated the magistrate's ruling in favor of the government because the lower court had not placed the burden of proof on the government to show by substantial evidence a nexus between the third party's property and the taxpayer whose liability the Service sought to collect.

c) Wrongful Levy Relief under Section 7426 is Exclusive

(1) A third party that claims a senior creditor's interest in property levied on by the Service may only seek a remedy in a wrongful levy suit under section 7426, which is subject to a nine-month period of limitations. The third party cannot seek redress in a quiet title action brought under 28 U.S.C. § 2410, which has a longer six-year limitations period. Congress provided section 7426 as the exclusive remedy for third persons claiming a senior interest in property seized by the Service. Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910 (8th Cir. 1998); Winebrenner v. U.S., 924 F.2d 851 (9th Cir. 1991); United Sand and Gravel Contractors v. United States, 624 F.2d 733 (5th Cir. 1980). Similarly, the third party cannot seek redress through a refund claim filed under 28 U.S.C. § 1346(a)(1) . EC Term of Years Trust v. U.S., 434 F.3d 807 (5th Cir. 2006), aff'd, 550 U.S. 429 (2007).

(2) The relief available under section 7426 includes, but is not limited to, the following:

An injunction to prevent the Service from enforcing the levy or selling the property of one whose rights in such property are superior to the United States and the recovery of the specific property or, if the property was sold, a judgment in an amount not exceeding the greater of the amount received by the U.S. from the sale or the fair market value of the property immediately before the levy. See I.R.C. §§ 7426(b)(2)(C) and 7426(g) (interest).

d) Injunctive Relief -- limited to cases in which the court determines that the government's action is wrongful and, if completed, would irreparably injure the rights of another in the property whose rights are senior to those of the government.

(1) A levy is wrongful under Treas. Reg. § 301.7426-1(b) if:

i. it is upon property exempt under section 6334

ii. it is upon property in which the taxpayer had no interest at the time the lien arose or thereafter

iii. it is upon property with respect to which such person is a "purchaser" against whom the lien is invalid

iv. the levy or sale pursuant thereto will destroy or otherwise irreparably injure such person's interest in the property, which interest is senior to the FTL.

(2) A levy may be wrongful against a holder of a senior lien upon the taxpayer's property under certain circumstances though legal rights to enforce the lienholder's interest survive.

Example: The Service sells a large number of items "subject to" the senior security interest, thereby requiring the secured party to pursue each purchaser. Thus, the property is not available as a realistic "source" for enforcement of the senior lien. Treas. Reg. § 301.7426-1(b)(iv).

Example: The property levied upon is an obligation, which if collected on pursuant to the levy, would leave nothing for the senior lienholder. Alabama Exchange Bank v. United States, 373 F. Supp. 1221 (M.D. Ala. 1974).

(3) Sections 7426(b)(3) and (4) also permit: (a) actions to enforce a junior lienholder's interest in surplus proceeds realized by the Service from a levy and sale of the taxpayer's property; and (b) actions by a third party, including the taxpayer, to enforce his/her interest in substituted sale proceeds received from the sale of property under a certificate of discharge. I.R.C. § 6325(b)(3). The United States may interplead the surplus proceeds under section 7402(a) and 28 U.S.C. § 1345. See CCDM 34.5.3.3.

e) Statute of Limitations –

(1) Section 7426 actions must be instituted within 9 months of the date of the levy or agreement giving rise to the action. State Bank of Fraser v. United States, 861 F.2d 954 (6th Cir. 1988); United States v. Bowery Savings Bank, 1976 WL 1177, 76-2 USTC P 9796 (S.D.N.Y. 1976). But if a third party files a timely written request for a return of the property, the 9-month period is extended to 12 months from the date the request is filed or 6 months after a Service notice disallowing such request is mailed, whichever is

shorter. I.R.C. §§ 6343(b), 6532(c); Vermont v. United States, 1974 WL 766, 75-1 USTC P 9175 (D.Vt. 1974). Filing an administrative claim is not a prerequisite to suit. I.R.C. § 7426(f).

(2) Suspension of the running of the collection period of limitation - - Section 6503(f) - - the 10-year period of limitation for collection after assessment provided by section 6502 is suspended from the date the Service wrongfully seizes or receives a third party's property to 30 days after the earlier of: (1) the date the Service returns the property under section 6343(b); or (2) the date on which a judgment secured pursuant to section 7426 becomes final. I.R.C. § 6503(f)(1). Similarly, with respect to erroneous liens, the 10-year limitation period is suspended from the time the third-party owner is entitled to a certificate of discharge of lien until 30 days after the earlier of: (1) the date the Service no longer holds any amount as a deposit or bond that was used to satisfy the unpaid liability, or was refunded or released; or (2) the date the judgment in a civil action under section 7426(b)(5) becomes final. I.R.C. § 6503(f)(2). The underlying tax assessment is conclusively presumed to be valid. I.R.C. § 7426(c).

(3) The Fifth Circuit issued a taxpayer favorable decision on an issue of first impression involving a wrongful levy and the Taxpayer Advocate Service. The Fifth Circuit held that that the third party whose property had been wrongfully levied upon was a taxpayer for purposes of section 7811 and that under section 7811(d) her TAO application suspended the running of the limitations periods. Rothkamm v. United States, 802 F.3d 699 (5th Cir. 2015), rev'g 2014 WL 4986884 (M.D. La Sept. 15, 2014).

