

# Handbook 5.17

## Legal Reference Guide for Revenue Officers

### Chapter 1 -- General Information

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#### [5.17] 1.1 (09-20-2000) Purpose

1. The Legal Reference Guide for Revenue Officers is intended to make available to revenue officers and other personnel engaged in collection efforts the fundamentals of legal knowledge needed in their daily activities. The results of recent legislation and recent court decisions have been incorporated into the revised text.
2. While the Legal Reference Guide for Revenue Officers has been established as a Handbook keyed to the Internal Revenue Manual, it is not the source of procedural instructions. Revenue officers and other Internal Revenue Service personnel must still look to the basic Manual provisions outside the Handbook for such instructions.
3. Constant study and use of the information contained in the Handbook is needed for it to be most beneficial; however, such study is not intended to make lawyers of the users

and it is not a substitute for any required referral of cases through proper channels to Counsel.

[5.17] 1.2 (09-20-2000)

Local Law Section

1. In order to maintain a comprehensive reference guide, field counsel will ordinarily prepare supplementary material discussing the impact of local law on subject matter of the Handbook.
2. The choice of subject matter to be included in the local law material is discretionary between the field counsel office and the functions of the Service requesting advice on such matters.
3. So far as it is feasible, the numbering sequence in local law material corresponds to that of the Handbook. For example, if the local law material deals with the filing of notice of lien, it should be keyed to Section 230 of the Handbook.

[5.17] 1.3 (09-20-2000)

Functions and Organization of Office of Chief Counsel

[5.17] 1.3.1 (09-20-2000)

Statutory Basis

1. There is established in the Department of the Treasury the office of General Counsel and the office of an Assistant General Counsel, who serves as Chief Counsel of the Internal Revenue Service. 31 U.S.C. 301(f); I.R.C. § 7803(b)(1). The Chief Counsel is appointed by the President with the advice and consent of the Senate, but the Commissioner recommends to the President a candidate for appointment as Chief Counsel and, if necessary, recommends the removal of the Chief Counsel. I.R.C. §7803(a)(2)(B), (b)(1).
2. The Chief Counsel is the chief law officer for the Internal Revenue Service. The Chief Counsel reports directly to the Commissioner except as follows. The Chief Counsel reports solely to the General Counsel with respect to legal advice or interpretation of the tax law relating solely to tax policy. The Chief Counsel reports to both the Commissioner and the General Counsel with respect to legal advice or interpretation of the tax law not relating solely to tax policy, and with respect to tax litigation; if there is any disagreement between the Commissioner and the General Counsel on any such matter, it is submitted to the Secretary or Deputy Secretary for resolution. I.R.C. § 7803(b)(3).
3. All personnel in the Office of Chief Counsel report to the Chief Counsel. I.R.C. §7803(b)(4).
4. There is also created an Office of Special Counselor to the Commissioner for Practice. Included under this office is the Director of Practice.

[5.17] 1.3.2 (09-20-2000)

General Statement

1. About one-third of the office of Chief Counsel attorneys work in the vicinity of Washington, D.C., for the most part in connection with the work of the National Office.

About two-thirds of the attorneys are assigned to counsel field offices or to Operating Division Counsel.

[5.17] 1.3.3 (09-20-2000)

#### General Organization

1. The Chief Counsel has an immediate staff consisting of the Deputy Chief Counsel (Operations) and Deputy Chief Counsel (Technical), and a number of Special Counsel, Associate Chief Counsel, and Division Counsel.

[5.17] 1.3.4 (09-20-2000)

#### National Office Functions

1. The National Office functions involve planning and directing policies and programs with respect to legislation, regulations, interpretative rulings and opinions, litigation, and advisory services, pertaining to the laws administered by the Internal Revenue Service. The work is handled by the Offices of Associate Chief Counsel (Income Tax & Accounting), (Passthroughs & Special Industries), (Corporate), (Financial Institutions & Products), (International), (Procedure & Administration), (Tax Exempt & Government Entities), (Criminal Tax), and (General Legal Services); and by the Office of the Counsel to the National Taxpayer Advocate.
2. The Associate Chief Counsel (Procedure & Administration) includes the Assistant Chief Counsel (Administrative Provisions & Judicial Practice), Assistant Chief Counsel (Collection, Bankruptcy & Summonses) [CBS], and Assistant Chief Counsel (Disclosure & Privacy Law).

[5.17] 1.4 (09-20-2000)

#### Operating Divisions and their Field Offices

[5.17] 1.4.1 (09-20-2000)

#### Operating Division Counsel

1. The function of each operating division counsel office is to serve the respective level of the operating division to which that office is assigned. The division counsel reports directly to the Chief Counsel. Additional division counsel offices will be managed by area counsel or associate area counsel.
2. Operating division counsel, and their respective field offices, have been created for the operating divisions of: Large & Midsize Business, Tax Exempt & Governmental Entities, Criminal Investigations, Small Business & Self Employed (SB/SE), and Wage & Investment Income (WI). In the field, operating division counsel for SB/SE will also serve WI.
3. Division counsel for SB/SE will work closely with CBS to render legal advice for collection matters.

[5.17] 1.4.2 (09-20-2000)

#### SB/SE Operating Division Counsel, and Area and Associate Area Counsel

1. The SB/SE Operating Division Counsel, and Area and Associate Area Counsel, provide the large variety of legal services which the Office of the Chief Counsel renders in connection with collection of federal taxes (except those

involving Alcohol, Tobacco and Firearms matters), summonses, damage suits for failure to release levy or unauthorized collection actions, and defense to or suits to obtain injunctions other than promoter injunctions. A prime concern is with the legal problems involved in the collection of delinquent accounts, i.e., those with which revenue officers are directly concerned.

2. Certain matters involving initial action by the field offices are subject to review in the National Office to insure consistency of treatment and uniformity of approach. However, most SB/SE functions have been delegated to area and associate area counsel for final disposition in order to provide prompt and readily available legal service to the field offices of the Internal Revenue Service handling SB/SE and WI issues and to accomplish the broad responsibilities implicit in the handling of the wide range of legal problems in the collection area. Each such counsel, through his or her staff, handles legal work with respect to:
  - A. Collection and protection of the tax claims and liens of the United States in proceedings under 11 USC (Bankruptcy), federal and state receiverships, corporate dissolutions, decedents' estates, and assignments for the benefit of creditors;
  - B. Protection of priority rights of federal tax liens in foreclosure actions by mortgagees or other lien holders in partition suits, condemnation suits, interpleader suits and in suits to quiet title;
  - C. Applications filed for the discharge of property from the effect of federal tax liens or for the release of such liens and applications for subordination of federal tax liens and for certificates of nonattachment;
  - D. Offers in compromise and installment agreements;
  - E. Enforcement of summonses, third-party contact issues, and certain disclosure problems;
  - F. Taking of affirmative action, whether by way of a separate suit or intervention in a pending proceeding, to collect taxes (with the exception of Alcohol, Tobacco, and Firearms taxes) with a view to reducing tax claims to judgment, enforcing federal tax liens (including the appointment of a receiver), opening safe deposit boxes, enforcing a levy, asserting transferee liability, seeking to collect on bonds, and asserting liability against third parties paying or providing wages;
  - G. Recommendations to the United States Attorney with respect to petitions for writ of entry;
  - H. Proposals of settlement of pending litigation to be effected through the Department of Justice;
  - I. Defense of injunction suits to restrain the assessment or collection of federal taxes (except with respect to Alcohol, Tobacco, and Firearms matters);
  - J. Recommendations concerning administrative claims for damages regarding unlawful collection actions, release of liens, and violation of the automatic stay under sections 7432 and 7433;

- K. Release of the Government's right under Section 28 U.S.C. 2410 or IRC 7425(d) to redeem property which has been the subject matter of a foreclosure proceeding in which the United States has been properly named a party, or given adequate notice of nonjudicial sale;
  - L. Actions for the perpetuation of testimony;
  - M. Handling of legal matters with respect to leases, bonds, contracts and other similar matters;
  - N. Jeopardy levies, and the administrative and judicial review procedures under section 7429;
  - O. Determination of trust fund recovery penalty.
3. Field attorneys assigned to SB/SE area or associate area counsel units will provide legal advice on various collection matters to Service personnel in the SB/SE and WI Operating Divisions. In addition, the area or associate area counsel, through his or her staff, renders legal advice to the offices of the respective commissioner, service center director, and field offices, on matters not within the scope of the above listed functions. In connection with this type of activity, which is vital to the success of any organization operating on a decentralized basis, visitation programs have been established so that legal personnel make regular periodic visits to the field offices located throughout the counsel office's service area.
  4. The area or associate area counsel legal staff also maintains day-to-day contacts with the United States Attorneys' offices, and the appropriate Trial Section of the Tax Division, Department of Justice, charged with the ultimate responsibility for the trial of certain proceedings in the federal and state courts. Upon request, the area or associate area counsel and his or her staff furnish appropriate legal services to the United States Attorney and the Department of Justice, which may include preparation of suit or defense letters, authorizing the institution of legal proceedings or the defense of a civil action against the United States and setting forth the pertinent legal issues and the Internal Revenue Service's position thereon. Area or associate area counsel attorneys may also be selected as Special Assistant United States Attorneys (SAUSAs) and appear on behalf of the Service in various types of bankruptcy proceedings.
  5. Not the least of the services rendered by the area or associate area counsel and his or her staff is their participation, sometimes in conjunction with the Chief Counsel's National Office staff, in the various training programs for revenue officers and other personnel concerned with collection matters, which includes preparation and maintenance of a Local Law Section for the Legal Reference Guide.

[5.17] 1.5 (09-20-2000)

Collection and Summonses -- Assistant Chief Counsel  
(Collection, Bankruptcy & Summonses)

1. Assistant Chief Counsel (CBS) will provide legal interpretations of tax law involving collection, bankruptcy and summons matters that will directly

- implicate the work of the revenue officer.
2. The CBS function has a dual responsibility -- technical and litigation assistance. Not only does CBS provide interpretations of tax law within its areas of responsibility, but it also provides litigation assistance to SB/SE area counsel and associate area counsel for certain actions brought by or against the United States. In certain litigation matters, a suit or defense letter must be referred to the Assistant Chief Counsel (CBS) for review and approval before referral to the Department of Justice. Those cases or issues include: requests for appointment of a receiver, suits for enforcement of a levy where the 50% penalty is sought, suits for judicial approval of service of John Doe summonses, summons cases raising third-party contact issues under section 7602(c), injunction suits to stop pyramiding in no equity seizure situations, suits for damages under sections 7432 and 7433, suits to assert tort liability for converting property subject to the federal tax lien, suits involving a bona fide dispute with another Government agency, or collection-due-process actions brought under sections 6320 or 6330. A complete listing of matters requiring prerule by the Assistant Chief Counsel (CBS) is found in CCDM Part 34(613).
  3. In its role of providing technical guidance in order to achieve uniformity in positions and treatment of taxpayers, CBS prepares various guide materials, such as Chief Counsel Directives Manual Part 34, the texts for various training programs, Chief Counsel Notices, Chief Counsel Advice and Service Center Advice, the maintenance of advisory and technical contact with operating division and other field office counsel, and the utilization of systems of advance consideration and post review. CBS is also responsible for reviewing Internal Revenue Manual revisions and updates for matters involving collection issues.
  4. CBS is responsible for preparing all recommendations regarding appellate and certiorari matters for the Office of Chief Counsel in all cases under its jurisdiction.
  5. CBS serves as principal legal advisor to the Chief Counsel, the Operating Division Counsel, and the operating division of SB/SE, on matters concerning collection, bankruptcy and summonses.
  6. Even though issues of collection, bankruptcy and summonses, as more particularly described above in section 1.4, will most often concern the SB/SE function, those issues may also concern other operating divisions. In cases where this occurs, the area counsel or associate area counsel or operating division counsel of these other functions may request technical advice from the Assistant Chief Counsel (CBS).

[5.17] 1.6 (09-20-2000)

Department of Justice

1. The Department of Justice through its staff of attorneys and the United States Attorneys in the field are the Government's representatives in the courts of the federal and state judicial systems and, as such, represent the

Internal Revenue Service. The Chief Counsel's office furnishes such assistance as may be necessary, including recommendations on offers in settlement, suit and defense letters in support of the Service's position on pertinent issues, and recommendations with respect to appeal or certiorari of a court's decision, often conferring with Justice Department's attorneys on various matters.

[5.17] 1.7 (09-20-2000)

United States Attorney

1. In the field there is usually close contact between the United States Attorneys and field office counsel. Field office counsel furnish such assistance to the United States Attorneys as may be necessary, including preparing pleadings, interviewing witnesses, taking depositions, and participating in conferences with taxpayers' representatives. Chief Counsel staff attorneys in SB/SE offices may be designated to act as Special Assistant United States Attorneys (SAUSAs) to represent the Service's interests in bankruptcy proceedings; when so acting, they are subject to supervision by the United States Attorney or the Tax Division of the Department of Justice, whichever is responsible for the case.

[5.17] 1.8 (09-20-2000)

Revenue Officer's Role

1. From what has preceded, it is obvious that the all-important collection of the revenue is the result of joint efforts involving many individuals and offices both inside and outside the Internal Revenue Service. In order for a revenue officer to have a proper perspective of his or her role and better understand his or her duties as well as the duties and responsibilities of others, it is important that a revenue officer be familiar with the various interrelationships of the offices involved in tax collection work.
2. While revenue officers are not expected to have the comprehensive knowledge of the law required of attorneys, it is hoped that they will gain a sufficient understanding from the material in the following chapters to recognize the legal problems that might call for reference to Counsel for consideration. Whenever litigation involving collection matters is pending or the institution of affirmative legal action to effect collection is being considered, revenue officers will, in the main, be investigators of facts and will be required to prepare reports concerning any facts ascertained. The lawyers charged with the responsibility of handling SB/SE cases must rely upon the administrative personnel of the Internal Revenue Service for investigation of the facts in any case. The importance of the revenue officer as an investigator and fact finder cannot be too strongly emphasized. See Chapter (12)00 on Investigations and Reports.

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[Tax Professional's Corner]

Handbook 5.17  
Legal Reference Guide for Revenue Officers

Chapter 4  
Suits by the United States

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 [5.17] 4.1 (09-20-2000)

#### Suits by the United States Chapter Overview

1. The purpose of this Chapter is to outline some of the general characteristics and procedures followed in instituting and carrying out a lawsuit and some of the most common types of lawsuits commenced by the United States for effecting or assisting in the collection of taxes.

[5.17] 4.1.1 (09-20-2000)

#### Distinctions between Judicial and Administrative Collection Processes

1. U.S. Constitution, Article 1, Section 8, provides that ". . . Congress shall have power to lay and collect taxes . . ." Congress in enacting the Internal Revenue Code gave the Service broad administrative processes for the collection of taxes. Although such processes are responsible for a majority of the delinquent tax accounts collected, considerable credit for such success lies in the ability of the Internal Revenue Service to utilize, when the need arises, the aid of the courts to insure collection of the tax. This use of the courts in assisting and effecting collection is commonly referred to as "judicial process."
2. As between the two collection processes, administrative and judicial, the administrative process is far less expensive and time consuming; therefore; judicial proceedings should usually be a last resort. However, once the decision is made to proceed by way of a court action, collection personnel should move quickly and thoroughly to insure its success. Because of the publicity that generally accompanies a court proceeding, the success of such an action cannot be measured only in the dollar amount of the tax collected. A timely and successful court action can do much to increase the effectiveness and success of the voluntary and prompt payment of taxes.

[5.17] 4.2 (09-20-2000)

#### Initiating and Processing Collection Suits

1. A request for institution of a legal proceeding to effect or assist in the collection of a tax is generally initiated in the office of the District Director. In some cases, such as interpleader suits, the legal proceeding will have been commenced by a party other than the United States. In such cases, the District Director or his/her designated representative must recommend either on his/her own initiative or upon request whether the United States should join in the proceeding for the purpose of collecting taxes.

[5.17] 4.2.1 (09-20-2000)

#### General Procedures

1. Prior to recommending the commencement of any legal proceeding for the collection of taxes the responsible initiating officer should become thoroughly familiar with appropriate provisions of the Internal Revenue Manual and Chapter 12 herein, entitled "Investigations and Reports" .
2. Counsel is always available for the purpose of rendering legal advice in ascertaining the most desirable course of action available and the probability of processing a case through to a successful conclusion. Should the revenue officer uncover information early in the investigation that casts doubt on the success of a contemplated legal proceeding, much time and effort can be saved by requesting timely legal assistance.
3. An examination of the steps taken after the District Director's determination and recommendation that suit be instituted will show the advantage of making a timely recommendation for the institution of a collection suit. After receipt of the District Director's recommendation, together with supporting documents, Counsel examines the case carefully from a legal viewpoint to determine whether or not suit is warranted on the facts presented. Assuming suit is warranted, Counsel then prepares a letter to the Assistant Attorney General, Tax Division, Department of Justice, authorizing and requesting the institution of suit. That letter must contain a discussion of the necessary facts and supporting documents, tax information, and applicable statutes and pertinent judicial decisions that may be relevant to the case.
4. When the Department of Justice receives the authorization, the case becomes the responsibility of that Department, which makes the final decision whether to institute the suit. If the action is instituted, pleadings will generally be prepared in the Tax Division of the Department of Justice and forwarded to the local United States Attorney for filing in the appropriate United States District Court. The Department of Justice may determine that a settlement agreement with the taxpayer should be given consideration. If a settlement is proposed, the Department of Justice generally will request the recommendation of the Counsel on the proposed terms of such settlement. This procedure reflects the close cooperation that exists between the two Government agencies, but it should not be misconstrued as meaning that final authority for settlement rests with the Internal Revenue Service. The Department of Justice has the final word on settlement.

[5.17] 4.2.2 (09-20-2000)

Statutory Authority

1. The authority for the United States to commence a court action for the collection or recovery of taxes is provided for by IRC 7401, as follows:

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

2. The Attorney General has not delegated the authority to direct the institution of such a proceeding to the United States Attorney. The Secretary of the Treasury has delegated his power of authorization to the Chief Counsel of Internal Revenue. Where the commencement of such an action has not been authorized or sanctioned it is subject to dismissal. Civil actions commenced under this provision must be brought in the name of the United States and not a government official.

[5.17] 4.2.3 (09-20-2000)

#### Parties to Suit

1. Generally the parties or persons who are actively concerned in the prosecution and defense of a lawsuit can be designated as either plaintiffs or defendants.
  - o The plaintiff is the usual term applied to the person or persons who initiate the suit.
  - o The defendant is the usual term applied to the person or persons against whom relief or recovery is sought in an action or suit.
2. Although the United States has the right to bring suit without express legislative authority, the United States may only be sued where Congress has enacted a statute specifically authorizing such suit. See Chapter 5 of this Handbook.

[5.17] 4.2.4 (09-20-2000)

#### Jurisdiction of Courts

1. Generally, jurisdiction can be defined as the power conferred upon a court to hear and determine the subject matter in controversy between parties and to grant the relief asked for. Federal courts derive their authority to act either from the Federal Constitution or an Act of Congress. State courts derive their authority to act either from the State Constitution or Acts of the Legislature of the particular State. The United States may resort to the state courts to collect its taxes where it is a defendant, for example, in a mortgage foreclosure proceeding. Where it is the plaintiff, the United States utilizes Federal courts to enforce collection of its taxes.
2. The jurisdiction of United States district courts to hear collection suits is established by IRC 7402(a), which provides as follows:

The district courts of the United States, at the instance of the United States, shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica , orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

3. The United States Code additionally provides, in 28 U.S.C. § 1345:

United States as plaintiff. Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

[5.17] 4.2.5 (09-20-2000)  
Venue of Actions

1. Venue means the place at which a suit is tried. A civil action for the collection of internal revenue taxes may be brought in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return was filed. 28 U.S.C. § 1396.
2. The United States, therefore, has a choice of forum in the institution of civil suits for the collection of taxes. However, in an in rem action (an action against property, rather than against a person), venue would ordinarily lie in the district where the property in question was located.