As a result of this case, section 7811 has been designated as a code section requiring National Office coordination. See Chief Counsel Notice CC-2016-009.

f) Damages –

If, in any action filed under section 7426, the court determines that the Service recklessly or intentionally, or by reason of negligence, wrongfully levied upon plaintiff's property, the plaintiff may recover the lesser of $1,000,000 ($100,000 in the case of negligence) or the sum of actual, direct economic damages sustained and the costs of the action. I.R.C. § 7426(h). The plaintiff must exhaust administrative remedies, including filing a claim for damages before the Service. The failure to exhaust administrative remedies is a jurisdictional bar to an action for damages under section 7426. Litigation costs may be

recovered pursuant to section 7430. Administrative costs are not recoverable. The section 7426 action must be filed within two years of when the plaintiff's action accrued. I.R.C. §§ 7426(h)(2), 7433(d)(3). The cause of action accrues when the plaintiff knew or should have known sufficient facts to apprise her of all essential elements of a possible cause of action. Treas. Reg. § 301.7433-1(g)(2).

9. Erroneous Lien Actions

a) Authority – I.R.C. § 6325

b) Principal purpose -- Under section 6325(b)(4), an administrative procedure exists to permit a record owner of property against which a NFTL has been filed to obtain a certificate of discharge if such record owner is not the person whose unsatisfied tax liability gave rise to the filing of the notice. The record owner must file with the Service an application for such certificate and either deposit cash or furnish a bond in an amount sufficient to protect the lien interest of the United States.

c) Considerations -- This administrative procedure is <u>not</u> available to an owner of property subject to a FTL if the owner is the person whose unsatisfied liability gave rise to the filing of the NFTL.

(1) If the Service determines that: (1) the liability to which the lien relates can be satisfied from other sources; or (2) the value of the government's interest in the property is less than originally determined, the Service must refund, with interest at the same rate afforded to overpayments under section 6621, the amount deposited or release the bond posted by the third party.

(2) Within 120 days after the issuance of a certificate of discharge under this procedure, the third-party owner may file a civil action under section 7426(a)(4) against the United States in a district court to obtain a determination as to whether the interest of the United States in the property, if any, has less value than determined by the Service. If the court finds that the valuation of the government's interest by the Service exceeds the actual interest of the government in the property, the court will order a refund of the deposited amount or a release of the bond, whichever is appropriate, to the extent that the deposited amount or the bond exceeds the actual value of the government's interest in the property as determined by the court.

(3) Where no civil action is filed within the 120-day period, the Service, within 60 days following the expiration of the 120-day period, must: (1) apply the amount deposited or collect on the

posted bond to the extent necessary to satisfy the tax liability secured by the FTL; and (2) refund to the third party, with interest, any amount exceeding the amount required to satisfy the tax liability.

10. Surplus Proceeds Actions

a) Authority – I.R.C. § 7426

b) Principal purpose -- Section 7426(a)(2) provides that if surplus proceeds have been realized by the U.S. from the sale of property following levy, any person (other than the taxpayer) who claims a junior interest in, or a junior lien upon the property sold, may bring an action for the surplus proceeds.

c) Considerations--

(1) "Surplus proceeds" are those in excess of the amount necessary to satisfy the tax liability giving rise to the levy plus the expenses of the levy sale.

(2) Jurisdiction is in the federal district court.

d) Payment of Interest on section 7426 Refunds --

(1) With respect to section 7426, interest shall be paid on amounts refunded at the overpayment rate established under section 6621 as follows:

i. in the case of a judgment pursuant to section 7426(b)(2)(B), from the date the Secretary receives the money wrongfully levied on to the date of payment of such judgment.

ii. in the case of a judgment pursuant to section 7426(b)(2)(C), from the date of the sale of the property wrongfully levied on to the date of payment of such judgment.

iii. in the case of a judgment pursuant to section 7426(b)(5), which orders a refund of any amount, from the date the Secretary received such amount to the date of payment of such judgment.

(2) To the extent a judgment exceeds $10,000, the reduced rate of

overpayment interest described in the flush language of section 6621(a)(1) applies. Cheung, Inc. v. U.S., 545 F.3d 695 (9th Cir. 2008).

11. Federal Tort Claims

a) Authority - Federal Tort Claims Act (28 U.S.C. §§ 2671- 2680)

b) Principal purpose -- provides that the United States shall be liable for tort claims to the same extent as a private individual.

c) Considerations -- These cases are handled by the General Legal Services Division (GLS). However, a tort claim case may possibly ask for injunctive relief as well. Where this occurs, and the primary purpose of the lawsuit is to restrain the Service's assessment or collection activities rather than to collect money damages, the case will normally be handled by Procedure & Administration. In these instances, coordination with GLS is required. CCDM 34.5.7.2(9).

12. Damages for Failure to Release Lien (I.R.C. § 7432)

a) Principal purpose – to give taxpayers the right to bring a damage action in federal district court against the United States if any officer or employee of the Service knowingly, or by reason of negligence, fails to release a FTL under section 6325 on property of the taxpayer.