[5.17] 4.3 (09-20-2000)  
General Characteristics of a Suit

1. A lawsuit by the United States to collect taxes is generally commenced by the filing of the complaint drawn, in most cases, in the Tax Division of the Department of Justice and forwarded to the local United States Attorney for filing with the appropriate court. When the suit is brought by the United States, the action is commenced in a Federal district court. After the filing of the complaint with the court, a copy of the complaint accompanied by a summons is generally served upon all persons named as a party to the action. After service of a summons and complaint, the defendant or defendants are required to file an answer to the complaint within 20 days. The purpose of the complaint and answer thereto, which together with motions, replies, etc., are described as pleadings, is to define the issues and apprise the parties of what they must be prepared to meet at the trial.

[5.17] 4.3.1 (09-20-2000)  
Trial of a Suit

1. In the usual sense, the term "trial" means the investigation and decision of a matter at issue between parties before a competent court, including all the steps taken in the case from its submission to the court or jury to the rendition of judgment. Once a case is at issue, that is, the pleadings have established the controversy between the parties, the court will then set the case for trial. Depending on the issue or issues in controversy and the requests of the parties involved, the case will either be tried before a jury or presented to the judge of the court without a jury for determination. The parties to a lawsuit are not in all cases entitled to a trial by jury.

The function and purpose of a jury in any civil lawsuit is to determine contested or disputed questions of fact. If the facts in a particular suit are uncontested, then generally the parties are not entitled to a jury and the case would be decided by the judge. Even if the parties are entitled to a jury trial, such right can be waived by the parties should they so desire.

2. The actual trial of a civil lawsuit is generally along the following lines:
  - A. selection of the jury if a jury is considered appropriate,
  - B. opening statements by counsel for the parties,
  - C. presentation of evidence, including testimony and examination of witnesses,
  - D. closing statements by counsel,
  - E. instructions to the jury by the judge if a jury was used, and
  - F. the decision or judgment of the jury or of the judge.
3. Generally, if the case is not tried before a jury, the court does not immediately render its decision on the matter. It may request the parties to submit written statements or briefs outlining their positions in the case and the relevant law.

[5.17] 4.3.2 (09-20-2000)

#### Appeal

1. Decisions of the jury or trial court are generally subject to review by another court. That is, the losing party can usually appeal the case as a matter of right to a higher authority, generally referred to as an appellate court. The method and procedure for effecting an appeal are provided by statute. Under the Federal Rules of Civil Procedure, issues appealable from a Federal district court are usually appealed to the Court of Appeals for the Circuit in which the district is located. Appeals to the United States Supreme Court may be taken from a decision of a Court of Appeals, or the highest state court. The usual time limitation in which an appeal may be taken from a decision of the Federal district court in a case in which the United States is a party, is 60 days.
2. Generally, when the United States voluntarily becomes a party to litigation, it stands on the same footing as a private person and it is bound by the decision of the court. Neither the United States nor any person is bound by a judgment rendered in an action to which it is not a party.

[5.17] 4.4 (09-20-2000)

#### Periods of Limitation Upon Assessment and Collection of Tax Under the Internal Revenue Code

1. The statute of limitations for collection is found in IRC 6502. However, since the statute of limitations for collection generally starts to run on the date of assessment, it is also important to be familiar with the statutory period within which such assessment must be made to be valid. See Exhibits 4-1 and 4-2 for a summary of some of the more common periods of limitation upon assessment, or commencement of a proceeding in court

without assessment, and collection of tax as provided for by the Internal Revenue Code. The failure to timely assess or to commence a suit for the collection of taxes assessed within the period of limitations can defeat a judicial action.

2. The burden of proving that the assessment or collection suit is timely, and that the period of limitations has not expired, generally rests on the taxpayer, unless the United States is acting in reliance on an exception to the normal statute of limitations. If an exception is relied upon for assessing the tax or commencement of the collection suit after the normal period for such action has expired, the burden is upon the Government to show that the exception applies. Failure to carry this burden will generally result in a dismissal of the proceedings.

[5.17] 4.5 (09-20-2000)

#### Administrative Procedures for Extending Period of Limitations for Collection

1. Prior to the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98" ), the collection period could commonly be extended by the execution of a written waiver between the taxpayer and the Secretary of the Treasury or his delegate. This authority was severely curtailed by RRA 98.
2. For waiver agreements entered into on or prior to December 31, 1999, the expiration of the collection period is the latter of:
  - A. the 10-year period,
  - B. December 31, 2002, or
  - C. in the case of an extension in connection with an installment agreement, the 90th day after the end of the period of such extension.
3. For agreements to extend the period of limitations made in conjunction with offers in compromise, the above rules also apply. Thus, in the case of a waiver made in conjunction with an offer entered into on or prior to December 31, 1999, the expiration of the collection period is the later of the 10-year period or December 31, 2002. No waiver may be made in conjunction with offers entered into after December 31, 1999. In situations involving cumulative offers, or other statute problems involving offers, advice of Counsel may be sought.
4. After December 31, 1999, waiver of the statute of limitations for collection may be secured only in the following two situations:
  - A. For requests to extend the period of limitations made after December 31, 1999, if there is an installment agreement between the taxpayer and the Secretary, a court proceeding must be brought or a levy made prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into.
  - B. Where release of levy has been made under section 6343 after the 10-year period, a levy must be made or court proceeding begun prior to the expiration of any period for collection agreed upon in writing by the

Secretary and the taxpayer before such release.

5. For any waiver the extension period commences to run on the date the acceptance of the waiver is signed by the District Director, not the date of receipt of the waiver.

[5.17] 4.6 (09-20-2000)

#### Collection of Judgments

1. The primary responsibility for the collection of judgments rendered in favor of the United States for the collection of taxes rests with the Department of Justice. As a general rule, the Department of Justice looks to the local United States Attorney to collect the judgments. In fulfilling his/her responsibility, the United States Attorney will frequently request advice and assistance from the District Director. If the initial effort of the United States Attorney fails to collect the judgment, his or her office will usually make no further effort unless it receives information that would indicate a successful collection can be made. If property is located which can be seized in satisfaction of the judgment, this information should be made immediately available to the appropriate United States Attorney. Levy provisions of the Internal Revenue Code are also available to enforce collection of accounts reduced to judgment within the 10-year collection period.

2. Under the provisions of IRC 7406, "[a]ll judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties shall be paid to the Secretary as collections of internal revenue taxes."

[5.17] 4.7 (09-20-2000)

#### Suit to Reduce Tax Claim to Judgment

1. As a general rule, the purpose of instituting a suit to reduce tax claims to judgment is to prevent the statute of limitations for collection from running where collection cannot be accomplished by administrative methods within the normal statutory period.
2. A suit in aid of collection of taxes will not usually be authorized unless all administrative remedies available have been exhausted or their use would prove ineffective.

[5.17] 4.7.1 (09-20-2000)

#### Statutory Authority

1. The statutory authority for bringing a suit to reduce tax claims to judgment is found in IRC sections 7401 and 7402(a). These sections are set forth in sections 4.2.2.1 and 4.2.4.2 of this Chapter.

[5.17] 4.7.2 (09-20-2000)

#### Amount and Collectibility of Tax Claim

1. Guidelines for determining whether it is feasible to recommend a suit to reduce a tax claim to judgment will be found in the Law Enforcement Manual, Section 5.5.

[5.17] 4.7.3 (09-20-2000)

#### Effect of Judgment on Tax Lien and Levy

1. IRC 6322 (relating to period of lien) provides that where a tax assessment is reduced to judgment, the lien

continues until the underlying tax liability is satisfied or becomes unenforceable by reason of lapse of time. With respect to levy proceedings, IRC 6502(a) (relating to length of period of collection) makes it clear that the Government may continue to levy beyond the normal collection period when a judgment is timely sought, until the tax liability or judgment is satisfied or becomes unenforceable. Moreover, the Government's right to foreclosure under the tax lien (as contrasted with the more cumbersome method of foreclosing under the judgment) is still available after the assessment is reduced to judgment.

[5.17] 4.8 (09-20-2000)

#### Foreclose of Federal Tax Lien

1. The Government uses a suit to foreclose a tax lien where there is a specific, presently available source of collection. It uses a suit to reduce a tax claim to judgment, on the other hand, to extend the collection period where there is no source of collection currently available. In most other respects, the commencement and prosecution of the suits are very similar.
2. In a foreclosure action, the Department of Justice often also requests a judgment against the taxpayer. Doing so is appropriate where the property subject to the Federal tax lien is not sufficient to satisfy the entire tax liability. In addition, combining a lien foreclosure action with a suit to reduce tax claim to judgment avoids potentially duplicative suits.

[5.17] 4.8.1 (09-20-2000)

#### Statutory Authority

1. Under section 7403 of the Internal Revenue Code, where there has been a refusal or neglect to pay any tax, the Attorney General, at the request of the Secretary of the Treasury, is authorized to institute a civil action in Federal district court to enforce the lien or to subject any property in which the taxpayer has an interest to the payment of the tax liability. IRC 7403(a). The Secretary of the Treasury has delegated to the Chief Counsel authority to request instituting an action under section 7403.
2. All persons having liens on or claiming any interest in the property involved in the action must be made parties to the action. IRC 7403(b).
3. In a lien foreclosure action, the court determines the merits of all claims to and liens on the property, and, where the interest of the United States is established, may order the sale of the property. The property is sold free and clear of all liens and encumbrances. The proceeds of the sale are then distributed in accordance with the court's determination of the parties' interests in the property. IRC 7403(c).

#### NOTE:

In *United States v. Rodgers*, 461 U.S. 677 (1983), the Supreme Court held that I.R.C. § 7403 contemplates the sale of the entire property, not just the taxpayer's interest in the property.