The amount of damages recoverable under section 7432 is limited to actual, direct economic damages that, but for the failure to release the lien under section 6325, would not have been sustained, plus costs. Damages are payable out of funds appropriated for judgments, awards and compromise settlements under 31 U.S.C. § 1304. Damages will not be awarded for the failure to release a lien unless the court determines that the taxpayer has exhausted all administrative remedies available within the Service. See Lemon v. Martin, 46 F.3d 1142 (9th Cir. 1995), cert. denied, 514 U.S. 1134 (1995). A taxpayer has a duty to mitigate damages, and any award will be reduced by the amount of damages that the taxpayer reasonably could have mitigated. An action for damages under section 7432 may be brought without regard to the amount in controversy, but must be brought within two years after the action accrues (i.e., within two years of the date when the taxpayer had a reasonable opportunity to discover all the elements of a possible cause of action).

b) Considerations - Treas. Reg. § 301.7432-1 has procedures for filing an administrative claim for damages and for informing the Service that it should release a lien. These are suit prerequisites. Administrative costs before the Service are not recoverable, and litigation costs are only

recoverable under section 7430.

13. **Damages for Wrongful Collection Actions**

a) Authority – I.R.C. § 7433

b) Principal purpose -- Section 7433 provides that if, in connection with the collection of any federal tax, an officer or employee of the Service recklessly or intentionally, or by reason of negligence, disregards any provision of the Code or implementing regulations, the taxpayer may file an action in federal district court for actual, direct economic damages plus costs of the action.

(1) Except as provided in section 7432 (action for failure to release a lien under section 6325), civil actions under section 7433 are the exclusive remedy for recovering damages caused by unlawful collection actions.

(2) There is a $1,000,000 ceiling on damages caused by reckless or intentional disregard. There is a $100,000 ceiling on damages caused by negligent disregard. Litigation costs may be recovered pursuant to section 7430. Administrative costs may not be recovered.

(3) Section 7433(e) provides that a taxpayer may recover up to $1 million in civil damages plus costs of the action for the Service's willful violation of the automatic stay provided by 11 U.S.C. § 362, or the bankruptcy discharge injunction provided by 11 U.S.C. § 524. Administrative costs incurred on or after the date the bankruptcy petition was filed and litigation costs may be recovered pursuant to section 7430.

(4) Actions for damages caused by an unlawful disclosure of taxpayer return information during the collection process are cognizable under section 7433, not section 7431. Schipper v. United States, 95-2 USTC P 50,537 (E.D.N.Y. 1995).

(5) Jurisdiction lies in the federal district court for actions filed pursuant to section 7433(a). Jurisdiction lies in federal bankruptcy court for actions filed under section 7433(e).

(6) Prior to filing a complaint under section 7433, the plaintiff must exhaust all administrative remedies provided by the Service. The failure to exhaust administrative remedies, including filing an administrative claim for damages under Treas. Reg. § 301.7433-1,

is a jurisdictional bar to an action in federal district court if the Service' unlawful actions occurred after July 22, 1998.

(7) The plaintiff must file an action in federal district court or bankruptcy court within two years of the date the action accrues. The action accrues when the plaintiff knows or should have known sufficient facts to apprise the plaintiff that he or she has a claim.

14. Award of Court Costs and Attorneys' Fees (Section 7430)

a) Principal purpose -- With respect to any administrative or court proceeding involving the determination, collection, or refund of any tax, interest or penalty, brought by or against the United States, a court of the United States (including the Tax Court) generally may award reasonable litigation and administrative costs to the prevailing party. I.R.C. § 7430(a). The court may not award administrative costs with respect to collection actions, except for damage actions under section 7433 for the willful violation of section 362 or section 524 of the Bankruptcy Code.

b) Considerations –

(1) Prevailing Party

i. In order to be a prevailing party, the party must substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented. I.R.C. § 7430(c)(4)(A).

ii. Exceptions - A party is not a prevailing party if the U.S. establishes that its position was substantially justified.

iii. The position of the United States shall be presumed to be not substantially justified if the Service did not follow its applicable published guidance in the administrative proceeding. Published guidance means regulations, revenue rulings, revenue procedures, information releases, notices and announcements, as well as any private letter rulings, technical advice memoranda, and determination letters that are issued to the taxpayer.

iv. For purposes of determining whether the United States' position is substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

v. Qualified Offers - An award of fees and costs may be available regardless of whether the United States' position is substantially justified if the taxpayer makes a "qualified" offer and under the court's judgment the liability of the taxpayer is equal to or less than the taxpayer's offer (determined without regard to interest). I.R.C. §§ 7430(c)(4)(E) & (g). The qualified offer provisions do not apply to a judgment issued pursuant to a settlement or in a proceeding in which the amount of the tax liability is not at issue, such as a declaratory judgment or summons enforcement proceeding.

(2) Position of the United States

i. "Position of the United States" means the position taken by the United States in the underlying judicial proceeding, and

ii. the position taken in administrative proceedings as of the earlier of the date of the receipt by the taxpayer of the notice of the decision of the Office of Appeals or the date of the notice of deficiency.