Nevertheless, the Court found, where a nondelinquent third party has an interest in the property (such as homestead property), courts have limited equitable discretion to refuse to order the sale of the entire property. Where the entire property is sold, the nondelinquent third party is entitled to be fully compensated for the value for his interest in the property from the proceeds of the sale.

4. If the United States holds the first lien on the property, it may bid at the sale. The amount of the United States' bid cannot exceed the amount of the Federal tax lien, plus the expenses of sale. IRC 7403(c).

NOTE:

Whether the Government exercises its right to bid is a matter within the discretion of the appropriate District Director. It may be appropriate for the Government to bid on the property to prevent its sale at distress prices. This protects the interests of the Government, as well as those of the taxpayer.

5. Section 7403 also provides that the court may, at the request of the Government, appoint a receiver to enforce the lien. The court may also appoint a receiver with all of the powers of receivers in equity where the Government has certified that such appointment is in the public interest. IRC 7403(d). For detailed discussion of receivership, see section 4.10 in this handbook.

[5.17] 4.8.2 (09-20-2000)

#### Issues to Consider When Recommending an Action to Foreclose a Tax Lien

1. Listed below are factors to consider when determining whether to recommend to District Counsel that a case be referred to the Department of Justice to institute an action to foreclose a Federal tax lien.

[5.17] 4.8.2.1 (09-20-2000)

#### Administrative Collections Devices Are Not Feasible or Adequate

1. As a general rule, the administrative collection remedies available to the Government are adequate. However, there are situations in which such remedies have been exhausted or where administrative collection would not be feasible because, for example, a distraint sale would result in a lower price paid for the property. In such cases, consider recommending to Counsel that the matter be referred to the Department of Justice for court action. Below are several examples of situations in which lien foreclosure may be appropriate:

- o There are encumbrances on the property in addition to the Federal tax lien which make it difficult to determine the relative interests in the property, thereby, in all likelihood, driving down the price purchasers would be willing to pay at a distraint sale.
- o There is a cloud on title or title is contested by a third party or parties.

NOTE:

Where a person served with a notice of levy retains the property under a good faith belief

that he or parties other than the taxpayer may have a claim against the property superior to the Federal tax lien, a suit under IRC 7403 is generally more appropriate than a suit under IRC 6332 for failure to honor a levy. In a lien foreclosure action, the court determines the interests of all parties in the property.

- o A business is to be sold as a going concern.
- o The Government wishes to reach the cash surrender value of a taxpayer's insurance policy.

NOTE:

The cash loan value of an insurance policy or endowment contract may be reached by administrative means under IRC 6332(b). However, reaching the cash surrender value requires lien foreclosure.

[5.17] 4.8.2.2 (09-20-2000)

Redemption Rights

1. Unlike the sale of real property at a distraint sale, the taxpayer has no right to redeem his property after court ordered foreclosure of the Federal tax lien. This makes the property generally more desirable to purchasers and would normally result in a higher selling price than at a distraint sale.

[5.17] 4.8.2.3 (09-20-2000)

Statute of Limitations

1. See 4.5 of this handbook and Exhibits 4-1 and 4-2 for a general discussion of the statute of limitations on collection actions.
2. Where the Government has reduced a tax claim to judgment, it may bring a lien foreclosure action after the statutory period provided in IRC 6502(a) expires.

NOTE:

While obtaining a judgment extends the life of the lien for the purposes of bringing a lien foreclosure action, in order to maintain the priority of the lien in relation to other creditors, the Government must refile the notice of Federal tax lien as provided in IRC 6323(g).

[5.17] 4.8.2.4 (09-20-2000)

Economic Feasibility of Lien Foreclosure

1. The tax liability and the amount expected to be recovered should be substantial enough to warrant bringing a foreclosure action. Guidelines for determining whether it is feasible to recommend a suit are found in section 5.5 of the Law Enforcement Manual.

[5.17] 4.8.2.5 (09-20-2000)

Lien Foreclosure on a Principal Residence

1. Lien foreclosure on the principal residence of any person requires the written approval of the District Director or the Assistant District Director.

[5.17] 4.8.3 (09-20-2000)

Preparing Recommendation to Institute an Action to Foreclose Tax Liens

1. A suit to foreclose a tax lien is initiated and processed in much the same manner as a suit to reduce a tax claim to judgment.
2. In preparing a suit letter to the Department of Justice, Counsel relies on information provided in the recommendation. The Department of Justice, in turn, relies on the suit letter from Counsel in drafting its complaint, should it decide to bring suit. Therefore, it is imperative that complete, accurate information be provided in the recommendation.

NOTE:

If the recommendation is to foreclose the lien on a principal residence, the written approval of the District Director or the Assistant District Director must be provided along with the recommendation.

[5.17] 4.8.3.1 (09-20-2000)

Tax Information, Description and Valuation of Property

1. The complaint filed by the Government in a suit under IRC 7403 must provide information demonstrating proper assessment and attachment of the federal tax lien, including date of assessment and demand for payment of each tax liability.
2. In addition to setting forth accurate tax information, the complaint must contain the correct legal description of all real estate and the best available description of personal property subject to the tax lien. The legal description of real property can be obtained from the deed recorded with the local recording office. Personal property must be adequately described to distinguish it from other property. For instance, if the property is an automobile, the description should state the make, style, year and vehicle identification number or VIN.
3. If the property is an insurance policy, the description should describe it by including the name of the insurance company, the contract number, the date issued, the name of insured, the name(s) of beneficiary(ies), and any other pertinent information available. With respect to all types of property obtaining documents related to the property, such as the title to an automobile or a copy of an insurance policy, can be helpful in describing the property accurately.

NOTE:

Obtaining documents related to the property subject to the tax lien can also be helpful in identifying additional parties to be named in the foreclosure suit. For example, in some states, the beneficiary of the policy is deemed to have a vested right in the policy, and therefore must be named as a party to the suit.

4. Careful consideration should be given to assessing the value of the property. The valuation is important in ascertaining whether a suit is justified.

[5.17] 4.8.3.2 (09-20-2000)

Identification of Parties and Competing Liens

1. The suit recommendation must identify all other persons

with liens on or other interests in the property. In a lien foreclosure suit, the court adjudicates all claims against the property. Therefore, the United States must name as defendants to the suit all known persons who have liens on or claim any interest in the property subject to the tax lien. In addition, providing this information enables the attorneys reviewing the case to ascertain prior to commencement of the suit the priority of the Government's tax lien and the amount of collection that can be expected.

NOTE:

Because persons named as parties must be served with process, it is important to furnish their addresses, as well as their correct legal names.

If	Then
the party to be named is an individual doing business under another name	both names should be provided, along with the home address of the individual as well as the business address.
the party is a partnership	the complete name and address of the partnership should be provided together with the individual partners' names and addresses
the party is a corporation	the complete name and address of the corporation and its officers, state of incorporation, and statutory agent for service of process should be provided.

\* The term "company" following the name of a business does not always mean the business has in fact been incorporated. Checking with the office of the Secretary of State in the state in which the business is located will generally confirm whether it is a corporation, local or foreign. If it is not registered, it may be doing business under a fictitious name.

[5.17] 4.9 (09-20-2000)

Proceeding to Seize A Principal Residence

1. A court order is required prior to the seizure of certain principal residences. In 1998, section 6334 of the Internal Revenue Code was amended to exempt principal residences from levy unless a judge or magistrate of a Federal district court approves the seizure, in writing. IRC 6334(e)(1).

NOTE:

- Section 6334(a)(13)(A) exempts from levy any real property used as a principal residence by any person (except real property which is rented) if the amount of taxes owed does not exceed \$5,000.
2. "Principal residence" refers to the principal residence (as defined by IRC 121) of the taxpayer, the taxpayer's spouse, former spouse, or minor child.
3. A proceeding to seize a principal residence (also called a 6334(e)(1) proceeding) is necessary in order for the Government to pursue administrative collection against a

principal residence; foreclosure of the tax lien on a principal residence is still available under IRC 7403. A section 6334(e)(1) proceeding should be recommended whenever the government would have, prior to the amendment of IRC 6334, administratively seized the principal residence. Continue to recommend lien foreclosure actions where appropriate.

4. A section 6334(e)(1) proceeding is generally commenced in the same manner as suits by the Government to collect taxes. A recommendation is forwarded to Counsel, which prepares a suit letter to the Department of Justice. The information required to be provided in a lien foreclosure recommendation (see section 4.8.3 of this handbook) must be provided in a 6334(e)(1) proceeding recommendation.

NOTE:

If the residence to be seized is the principal residence of the taxpayer's spouse, former spouse or minor child, remember to provide the name and address of that person or persons.

5. In addition to the information provided in connection with lien foreclosure, the recommendation must show that all the legal and procedural requirements for seizure have been met. For example, it should contain information regarding:

- o the notice given to the taxpayer under IRC 6331 (d)
- o any notices given or hearings conducted as required by IRC 6320 and 6330
- o the investigation of the status of the property required by IRC 6331(j)
- o alternative methods of collection considered
- o necessary approvals

6. Seizure of a principal residence of the taxpayer, the taxpayer's spouse, former spouse, or minor child (or of any other person) requires the written approval of the District Director or Assistant District Director. This written approval must accompany the recommendation.

[5.17] 4.10 (09-20-2000)

Court Appointed Receiver

1. The court may, under IRC 7403(d), at the instance of the United States, appoint a receiver to enforce the tax lien; or during the pendency of the proceeding, upon certification that it is in the public interest, a receiver may be appointed with all the powers of a receiver in equity.

[5.17] 4.10.1 (09-20-2000)

Types of Court Appointed Receivers

1. There are two types of court appointed receivers:
  - A. The first of the two types of receivers occurs after the lien priorities have been determined with respect to property. The Government may request a receiver to negotiate the sale of the property. The receiver is paid from the sale proceeds when approved by the court. An example would be selling securities through negotiation rather than by auction.
  - B. Another type is a receiver being requested during the pendency of the proceedings upon certification of the

Secretary that such receiver is in the public interest. This authority has been delegated to the Chief Counsel who certifies to the court that it is in the public interest that a receiver be appointed. The receiver's powers include, among others, the power to conduct the business of the taxpayer, safeguard the assets of the taxpayer, and liquidate the business to pay creditors.