(3) Exhaustion of Administrative Remedies

Reasonable litigation costs shall not be awarded unless the prevailing party has exhausted the administrative remedies available to it within the Service.

(4) Administrative Costs

i. Administrative costs include only those administrative costs that are incurred on or after whichever of the following is the earliest: (1) the date of the receipt by the taxpayer of the notice of the decision of the Office of Appeals; (2) the date of the notice of deficiency; or (3) the date on which the Service sent the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Office of Appeals.

ii. The Service may settle a claim for administrative costs.

(5) Net Worth Requirements

Only individuals and estates whose net worth does not exceed $2,000,000 and corporations whose net worth does not exceed $7,000,000 and have no more than 500 employees at the time the action was filed are eligible for an award of fees and costs.

(6) Cap on Hourly Fee

i. In 1998, Congress capped the hourly fees recoverable under this section at $125 per hour and indexed the cap to the rate of inflation.

ii. The difficulty of the issues raised and the lack of available tax attorneys may justify raising the cap on the hourly rate.

Reasonable attorney's fees may be awarded to persons who represent a prevailing party on a pro bono basis or for a nominal fee.

15. Suit to Challenge Revocation or Denial of Passport in Case of Certain Tax Delinquencies

a) Authority. Section 32101 of Fixing America's Surface Transportation (FAST) Act, Pub. L.114-94, enacted December 4, 2015, added Code section 7345, which provides for certification to the State Department of individual taxpayers who have "seriously delinquent tax debt." Upon receipt of such certification, the State Department is required to deny the issuance of new passports to such individuals, and is authorized to revoke or limit the passports of such individuals (although the State Department may make an exception for emergency circumstances or humanitarian reasons).

b) Principal purpose. Under section 7345(e), a taxpayer may bring a civil action against the United States in a district court of the United States or against the IRS in the Tax Court to determine if the certification was erroneous or should be reversed. There is no administrative appeals process; a taxpayer may file directly with the court. If the court determines that the certification was erroneous or should be reversed, the court may order the IRS to notify the State Department of such determination.

c) Considerations.

1. Definition of Seriously Delinquent Tax Debt. Seriously delinquent tax debt is unpaid, legally enforceable, and assessed federal tax liabilities of an individual, greater than $51,000 (as of January 1, 2018)and for which:
    - A Notice of Federal Tax Lien has been filed under section 6323, and the taxpayer's right to a hearing under section 6320 has been exhausted or lapsed; or
    - A levy has been issued under section 6331.

The dollar amount is adjusted for inflation each calendar year beginning after 2016. The $51,000 threshold is calculated by aggregating the total amount of all current tax liabilities for all years and periods meeting the above criteria (including penalties and interest) assessed against an individual. See IRM 5.1.12.27.2; 5.19.1.5.19.2.

2. Exclusions from Seriously Delinquent Tax Debt.

Seriously delinquent tax debt does not include debt:

- Being timely paid under an approved installment agreement (section 6159);
- Being timely paid under an accepted offer in compromise (section 7122);
- Being timely paid under the terms of a settlement agreement with DoJ (section 7122);
- With respect to which collection is suspended because of a request for or pending due process hearing (section 6330) in connection with a levy; and
- With respect to which collection is suspended because the taxpayer made an innocent spouse election (section 6015(b) or (c)) or requested innocent spouse relief (section 6015(f)).

A tax debt will not be certified as seriously delinquent while a taxpayer is serving in a combat zone pursuant to section 7508(a). See IRM 5.1.12.27.3; 5.19.1.5.19.3.

3. Discretionary Exclusions from Certification to the State Department of Seriously Delinquent Tax Debt.

Certification to the State Department is not required for all taxpayers with seriously delinquent tax debt. See IRM 5.1.12.27.4; 5.19.1.5.19.4. The IRS has discretion to exclude certain taxpayers from the certification process. The IRS currently plans to use its discretion to categorically exclude from the certification process:

- Taxpayers who are in a bankruptcy proceeding under Title 11 of the United States Code;
- Taxpayers who are victims of identity theft where the tax debt arises from the identity theft and who do not otherwise have seriously delinquent tax debt from legitimate tax liability;
- Taxpayers whose liability the IRS has determined is currently not collectible due to the taxpayers' inability to pay;
- Taxpayers who are deceased; and
- Taxpayers who have an installment agreement or offer in compromise pending with the IRS.
- Taxpayers who have a debt with a pending adjustment that will full pay the tax period
- Taxpayers in a Disaster Zone

4. Reversal of Certification

a) *In General*. The IRS is required to notify the State Department if the certification is found to be erroneous or if the debt with respect to such certification is fully satisfied, becomes unenforceable, or ceases to be a seriously delinquent tax debt for the reasons

described above. Full payment is required for reversal of certification, not just a decrease below the $51,000 threshold (or the threshold amount indexed for inflation effective at the time of certification). Upon such notice, the State Department shall remove the certification from the individual's record. The IRS also has discretion to notify the State Department that the certification should be removed from the individual's record for the reasons described in the discretionary exclusions from certification listed above.

b) *Timing of Notice*.