- C. The taxpayer will no longer be allowed to conduct affairs or business with respect to the property subject to the lien. The receiver has complete control over the assets, subject to the court's supervision. In some cases, however, the taxpayer continues in an advisory capacity. One of the reasons for requesting that a receiver with all the powers of a receiver in equity be appointed is to have supervision by a court officer in order to prevent waste or fraud by the taxpayer or others and to prevent, if possible, the insolvency of the business.

[5.17] 4.10.2 (09-20-2000)

#### Duties of a Receiver

1. Some of the duties of a receiver are conserving the property, maintaining the business as a going concern, and when the rights of all parties have been satisfied, turning of the property back to the owners, or liquidation of the business to pay creditors. In a lien foreclosure action, IRC 7403(d) gives the Service the right to appoint a receiver with all of the powers of a receiver with equity, upon certification by the Secretary during the pendency of such action that it is in the public interest.
2. Under IRC 6012(b), a receiver in equity, if operating the taxpayer's business, must make all the business tax returns for the partnership, corporation or individual.
3. If the taxpayer's property is partly located outside the jurisdiction, the receiver has the authority to take possession of all the property or to bring suit in any district where the property may be located. 28 U.S.C. 754.

[5.17] 4.10.3 (09-20-2000)

#### Cost and Expense of Receivership

1. The cost and expense of a receiver are paid from the assets of the taxpayer. Such expenses are usually substantial. Therefore, it is important to weigh this factor against the need for a receiver before making such a recommendation. It should be kept in mind that, although the receiver may be appointed at the request of the United States, the receiver is not an agent of the United States but rather is acting under the control and authority of the court.

[5.17] 4.11 (09-20-2000)

#### Intervention

1. Listed below are the guidelines for intervention by the United States in pending litigation.

[5.17] 4.11.1 (09-20-2000)

#### Definition and Purpose

1. The United States has the same right as any citizen to bring suit in its own name or intervene.
2. Intervention is allowed to enable the court to settle the entire controversy. A party should be permitted to intervene if it would enable the court to try all claims in one suit.
3. IRC 7424 provides that if the United States is not a party, it may intervene in such action or suit to assert any lien that is the subject of such action or suit. If intervention is denied, the adjudication has no effect on the federal tax lien. Intervention is controlled by the state or federal rules of practice applicable to the court in which intervention is sought.

[5.17] 4.11.2 (09-20-2000)

#### Procedure to Intervene

1. Whether an application to intervene is timely is a matter generally committed to the sound discretion of the court, with permission being granted even after final judgment in certain situations. Time is of the essence. Failure to intervene could mean that property might be distributed to claimants whose rights are inferior to those of the United States. While the United States might have a right of action against these distributees, as a practical matter the chances of successfully pursuing such a legal course of action may not be good.
2. A motion is filed with the appropriate court for leave to intervene. If granted, a petition of intervention is filed asking for a determination of the conflicting claims and liens together with an order entered by the court decreeing the sale of the property, if necessary. Intervention must be taken generally under the same conditions as attach to the commencement of an original suit under IRC 7401 and 7403. It must be authorized or sanctioned by the Chief Counsel and directed by the Attorney General. The United States intervenes as a party plaintiff.
3. In any case in which the United States intervenes, the same procedural rules as provided in 28 U.S.C. 2410 apply as if the United States had been initially joined properly as a party.

[5.17] 4.11.3 (09-20-2000)

#### Removal of Actions From State Court

1. The United States can, within 30 days after receipt of a copy of the complaint (not necessarily by way of formal service), remove a suit brought in state court to a Federal court if it is named as a party defendant in spite of the fact that such joinder of the United States is improper, since a suit against the United States raises federal questions. 28 U.S.C. 1441. IRC 7424 expressly provides that in any case where the United States intervenes, the provisions of 28 U.S.C. 1444 (relating to removal of foreclosure actions) shall apply as if the United States had originally been named a party defendant in such action or suit. Thus, the United States has the same right of removal where it intervenes as a party plaintiff in a state court proceeding as the United States

enjoys in any action brought against it under 28 U.S.C. 2410.

[5.17] 4.12 (09-20-2000)

#### Action to Enforce a Levy

1. Listed below are the guidelines for bringing an action to enforce a levy.

[5.17] 4.12.1 (09-20-2000)

#### Nature of Proceeding

1. Under IRC 6331 the District Director may collect any tax from a person liable to pay such tax who refuses to do so within 10 days after notice and demand and certain other procedural requirements. The levy may be made upon wages, any property belonging to such person, or on property on which there is a lien provided by IRC 6321. After this 10-day period, and prior to the issuance of any levy, the taxpayer has, pursuant to IRC 6330, the right to a due process hearing before an appeals officer. The taxpayer may appeal the determination of the appeals officer to the Tax Court or to a United States District Court within 30 days of the determination. The Service may not take levy action pursuant to the determination during such 30 day period or while the taxpayer's court appeal is pending. Seizure of a delinquent taxpayer's property or rights to property immediately after notice and demand is possible in case of jeopardy. However, in such cases, the Regional Counsel must personally approve the jeopardy levy in writing.

[5.17] 4.12.2 (09-20-2000)

#### Statutory Obligation to Honor Levy

1. The remedy for violation of the Service's right to levy established by IRC 6331 can be found in IRC 6332.

[5.17] 4.12.3 (09-20-2000)

#### Defenses for Failure To Comply

1. The defendant in a suit for failure to honor a levy is not permitted to raise defenses ordinarily available in actions directly instituted against the taxpayer for collection of the tax, such as constitutionality, amount, or validity of the assessment, or the statute of limitations. *United States v. Bank of Shelby*, 68 F. 2d 538; (5th Cir. 1934); *United States v. Citizens and Southern National Bank*, 538 F.2d 1101 (5th Cir. 1976); *United States v. Prudential Insurance Co. of America*, 461 F.2d 208 (5th Cir. 1972).
2. The defendant in a suit for failure to honor a notice of levy has two defenses: that the defendant is not in possession of the taxpayer's property or that the taxpayer's property is subject to a prior judicial attachment. *United States v. Sterling National Bank & Trust Co. of N.Y.*, 494 F. 2d 919 (2nd Cir. 1974); *In re Dell W. Carlson*, 580 F.2d 1365 (10th Cir. 1978). The allegation of lien priority is not a defense. If parties served with levies believe their claim has priority they can bring a suit under IRC 7426.
3. IRC 6332(e) makes clear the legal effect of honoring a

levy. A person levied upon, who makes payment or delivery to the District Director pursuant to levy is discharged from any obligation or liability to the taxpayer and any other person with respect to the property or rights to property arising from such payment or delivery. This even includes cases when the Government levies on property under an assessment that is incorrectly determined. Similarly, when a person incurs personal liability under IRC 6332(d)(1) for failure to honor a levy and subsequently pays this liability, he is discharged from any obligation or liability to the delinquent taxpayer and any other person. An insurance company honoring a levy with respect to a life insurance or endowment policy is discharged to the extent of any obligation or liability, not only with respect to the insured, but also with respect to any beneficiary under the policy. However, IRC 6332(d) does not relieve from liability any person who mistakenly surrenders to the United States property or rights to property belonging to a third party. When property has been wrongfully levied, the owners may secure the administrative relief provided for in IRC 6343(b) (return of property wrongfully levied upon) or may bring suit to recover their property under IRC 7426 (wrongful levy suit against the United States).

[5.17] 4.12.4 (09-20-2000)

#### Liability for Failure To Comply

1. IRC 6332 makes it clear that a recovery in a suit to enforce a levy (other than costs) is to be credited against the delinquent tax liability.
2. IRC 6332(d)(2) provides for the imposition of a 50-percent penalty by suit in addition to the personal liability described above when a person fails or refuses to surrender property without reasonable cause. The person will be liable for a penalty equal to 50 percent of the amount recoverable in the suit to enforce the levy. No part of this penalty is credited against the tax liability for the collection of which levy was made. The penalty is not applicable if there is a bona fide dispute or reasonable cause for the failure or refusal to surrender the property. When a court determined that a bank could not set off against a taxpayer's checking account after that account had been levied upon, the court declined to impose the 50-percent penalty, but warned that in the future, in like circumstances, no reasonable cause would exist to prevent the assertion of the penalty. *United States v. Sterling National Bank*, 494 F.2d 919 (2nd Cir. 1974).
3. In view of the severity of the 50-percent penalty the recommendation for its assertion should generally be made only when the failure or refusal to surrender the property levied upon is arbitrary or capricious, or when the alleged dispute over the amount owing or the legal effectiveness of the levy is frivolously raised. Questions concerning the appropriateness of assertion of the penalty should be referred to the District Counsel.

[5.17] 4.12.5 (09-20-2000)

#### Initiation of Suit

1. The Internal Revenue Manual sets forth the general procedure to be followed in recommending a suit under IRC 6332. Jurisdiction is in the United States district courts. 28 U.S.C. 1345. A suit for failure to honor a levy should not be recommended if use of an administrative process to collect the tax would prove adequate.
2. As a general rule, resort to suit under IRC 6332 is made when the party in possession of the taxpayer's property disposes of it subsequent to the levy. If the property is retained in her possession, then consideration should be given to a suit to enforce the Government's lien against the property under IRC 7403. Questions relative to the type of suit to recommend in doubtful cases should be referred to District Counsel.
3. If the notice of levy was duly and timely served prior to the expiration of any collection period running against the taxpayer, as provided in IRC 6502(a), then the personal liability arising from a dishonor of that notice of levy may in any appropriate case be enforced at any time without limitation, notwithstanding any subsequent expiration of the normal or extended period of limitations on collection against the taxpayer. *United States v. Atlantic Richfield Co.*, 73-1 U.S.T.C. 81,062 (E.D. Pa. 1973).

[5.17] 4.13 (09-20-2000)

#### Writs of Entry

1. The Supreme Court held in *G.M. Leasing v. United States*, 429 U.S. 338 (1977) that an entry without a warrant onto the private areas of personal or business premises of a taxpayer for the purpose of seizing property to satisfy a tax liability is in violation of the Fourth Amendment to the Constitution of the United States.
2. The purpose of the Revenue Officer's entry is to seize property in satisfaction of unpaid taxes, not rummage everywhere in search of seizable items once lawfully on the premises. *United States v. Condo*, 782 F.2d 1502 (9th Cir. 1986).
3. Revenue officers must either secure written consent to enter private premises or a court order permitting the entry. The revenue officer should obtain a consent to enter from the occupant of the premises. Generally, the revenue officer should attempt to obtain consent unless the officer believes that advance notice will jeopardize his safety or attempts to contact the taxpayer or occupant of the premises have failed.
4. A writ of entry obtained from the court authorizes the revenue officer to enter the premises identified in the officer's affidavit or declaration. The affidavit or declaration presented to the court will identify the property or types of property the officer intends to seize and thus the affidavit or declaration and the writ order limit the scope of the seizure.
5. Private portions of premises can be entered without a writ of entry if the revenue officer observes situations that are exigent circumstances, such as the taxpayer removing property beyond the reach of the Service under

circumstances that are not in the ordinary course of business.

NOTE:

District Counsel should be consulted before entering without a writ of entry.

6. See also Chapter 12.21(4)e, and IRM Handbook 5.10 Seizure and Sale Handbook, Subsection 1.10.4 Writ Procedures.

[5.17] 4.14 (09-20-2000)

Suits to Recover Erroneous Refunds

1. Section 7405 of the Internal Revenue Code authorizes the Service to bring a civil suit to recover any money erroneously refunded to a taxpayer or a third party.

2. Section 7405 provides:

"(a) Refunds After Limitations Period. -- Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States."

"(b) Refunds Otherwise Erroneous. -- Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514), may be recovered by civil action brought in the name of the United States."

"(c) Interest. -- For provision relating to interest on erroneous refunds, see section 6602."

"(d) Periods of Limitation. -- For periods of limitations on actions under this section, see section 6532(b)."

3. The suit to recover an erroneous refund may be brought regardless of whether the erroneous refund was made under a mistake of fact or a mistake of law.

4. The suit may be brought even if the erroneous refund was issued as a result of the Service's error with no wrongdoing on the part of the taxpayer.

5. No assessment is necessary to bring an erroneous refund suit.

6. Filing an erroneous refund suit is not the only way the Service may recover an erroneous refund. Refer to IRM 21.4.5, Erroneous Refunds.

A. The type of erroneous refund determines the applicable statutes of limitations and the means by which the Service can recover the erroneous refund.

B. Assessable erroneous refunds may be assessed and collected administratively within the applicable period of limitations on assessment and collection. Refer to IRM 21.4.5.2, What is an Erroneous Refund?

C. Recovery by suit should be considered only if administrative recovery is barred by the statute of limitations or the erroneous refund is unassessable, and LEM criteria for filing a suit is met. Refer to IRM 21.5.7, Collection Methods.

[5.17] 4.14.1 (09-20-2000)

## Burden of Proof

1. The Government has a burden of proof with respect to all the elements of the erroneous refund suit. The Service must show that the refund was erroneous, the amount of the refund, and that the taxpayer received or benefited from the erroneous refund. *Soltermann v. United States*, 272 F.2d 387 (9th Cir. 1959).

[5.17] 4.14.2 (09-20-2000)

### Statute of Limitations for Commencing Suit

1. I.R.C. § 6532(b) provides:

"Suits by United States for Recovery of Erroneous Refunds. -- Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of a refund if it appears that any part of the making of the refund was induced by fraud or misrepresentation of a material fact."

2. The Service generally has two years from the date the taxpayer receives the erroneous refund to bring the erroneous refund suit. *O'Gilvie v. United States*, 519 U.S. 79 (1996).
3. The Service has five years to bring the erroneous refund suit if any part of the erroneous refund was "induced by fraud or misrepresentation of a material fact."
  - A. Fraud is defined as "an intentional misrepresentation, concealment or nondisclosure for the purpose of inducing another [Government] ... to part with some valuable thing [e.g., money]."
  - B. Misrepresentation is defined as "an untrue, incorrect, or misleading representation." *Webster's Third New International Dictionary* (Third Edition 1986). The representation can be in a form of a statement, assertion, or a failure to disclose relevant information. It need not be intentional, but it must be regarding a fact (not law) that is material or essential to the Service's decision to issue the erroneous refund. See *United States v. Indianapolis Athletic Club, Inc.*, 785 F. Supp. 1336 (S.D. Ind. 1991).

[5.17] 4.14.3 (09-20-2000)

### Initiating Suit for Recovery of Erroneous Refund

1. Recommendations for suits of this nature are forwarded to District Counsel as are other recommendations for commencement of legal proceedings. See IRM Handbook 105.2, *Litigation and Judgments*.

[5.17] 4.15 (09-20-2000)

### Action to Quiet Title

1. The Government may acquire title to property through the enforcement of a tax lien. This may occur, for example, when the property is sold at a distraint sale, the minimum price is not met by the highest bidder, and the Government

bids in the property. This may also occur when there is a non-judicial foreclosure sale and the Government exercises its right to redeem pursuant to I.R.C. 7425(d). In order to increase the amount that property will bring at a sale by the Government, express authority has been given to the Government under IRC 7402(e) to bring an action to quiet title to property it has acquired through the enforcement of a tax lien. Jurisdiction in cases of this type is in the Federal district courts.

[5.17] 4.16 (09-20-2000)

#### Assertion of Liability Against Fiduciaries

1. The following provides procedures for collection from fiduciaries.
2. The definition of fiduciary, duties and responsibilities and available remedies are discussed below.

[5.17] 4.16.1 (09-20-2000)

#### Liability of Fiduciaries under Section 3713.

1. 31 U.S.C. § 3713 makes a fiduciary of an insolvent estate (such as an insolvent decedent's estate) personally liable for debts due to the United States if the fiduciary pays any debt owed by the estate without first paying priority debts of the United States of which the fiduciary is aware of. A fiduciary must first pay known debts to the United States or risk personal liability if he or she fails to do so.
2. Chapter 11, of this Handbook titled "Insolvencies and Decedents' Estates" explains the United States' priority under section 3713 and the liability of the fiduciary under section 3713 in detail. This section will deal generally with the duties of the fiduciary and the assessment and collection of the liability imposed by section 3713.

[5.17] 4.16.2 (09-20-2000)

#### Definition of a Fiduciary

The definition of a fiduciary provided in IRC 7701 (a)(6) includes: a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

[5.17] 4.16.3 (09-20-2000)

#### Duties and Responsibilities of a Fiduciary

1. The duties of a fiduciary depend on the type of estate for which the fiduciary acts. They generally include the prompt collection and marshaling of the assets of the estate, the custody, preservation and management of the assets of the estate, and the payment of the debts of the estate.
2. Treas. Reg. 301.6903-1 (a) requires that every person acting for another person in a fiduciary capacity shall give notice thereof to the District Director in writing. Written notice is also required to advise the District Director when the fiduciary relationship has terminated. Treas. Reg. 301.6903-1(b)
3. IRC 6012(b) requires the filing of income tax returns by

fiduciaries who have full control and custody of the property of a taxpayer.

[5.17] 4.16.4 (09-20-2000)

#### Extent of a Fiduciary's Liability

1. The liability of a fiduciary is not dependent upon any benefit the fiduciary may or may not receive from the estate. The amount of liability is to the extent of the payments the fiduciary made of debts over which the United States was entitled to priority under section 3713 or to the amount which may remain due and owing the United States on its claim, whichever is the lesser.

[5.17] 4.16.5 (09-20-2000)

#### Establishing a Fiduciary's Liability

1. A fiduciary's liability may be established through administrative procedures or through suit.
2. Liability may be established administratively through the notice and assessment procedures under IRC § 6901.
3. Section 6901 provides that the liability of a fiduciary may be assessed as any other tax, and notice and demand may be issued and collection may be effected by levy, if necessary. However, the liability of the fiduciary must be assessed within one year after the fiduciary liability arises or within the 10-year period for collection of the tax in respect of which such fiduciary's liability arises, whichever is later. The fiduciary may execute a waiver to extend the period of limitations for assessment. Where income, estate and gift taxes are involved, the fiduciary is entitled to a notice of fiduciary liability and an opportunity to file a petition with the Tax Court for a redetermination of the liability asserted against the fiduciary.
4. A suit may also be filed in court against the fiduciary under IRC § 7402(a) to collect the amount of the fiduciary's liability.

[5.17] 4.17 (09-20-2000)

#### Civil Injunctions Under IRC 7402(a) to Restrain Pyramiding

1. An injunction is a court order that requires a party either to refrain from certain actions or to perform certain actions. Federal district courts have jurisdiction to issue injunctions under 7402(a). Injunctions can be obtained to restrain the future conduct of any person, when necessary or appropriate to enforce the internal revenue laws. *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300-1301 (11th Cir. 1984), cert. den., 470 U.S. 1050 (1985); *United States v. Hart*, 701 F.2d 749 (8th Cir. 1983); and *United States v. Ekblad*, 732 F.2d 562 (7th Cir. 1984). Suits for injunctions may be appropriate against employers and their responsible officers who have a history of pyramiding federal trust fund taxes and who continue to do so.