- Full satisfaction of debt—In the case of a debt that has been fully satisfied or has become legally unenforceable (such as when the collection statute of limitations has run under section 6502), notification shall be made not later than the date required for issuing the certificate of release of lien with respect to such debt under section 6325(a) (30 days after the day on which the liability is fully satisfied or legally unenforceable or following acceptance of a bond in full payment of the liability).
- Innocent spouse relief—In the case of an individual who makes an election under section 6015 (b) or (c) or requests relief under section 6015(f), such notification shall be made not later than 30 days after such election or request.
- Installment agreement or offer in compromise—In the case of an installment agreement under section 6159 or an offer in compromise under section 7122, such notification shall be made not later than 30 days after such agreement is entered into or such offer is accepted by the IRS.
- Erroneous certification—In the case of a certification found to be erroneous, such notification shall be made as soon as practicable after such finding.
- In all other cases, such notification shall be made as soon as practicable.

5. Contemporaneous Notice to Individual

The IRS shall contemporaneously notify an individual of any certification or reversal of certification with respect to such individual. The notice shall include a description in simple and nontechnical terms of the right to bring a civil action as described in section 7345(e).

VI. MAY NOT ASK TAXPAYERS TO WAIVE RIGHT TO SUE

Under RRA 98, section 3468, no officer or employee of the United States may request that a taxpayer waive a right to bring a civil action against either the federal government or any officer or employee of the federal government stemming from any action taken in connection with the internal revenue laws. The law, however, provides exceptions in the following three (3) circumstances:

- if a taxpayer knowingly and voluntarily waives the right to sue
- if the request by the officer or employee is made in person and the taxpayer's attorney or other federally-authorized tax practitioner (as per section 7525(a)(3)(A)) is present

- if the request is made in writing to the taxpayer's attorney or other representative

The Conference Committee Report accompanying this section provides that it is not intended that this section shall apply to any waiver of a claim for attorneys' fees or costs or to the waiver of one or more claims brought within the same administrative or judicial proceeding with other claims that are being settled.

VII. APPENDIX

A. Procedures to Initiate and Process Suits by the United States

1. Case Referral

Normally your role in a suit by the United States will be triggered by a litigation request from a revenue officer.

a) The revenue officer has primary responsibility for collection of past-due taxes. He or she:

(1) Determines whether administrative remedies are adequate or feasible and requests the institution of a legal proceeding to assist in or effect the collection of the tax.

(2) Conducts the investigation and initiates the formal process for recommending civil suit.

b) Technical support is the focal point in the processing of the suit request, e.g., securing account transcripts and other documentation and obtaining the administrative files. The unit transmits the completed request to Counsel and remains the liaison between Counsel and the revenue officer for further development.

Problems of preserving evidence for trial purposes are frequently encountered due to the destruction of records programs and the fact that many pending suits involve assessments made 4 or more years ago. The administrative files should be secured by Technical Support. If they do not accompany the suit recommendation, request them at once.

c) Pre-referral assistance by Counsel - Counsel's assistance to the Service is often requested before the institution of a suit. A weak case may be strengthened or an obviously deficient case may be rejected. Counsel's efforts before preparation of the authorization of suit may produce the desired result. If it is expedient, a letter or other contact by Counsel to opposing counsel or a party should be undertaken, regardless of steps previously taken by the Service.

2. Suit Authorization Letter

Section 7401 provides that no civil action for the collection or recovery of taxes or penalties shall be commenced without the authorization of the Secretary of the Treasury. The underlying tax must have been assessed within the three-year assessment period. Section 6501(a). The Attorney General must then direct the action to be commenced. The Secretary's authority has been delegated to the Chief Counsel, who has delegated signature authority down the line. THUS, ALL SUIT LETTERS MUST STATE THAT THE CHIEF COUNSEL AUTHORIZES THE ACTION. The contents of the suit letter spell out how you propose to meet the various requirements for maintaining a suit. The suit letter is the field Counsel attorney's primary involvement in offensive cases. A bad or cursory suit letter can lead to unsuccessful litigation.

a) If Counsel concurs with the Service's recommendation, Counsel will prepare a letter authorizing and directing DOJ to institute a suit. The letter is directed to the Assistant Attorney General, Tax Division, Department of Justice, Attn: Chief, Civil Trial Section, _____ Region. This is referred to as a "suit letter." CCDM 34.6.1.1.1. As a general rule, a suit letter may be sent directly to the Department of Justice by Field Counsel, unless it involves a type of case or issue described in the CCDM that requires review by the Associate offices. CCDM 34.6.1.3

b) If suit is not commenced, Counsel should advise the Service by memorandum setting forth the reasons for declining to authorize suit. The National Office need not be involved unless it is felt the matter is of sufficient interest or there is disagreement between Counsel's office and the Service. In such circumstances, the views of both offices should be forwarded to Procedure & Administration for final resolution.

c) Emergency suit procedures (CCDM 34.6.1.2.1) - If for any reason a suit must be instituted immediately, Counsel may contact the appropriate Branch Chief of P&A by telephone to give the facts and circumstances. The tax data and pertinent documents should be available at that time for the use of the U.S. Attorney. Contact with P&A is required only if the letter is required to be pre-reviewed by the division under the case referral procedures in CCDM 34.6.1. If there is agreement for such action, the Civil Trial Section of the applicable region, Department of Justice, is contacted and advised of the urgency of the situation. If the Justice Department is in agreement, it will contact the appropriate U.S. Attorney, and authorize the filing of proper pleadings. The suit letter sanctioning the action should be forwarded to the National Office as soon as possible. Some reasons for the use of the emergency procedure may be:

(1) Imminent expiration of the statute of limitations.