[5.17] 4.17.1 (09-20-2000)

#### Standards for Injunctive Relief Under IRC 7402(a)

1. A litigant must be able to show "irreparable harm" and that it has no adequate remedy at law to obtain an

injunction. The Service has presented proof on "irreparable harm" satisfying these standards in trust fund cases referred for injunction. In addition, the Service's practice has been to limit injunction suits against trust fund pyramiding to cases where the amount of tax due is significant, and the Service has first exhausted all administrative means to collect the taxes. Before seeking an injunction, the Service should exhaust the following administrative steps:

- A. Pursuant to Treas. Reg. 31.6011(a)-5, the Service should administratively require a noncompliant employer to file its employment tax returns monthly (instead of quarterly) on Form 941-M.
  - B. Pursuant to IRC 7512, the Service should impose separate accounting for trust fund taxes by requiring the employer (and responsible persons) to (1) establish a separate bank account for trust fund taxes, (2) deposit trust fund taxes in the account within two banking days of collection, and (3) keep the deposited taxes in the account until payment is due. Failure to comply with IRC 7512 subjects the employer and its responsible persons to criminal prosecution under IRC 7215. Ordinarily, the Service does not impose IRC 7512 procedures on an employer unless or until the Service has exhausted its other available administrative collection remedies against the employer and its responsible persons.
2. The court will focus on two critical factors: first, the defendant's persistent failure to comply with employment tax laws after repeated administrative efforts to effect voluntary compliance, and second, the reasonable likelihood that the defendant will continue to pyramid trust fund liabilities. *United States v. Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985) and *United States v. Kaun*, 827 F.2d 1144, 1149-50 (7th Cir. 1987). Accordingly, requests for injunctions against a trust fund violator should show:
- A. the violation is not an isolated occurrence, but part of a pattern of past violations including, where applicable, evidence of prior assessments and penalties;
  - B. the defendant is clearly a "responsible person" with respect to the pyramided taxes;
  - C. the defendant's activities place him in a position where continued violations can be anticipated, and
  - D. the anticipated violations jeopardize the effective enforcement of the employment tax laws.

[5.17] 4.17.2 (09-20-2000)

#### Types of Injunctive Relief Against Trust Fund Pyramiding

1. In past trust fund pyramiding cases, the Government has first sought a preliminary injunction against in-business taxpayers preventing them from:
  - A. failing to timely pay their future corporate income tax, FUTA tax, and withholding and FICA tax liabilities;
  - B. transferring any money or property to any other entity to have that entity pay the salaries or wages

- of the defendants' employees; and
- C. assigning any property or making any payments after the preliminary injunction is issued until the trust fund liabilities, accruing after the preliminary injunction, are first paid to the Service.
2. The individual defendants and other persons authorized to disperse company funds have been required monthly to sign and deliver to the Service statements that they have read the court's preliminary injunction order and will obey it.
  3. The Justice Department has also asked district courts to issue preliminary injunctions authorizing the Service to enter defendants' premises and seize and sell corporate property, if the defendants violate the injunction. Such violations may result in further court proceedings against the violator for civil or criminal contempt, including the possibility of imprisonment. If a district court judge is initially unwilling to imprison the principals of a failing business for violating a preliminary injunction, the court may be willing to order the failing company (through its principals) to file a bankruptcy petition for immediate liquidation and appointment of a trustee.
  4. It may be appropriate for the Government to seek an injunction against certain corporate principals who have a pattern of creating new companies after the Service (or other creditors) seek to collect overdue accounts from an existing corporation. Under these circumstances, the Government may seek an injunction requiring the principals to, among other things, notify the Service if they acquire, manage, or work for another company in the next five years (or other appropriate time period). See *United States v. Campbell*, 897 F.2d 1317, 1323-1324 (5th Cir. 1990), for an injunction case sustaining affirmative duties of this nature under IRC 7408.

Exhibit [5.17] 4-1 (09-20-2000)  
IRM 5.17 Legal Revenue Officer Guide -- Ch. 4 Suits by U.S.

Exhibit [5.17] 4-1 (Cont.) (09-20-2000)  
IRM 5.17 Legal Revenue Officer Guide -- Ch. 4 Suits by U.S.

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Internal Revenue Hndbk. 5.17 Chap. 4 Suits (09-20-2000)  
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Handbook 5.17  
Legal Reference Guide for Revenue Officers

Chapter 6  
Summonses

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[5.17] 6.1 (09-20-2000)  
General

1. The purpose of this chapter is to acquaint revenue officers with the basic legal concepts governing the use and enforcement of administrative summonses. This chapter does not discuss procedure, such as summons preparation, service, or enforcement. For procedural guidance, refer to the Multifunctional Summons Handbook at IRM Handbook 109.1, Chapters 1 through 11.
2. In general, the Service should issue summonses only when the taxpayer (or other witness) will not produce the desired records or other information voluntarily. Before issuing any summons, the Service should consider:
  - A. The possibility that judicial enforcement will be required and
  - B. The adverse effect on future voluntary compliance if enforcement is abandoned.

NOTE:

The Service should only issue a summons when it is prepared to seek judicial enforcement if the summoned party fails to fully comply.

[5.17] 6.2 (09-20-2000)  
Statutory Authority

1. IRC 7601 authorizes the Service to inquire about any person who may be liable to pay any internal revenue tax. IRC 7602 authorizes the Service to summon a witness to testify or to produce books, papers, records, or other data that may be relevant or material to an investigation. *United States v. Powell*, 379 U.S. 48 (1964). IRC 7602 also identifies the purposes for which the Service may issue summonses. The purposes are:
  - A. to ascertain the correctness of a return;
  - B. to prepare a return where none has been made;
  - C. to determine the liability of a person for internal revenue tax;
  - D. to determine the liability at law or in equity of a transferee or fiduciary of a person in respect of any internal revenue tax;
  - E. to collect any internal revenue tax liability; or
  - F. to inquire into any offense (civil or criminal)

connected with the administration or enforcement of the internal revenue laws.

NOTE:

The Service's right to examine records provided by IRC 7602 includes the right to photocopy such records.

2. The following persons may be summoned under the authority of IRC 7602(a)(2):
  - A. the person liable for the tax or required to perform the act (prepare a return);
  - B. any officer or employee of such person who has information that may be relevant to the investigation;
  - C. any person having possession, custody, or care of books, papers, records, or other data that may be relevant to the investigation; and
  - D. any other person the Secretary deems proper.
3. Other IRC sections concerning the proper use and enforcement of a summons are:
  - A. Section 7602 -- Examination of Books and Witnesses; also sections 6420 and 6421
  - B. Section 7603 -- Service of Summons
  - C. Section 7604 -- Enforcement of Summons
  - D. Section 7605 -- Time and Place of Examination
  - E. Section 7609 -- Special Procedures for Third Party Summons
  - F. Section 7610 -- Fees and Costs for Witnesses
  - G. Section 7611 -- Restrictions on Church Tax Inquiries and Examinations
  - H. Section 7612 -- Special Procedures For Summonses For Computer Software
  - I. Section 7402 -- Jurisdiction of District Courts
  - J. Section 7210 -- Failure to Obey Summons
  - K. Section 6503(j) -- Designated and Related Summonses

[5.17] 6.2.1 (09-20-2000)

Summons Authority of Collection Personnel

1. Delegation Order No. 4, as revised, provides detailed instructions concerning the levels of authority delegated to various Service officials to approve and perform activities concerning summonses. Revenue officers should refer directly to the most current revision of Delegation Order No. 4 whenever an issue arises about their authority to take any of these actions:
  - A. authorize, issue and serve summonses;
  - B. set the time and place for examination;
  - C. administer oaths to witnesses;
  - D. take testimony under oath;
  - E. take and certify papers; and,
  - F. receive and examine summoned materials.
2. Revenue officers may use John Doe summonses in their investigations; however, they are not authorized to issue John Doe summonses. Pursuant to Delegation Order No. 4 (Rev. 22), the District Director and the Chief, Collection are authorized to issue John Doe summonses. No one may serve a John Doe summons without first obtaining approval from the appropriate federal district court.

[5.17] 6.3 (09-20-2000)

## Summons Use

1. The summons should not require the witness to do anything other than to appear on a given date to give testimony or to produce existing books, papers and records or both. A summons cannot require a witness to prepare or create documents, including tax returns, that do not currently exist.

### NOTE:

- Pursuant to IRC 6331(g), the Service may not levy on a person's property on the day that person (or that person's officer or employee) is required to appear in response to a summons issued for the purpose of collecting any tax.
2. A summons is not a necessary element of the Service's authority to examine books and records or to take testimony under oath. It is the statutory device with which the Service can compel persons to appear, testify, and produce documents. When a taxpayer or third person is willing to testify and produce documents voluntarily, a summons may not be required. In such cases, revenue officers may only need to produce their credentials.
3. This approach also applies when seeking financial records from financial institutions, except in cases governed by the Tenth Circuit's interpretation of the Right to Financial Privacy Act (RFPA). In general, the RFPA requires that account owners be given notice of (and an opportunity to challenge) a government agency's intent to obtain records of their finances from a financial institution. However, the RFPA also provides an exception to these requirements as they apply to the Service. Section 3413(c) states: "Nothing in [the RFPA] prohibits the disclosure of financial records in accordance with procedures authorized by the [IRC]. In all circuits other than the Tenth, the Service takes the position that an informal request for records is a procedure authorized under IRC 7602. The Tenth Circuit reached the opposite conclusion in *Neece v. Internal Revenue Service*, 922 F.2d 572 (10th Cir. 1990), and ruled that a bank's voluntary disclosure of a customer's financial records to the Service, without prior notice to the customer, violated the RFPA. The Tenth Circuit reasoned that IRC 7609, not section 7602, contained the procedures for obtaining records concerning a taxpayer from a financial institution.
4. Given the Tenth Circuit's holding in *Neece*, revenue officers should follow IRC 7609 procedures when seeking financial information from financial institutions governed by the Tenth Circuit's precedents. (The Tenth Circuit encompasses Kansas, Oklahoma, Wyoming, Utah, Colorado, and New Mexico). They should not seek this information by informal means, such as by producing credentials, letters of circularization, or by any other non-summons method if any of the following conditions exist:
  - A. the financial institution is located in the Tenth Circuit;
  - B. the information concerns taxpayers residing in the Tenth Circuit, regardless of the location of the

financial institution, or

- C. the IRS office is located in the Tenth Circuit, regardless of the location of the financial institution or the residence of the taxpayer.

NOTE:

Revenue officers should not attempt to obtain financial information voluntarily from financial institutions if the above conditions exist. To do otherwise could result in damages awarded against the Service and the expenditure of valuable resources in defending such damage suits. Revenue officers should seek district counsel's advice if there is any doubt regarding whether Neece applies.