(2) Imminent dissipation of the taxpayer's assets.

(3) Need for immediate intervention in a pending suit.

(4) Need to restrain the taxpayer from taking some specific action.

d) Technical requirements of the suit letter:

(1) Authorization - The letter sets forth the authorization required by section 7401 or section 7403, generally in the first paragraph. The underlying tax must have been assessed within the three-year assessment period. Section 6501(a).

(2) Action Requested - A clear statement of the action the Department of Justice is being requested to take should be made in the first or second paragraph of the suit letter; i.e., lien foreclosure, enforcement of a levy, etc. If a personal judgment is or is not being sought, that fact should be stated together with the reasons. If an operating receiver is requested or an injunction is being sought, the need must also be shown for such actions. CCDM 34.6.1.3.2.

(3) Designation of the case as "SOP" or "Standard" (CCDM 34.5.1.1) - After authorizing the suit, Counsel must designate the case as either a "Settlement Option Procedures" (SOP) case or a "Standard" case. This designation refers to the manner in which settlement of the case will be handled. If a case is designated as "Standard", DOJ is required to request Counsel's opinion prior to settling the case. As a general rule, the Department of Justice will also usually request Counsel's opinion on a case designated as SOP although they are not required to do so. As set forth in the CCDM, those cases which should be designated as "Standard" include: (1) injunction cases, (2) summons cases, (3) frivolous return refund cases, and (4) those cases involving issues requiring Associate Office review. See CCDM Exhibit 35.11.1-1. CCDM 34.5.1.1.1.2. Counsel is free to designate other cases as "Standard." If, however, the case does not fit within the CCDM, there must be an explanation in the suit letter sufficient to support the "Standard" designation. If there is no designation in the suit letter and the case does not fall within one of the categories in the CCDM, there is a presumption that it is an SOP case.

(4) Necessary Parties

i. The taxpayer is a necessary party if we wish to secure a judgment against him or her that affects his or her property. (**Note**: A necessary party is not the same as in personam jurisdiction).

ii. Suit under section 7403 - This is an in rem action to foreclose the tax lien. The taxpayer is a necessary party but in rem jurisdiction under 28 U.S.C. § 1655 is sufficient unless a personal judgment is sought against the taxpayer. The taxpayer is a necessary party because of the right to litigate the merits of the tax. Also, all persons having interests of record must be named in the suit. Even if a mortgage has been paid, if it is not satisfied of record, the mortgagee must be named in the suit.

iii. Suit under section 6332(a) - In a suit brought for failure to honor a levy, the taxpayer is not a necessary party because only the following two issues may be litigated: (1) whether the party levied upon is in possession of or obligated with respect to property of the taxpayer subject to levy; and (2) whether the property levied upon was subject to prior judicial attachment or execution.

(5) Amount of Liability - A Form 4340, Certificate of Assessments and Payments, is secured by Technical Support and forwarded with the suit recommendation. In addition, the Service office should provide a schedule of unpaid tax liability(ies) for incorporation in the suit letter. This schedule contains a detailed breakdown of all assessments and payments made and tax lien filing information. Section 6213(a) generally provides that no deficiency of a tax may be made, nor may a levy or proceeding in court for its collection be made or begun, until a statutory notice of deficiency has been mailed and the applicable time has expired for the taxpayer to file a petition in the Tax Court or, if a petition has been filed, until the Tax Court's decision has become final. Accordingly, unassessed "deficiencies" for income, estate and gift taxes would not be recommended for suit.

(6) Jurisdiction and Venue - The suit letter must include a full statement of the court's jurisdiction and venue.

i. Terms defined:

- Jurisdiction -- power conferred upon a court to hear and determine the subject matter in a controversy between the parties and to grant the relief requested. This discussion will deal with subject matter jurisdiction. Personal

jurisdiction over defendants is obtained by service of the summons and complaint.

- Venue -- place at which a suit is tried. States cannot claim sovereign immunity against the United States.

- In rem -- proceeding against property. No liability is established except in terms of the named property. See e.g., 28 U.S.C. § 1655.

- In personam -- personal judgment sought.

ii. Jurisdiction of federal courts

- Section 7402(a) -- Grant of jurisdiction to United States District Courts to hear collection suits.

- 28 U.S.C. § l340 -- General grant of original jurisdiction to United States District Courts over civil actions arising under any Act of Congress providing for internal revenue.

- 28 U.S.C. § 1345 -- General grant of original jurisdiction to United States District Courts when the United States is a plaintiff.

iii. Jurisdiction of state courts

The United States does not bring suit in a state court. Among the exceptions to this rule are intervention in state court actions, claims in state court estate actions, and claims in state court insolvency cases. If we do intervene, the United States generally removes per 28 U.S.C. § 1444 (unqualified option to remove granted to United States). If the United States is not a party to a civil action or suit, section 7424 permits the United States to intervene to assert its lien against the property which is the subject of the suit. If the application to intervene is denied, the adjudication in such action shall have no effect upon the lien.

(iv) Venue of federal suits

- 28 U.S.C. § 1396 -- collection suits may be brought in the district where: (1) the liability for such tax accrued; (2) the taxpayer resides; or (3) the return was filed. This

statute broadens the general venue statutes of 28 U.S.C. § 1391-1393.

- 28 U.S.C. § 1655 -- "Lien enforcement; absent defendants" -- Notwithstanding the wording of 28 U.S.C. § 1396, in rem venue will be where the property is situated (real or personal).

- When personal service is needed, suit is brought in the district of the taxpayer's residence.

(7) Statute of Limitations - The earliest date the statute is to expire should be stated. A complete statement is necessary to explain any assessments which on their face indicate they were made beyond the normal applicable period of limitations. Any suspensions or extensions should be fully explained. If fraud is involved, the Government has the burden of proof in proving fraud; therefore, it is necessary to supply special agents' reports, revenue agents' reports and any other data so indicating fraud. If possible, these documents should be mailed with the suit letter. Similarly, where it appears suit is recommended beyond the ten-year period for collection, there must be a statement as to what tolled the statute of limitations: i.e., offer in compromise, waiver, bankruptcy, etc. DOJ has adopted the rule of affirmatively alleging that the suit is timely filed. Therefore, if any documents are involved, such as a collection waiver, copies must be supplied to DOJ. Other legal defenses should be anticipated and a reply to such defenses should be included in the letter.

(8) Merits of the Tax - It is the government's position that only the taxpayer, and not a third party, can raise the merits of the tax as a defense to an action brought by the United States. A taxpayer may raise the issue of whether he or she owes the assessed tax in a collection suit when: (1) the merits have not previously been litigated in a court of law; and (2) the taxpayer is a party to a suit in which the United States seeks affirmative relief. If in a suit recommendation from the Service, it appears the merits of the tax have been or could be raised, Counsel should consider the evidence available, particularly if fraud penalties are involved.

(9) Service of Process - To obtain personal jurisdiction, a summons and complaint must be served upon defendant. Personal service upon an individual, as required by Rule 4(c)(1) of the Federal Rules of Civil Procedure, is accomplished by serving the individual personally or by leaving a copy of the summons and complaint at his or her dwelling place or usual place of abode. Normally service is attempted on individuals (other than infants and incompetents), corporations, partnerships and other unincorporated associations (some labor unions, fraternal organizations)

by mail pursuant to Rule 4(d)(2)(B). If there is a reason for immediate personal service by a U.S. Deputy Marshal, the suit letter should state this. Regardless of how service is to be made, accurate, up-to-date address information is needed. If time permits, ask the revenue officer to update this information. Bringing suit against a dead person or a defunct corporation is embarrassing.

(10) Intervention - Special concerns must be discussed if you request intervention in a pending action, especially a state court action. The following are examples of matters that should be discussed:

i. The nature of the property involved.

ii. The relative rights of the United States vis-à-vis other participants.

iii. The necessity for intervention in the particular proceeding rather than pursuing other collection activities.

iv. The matter of removal to the federal court.

v. The lack of consent to the suit, since the government may have to file a motion to dismiss.

vi. Timeliness - The court may not want to burden litigation with the new factor of an intervening party.

vii. Choice of forum - By intervening, the United States is subjecting itself to the forum of the pending suit. If this forum is not suitable to litigate the government's interest, you may wish to consider some alternative action. There is, however, the right to remove to federal court.

(11) Merits of the Case - Once the procedural requirements are established, the letter should discuss the theory of the government's case. If the case is a simple suit to reduce to judgment based upon the taxpayer's return or a Tax Court decision, discussion of the Certificates of Assessments and Payments to establish the government's prima facie case and the returns or Tax Court order may suffice. If the action is a lien foreclosure case, the nature of the taxpayer's interest in the property (including a complete and accurate description of the property), as well as all other interests in the property, also need to be discussed. In a fraudulent conveyance case, the facts showing the fraud and state law should be fully set out. Tax Division attorneys are often assigned to several different states. The letter should not assume familiarity with state

law. It must set out the facts and law in such a fashion as to show why the Service should win the case. Hazards also should be discussed. If the taxpayer no longer has an interest in the property involved in a lien foreclosure action, or if he should not be a party for some other reason, no discussion of the liability is usually necessary except to state the amount still owing. Only the taxpayer can litigate his tax obligation. United States v. Formige, 659 F.2d 206, 208 (D.C. Cir. 1981). If the taxpayer's interest in property at the time the lien attached is an issue, include the assessment date.

3. Post-Referral Actions

a) The Department of Justice

After a case has been referred to DOJ by a "suit" letter, the full responsibility for its disposition settlement authority rests with DOJ. If the case has been designated as "Standard," DOJ will seek the opinion of Counsel prior to settling the case. As a general rule, Counsel has 45 days to respond to DOJ's request for Counsel's recommendation regarding the settlement proposal. Thereafter, no objection is presumed.

b) Post-Referral Assessments and Administrative Collection

When a suit is begun and additional assessments are made or it is discovered that existing assessments were omitted from the suit, amending a complaint to include the assessments, particularly after the pretrial state, is not favored by the courts. Thus, collection should be attempted from sources other than by suit, or if the amounts are de minimis, they may be disregarded. However, if the amounts are substantial and the suit is in its early stages, these assessments should be brought to the attention of DOJ by supplemental letter for inclusion in the suit so that one judgment will cover all outstanding obligations of the taxpayer.

Any administrative collection activity contemplated should be pre-cleared with DOJ. All payments received should be brought to the attention of DOJ, since they will generally affect the course of litigation.

c) If the suit letter was pre-reviewed by P&A, the Counsel attorney is required to keep P&A informed as the case goes along. Copies of all pleadings, correspondence, etc., are required to be sent to P&A.

B. Procedures in Defensive Litigation

1. Procedure and Responsibility in 28 U.S.C. § 2410 Actions

a) Primary responsibility:

(1) The Tax Division of DOJ and U.S. Attorneys have the primary responsibility for handling suits brought under 28 U.S.C. § 2410.

(2) The Service, through Counsel and the appropriate Service offices, aids and assists.

b) Interpleader suits are routed through DOJ. A defense letter must be prepared by Counsel.

Other 28 U.S.C. § 2410 cases are direct referrals from the Service to the U.S. Attorney. Counsel may be called upon if questions arise re: settlement proposals, priorities, redemption or release of redemption rights. Also, assistance at and preceding trial is provided as requested.

2. Review and Processing of 28 U.S.C. § 2410 Cases

a) 28 U.S.C. § 2410(b) provides that the complaint or pleading must set forth with particularity the nature of the interest or lien of the U.S.

The complaint or pleading in suits involving FTL's must:

(1) Include the name and address of the taxpayer.

(2) Identify the Service office that filed the NFTL.

(3) Specify the date and place such notice was filed.

(4) Verify that the lien is recorded and note the date on which it will self-release.

b) The summons and complaint must be hand delivered to the U.S. Attorney for the district in which the action is brought and must be served on the Attorney General in Washington, D.C., by registered or certified mail.

c) The answer or other pleading by the United States must be made within 60 days after service.

d) If no outstanding tax lien exists, or it is clear the taxpayer has no interest (title, claims, etc) in the property (and had no interest during the life of the tax lien), the U.S. Attorney will file a disclaimer on behalf of the United States. A disclaimer is not filed merely because there are superior interests. Priority claimants are put to their proof. Disclaimers

may also be filed when the amount involved is too small to become involved in litigation and under circumstances where it is prudent to avoid jeopardizing the government's position in another case.

e) Does the court have jurisdiction to entertain the plaintiff's cause of action? Since 28 U.S.C. § 2410 is only a consent statute, it is necessary to show independent state law jurisdiction in the particular court to handle such matters.

f) If the action is in a state court, removal must always be considered and discussed in the defense letter.

g) A statement of facts and legal authorities to support the government's tax claims must be included in the defense letter, together with a schedule of the tax data.

h) An analysis must be made of the relative lien priorities of the parties to the action. While time is a factor, to the extent practical, Counsel attorneys should make their own investigation of competing claimants. The following methods may be used.

(1) Since most responsive pleadings are required to be filed within 20 days of service (except by the U.S.), court records can be checked after the 20th day. These should lay out the claims of the parties.

(2) Contact the plaintiff-interpleader to determine whether he has additional information regarding the competing claimants.

(3) Contact the competing claimants to ascertain the basis and amount of their claims.

(4) Finally, contact the revenue officer who may have personal knowledge of the other claims.

(5) In the event full information does not reach the Department of Justice by the Answer due date, they will use whatever information is available and file general denials, as necessary. Justice will notify the Chief Counsel's Office if any answers have or have not been filed by the competing complainants and will forward copies of answers for further investigation of the allegations, as necessary.

3. The Defense Letter in Procedure & Administration Cases

a) A defense letter in a P&A case should authorize DOJ to take such action as is necessary to defend the interest of the United States.

b) If offensive relief is sought, (e.g., a cross-claim to reduce to assessment or to foreclose on a lien), suit authorization language must also be included. Determine if offensive relief should be sought.

c) In any case, the letter must first look to jurisdictional issues.

(1) Does a waiver of sovereign immunity apply? If so, have all the conditions of that waiver been met?

(2) Has the United States been properly served?

(3) Is there an exclusive statutory remedy?

(4) If the Court lacks jurisdiction, should the United States intervene?

d) Consider the merits of the case.

(1) First, determine if the United States has outstanding tax claims.

i. If not, the case can often be quickly conceded.

ii. If so, remember that only the taxpayer can litigate the issue of his liability. United States v. Formige, 659 F.2d 206 (D.C. Cir. 1981).

(2) If the taxpayer is not a party, or if the government does not seek affirmative relief, the case will involve only lien priority or levy questions.

4. Post-Referral Actions

If the case is designated "Standard," DOJ is required to request Counsel's opinion prior to settling the case. You should also periodically monitor the case as it is handled by the Assistant U.S. Attorney or DOJ attorney. Remember, it is up to you to ensure that your client is properly represented.

2018 GL-1 Instruction Assigned to Thomas W. Curteman, Jr. (CC:PA)

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