5. In RRA 1998, Congress enacted IRC 7609(j), which provides that nothing in IRC 7609 shall be construed to limit the Service's ability to obtain information, other than by summons, through formal or informal procedures authorized by IRC 7601 and 7602. This section indicates that the Service's ability to seek informally the voluntary exchange or records, i.e., without a summons, constitutes a procedure authorized by the Code. Nevertheless, the Service is currently following the Neece ruling in cases governed by the Tenth Circuit's precedents.
6. During the course of collecting a tax liability, the revenue officer may have another opportunity to obtain records without issuing a summons. IRC 6333 states: "If a levy has been made or is about to be made on any property, ... any person having custody or control of any books or records, containing evidence or statements relating to the property ... subject to levy, shall, upon demand of the [Service], exhibit such books or records to the [Service]." This action is a procedure under the IRC and may be used in circumstances governed by Tenth Circuit precedents and in all other circuits.

[5.17] 6.4 (09-20-2000)

Relevance and Materiality

1. IRC 7602 authorizes the Service to issue a summons to any person to produce, for examination, books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to the determination or collection of any internal revenue tax. The question of what "may be relevant or material" depends on the facts and circumstances of each case. In general, courts reject the use of a summons as a "fishing expedition" and have held that there must be a "realistic expectation" rather than an "idle hope" that something may be discovered to satisfy the relevance and materiality requirements of IRC 7602, particularly where third-party documents are sought. However, courts also recognize that not all documents summoned will prove relevant or material, emphasizing the test is whether the summoned documents "might throw light upon subjects under legitimate inquiry." *United States v. Arthur Young & Co.*, 465 U.S. 805, 814-815 (1984).
2. When documents or information are sought from the taxpayer, clearly all records of financial transactions, all books and records showing the receipt or expenditure of money by the taxpayer, all financial transactions of

the taxpayer with other persons and the names of such other persons to verify such transactions satisfy the relevance test of IRC 7602. Where documents or information are requested from third persons, all records or information of the taxpayer's financial transactions with such third persons or other persons satisfy the relevance test of IRC 7602. Apart from these basic guidelines, situations may arise where the court might require the Government to demonstrate the relationship of summoned documents or information to the investigation in order to determine whether such documents or information "may be relevant or material."

[5.17] 6.5 (09-20-2000)

#### Proper Description of Documents

1. A demand on a third person for documents required to be produced for examination cannot be so general and vague that it would be unreasonable to expect the summoned party to comply. The rule established by the courts is that the Service employee or officer issuing the summons need not describe in minute detail every document and paper to be produced, but must describe them with "such reasonable particularity" that the person summoned will have sufficient information to enable him to produce such documents.
2. In general, the meaning of the phrase "reasonable particularity" is a factual matter which will depend on all the circumstances involved.
3. In cases where the revenue officer does not know what, if any, relevant records exist, he or she can summon the testimony of the person believed to possess or know of the desired records. Thereafter, the revenue officer can serve a second summons for the records identified by the testimony while the summoned party is present.

[5.17] 6.6 (09-20-2000)

#### Time and Place of Questioning

1. IRC 7605(a) specifically provides that the time and place of an examination pursuant to the provisions of 7602 may be fixed by the Secretary or his delegate with the only restrictions being that: the time and place be "reasonable under the circumstances" and when the appearance is pursuant to a summons, the date fixed should not be less than ten days from the date of the summons. In computing the 10 day period, the date of service should not be included. The day following the date of service is considered the first day, and the tenth day following the date of service is the earliest date on which the summoned person can be required to appear. If the 10th day falls on a Saturday, Sunday, or legal holiday, then the appearance date should be delayed at least until the next business day. The 10 day period does not apply to summonses subject to the 23 day waiting period of IRC 7609.
2. It is essential that the summons specify, in the spaces provided:
  - A. the business address and telephone number of the Service official before whom the summoned party is to appear; and

- B. the complete street address and room number (even if identical to (a)) at which the summoned party is required to appear.
3. When a third party indicates that she will voluntarily provide information but requests the service of a summons as evidence of her legal duty to testify or produce records, revenue officers should follow the notice and waiting period requirements of IRC 7609 when issuing the summons unless the summons is excepted from these requirements by IRC 7609(c)(2). Revenue officers should not accept the voluntary production of records before the waiting period expires. This procedure is never available when issuing a "John Doe" summons, which may only be served after obtaining approval from the appropriate federal district court.

[5.17] 6.7 (09-20-2000)

#### Service of Summons

1. IRC 7603(a) provides that service will be made by delivery in hand of an attested copy to the person to whom it is directed, or by leaving an attested copy at the last and usual place of abode.
2. Except when serving a summons on a third-party recordkeeper, personal service is always preferable. Under IRC 7603(b), third-party recordkeepers (i.e., banks, consumer reporting agencies, attorneys, accountants, etc.) may also be served by certified or registered mail to the last known address of the recordkeeper. If a summoned party (not a third-party recordkeeper) is not at home, an attempt should be made to serve him personally at some other place. A summons should never be served in any other manner that does not meet the requirements of IRC 7603.
3. When it is necessary to leave a summons at a person's "last and usual place of abode," it is desirable that the summons be left with a responsible person, who is old enough to understand the importance of giving the summons to the summoned party. Revenue officers should also establish that the place where a summons is left is, in fact, the summoned party's "last and usual place of abode." In this regard, the home or residence of the party summoned is the place of abode rather than the business address.
4. When a summons is directed to a specific corporate officer to appear on behalf of the corporation, the officer may be personally served either at the corporation's place of business or wherever he may be found. Whenever a person is summoned in a corporate capacity the corporate capacity of the individual summoned should be indicated.
5. If a summons is directed to a corporation, service should be made upon a corporate officer, director, managing agent, or other person authorized to accept service of process for the corporation. Those persons may be served personally at the corporation's place of business or wherever they may be found. Such summonses can not be served by leaving the summons attached to the door of the corporate office or by leaving the summons with someone other than the officer, director, managing agent, or other person authorized to accept service. For example, such

summonses cannot be left with the corporate officer's secretary.

6. IRC 7603(a) provides that the certificate of service signed by the person serving the summons will be evidence of the facts it states at a hearing of an application for the enforcement of the summons.

[5.17] 6.8 (09-20-2000)

#### Third-party Summonses

1. Pursuant to IRC 7609, the Service must observe special notice and waiting period requirements when serving any third-party summons (other than one subject to an exception in section 7609(c)(2)(B)-(F) which requires the third party to give testimony, or to produce records, or to produce a computer software source code regarding "any person identified in the summons." Within three days of serving the summons, the Service must notify all persons identified in the summons (including the taxpayer) of the service. No examination is allowed before the close of the 23rd day after notice is given. This waiting period is designed to permit a noticee to bring a proceeding to quash the summons within the 20 day period provided in section 7609(b). Therefore, revenue officers should set the date for appearance:

- A. no sooner than the close of the 23rd day after service of notice to the taxpayer to ensure sufficient time for the noticee to receive notice and, if desired, file a petition to quash, and

- B. on a workday.

2. See Chapter 6, Summons Handbook, IRM 109.1.6 for the procedures applying to third-party summonses.

#### NOTE:

A summons served on a third-party recordkeeper may be served by certified or registered mail to the recordkeeper's last known address. IRC 7603(b)(1).

[5.17] 6.8.1 (09-20-2000)

#### Exceptions to Third-Party Notice and Waiting Period Requirements: IRC 7609(c)(2)(B) - (F)

1. The exceptions to the notice and waiting period requirements are set forth in IRC 7609(c)(2)(B) - (F). The notice and waiting period requirements do not apply to third-party summonses:
  - A. issued to determine whether records of the business transactions or affairs of an identified person have been made or kept;
  - B. issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in IRC 7603(b)(2);
  - C. that are "John Doe" summonses described in IRC 7609(f);
  - D. issued pursuant to a court's determination that there is reasonable cause to believe that giving notice may lead to attempts to conceal, destroy, or alter records, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution,

testifying, or production of records;

E. issued by a criminal investigator and served on a person who is not a third-party recordkeeper;

F. issued to aid in collecting an assessment or judgment "against the person with respect to whose liability the summons is issued," or the liability at law or in equity of any transferee or fiduciary of the person with respect to whose liability the summons is issued. The significance of this exception is discussed in the following subparagraphs.

[5.17] 6.8.1.1 (09-20-2000)

#### The Collection Summons Exception of IRC 7609(c)(2)(D) and Trust Fund Recovery Penalty Investigations

1. RRA 1998 redefined the types of collection summonses that fit within the collection exception of IRC 7609(c)(2)(D). The current statutory language of subsection 7609(c)(2)(D) only provides an exception for collection summonses issued to aid in collecting an assessment or judgment "against the person with respect to whose liability the summons is issued" i.e., the person identified as the taxpayer (or his fiduciary or transferee) in the heading of the summons.
2. The Service must follow the notice requirements of section 7609(a) when serving a summons on a third party to identify those persons who may be responsible for the trust fund recovery penalty (TFRP). For example, the Service often serves a summons on a bank to obtain records of the corporation's accounts. In many cases, the Service knows of several corporate officers or employees who may be responsible for the penalty. In these cases, the Service should issue a separate summons to the bank for each potentially responsible person. (The bank or other summoned party need only produce each summoned document once.) The Service should not issue a summons that lists the names of all potentially responsible persons in the heading of one summons and provide redacted notice copies to noticees.
3. When preparing such a third-party summons, the Service should identify the potentially responsible person in the heading of the summons by name and by her capacity as an employee or officer of the corporation. Thus, using an example where two potentially responsible persons, an officer and an employee, have been identified, two summonses would be issued. A summons concerning the liability of John Smith, President of Corporation XYZ, Inc., would be issued for records that may be relevant to the liability of "John Smith, as President of Corporation XYZ," and that may be relevant to the time periods at issue. A separate summons concerning the liability of employee, Mary Smith, would be issued for records that may be relevant to the liability of "Mary Smith, Employee of Corporation XYZ, Inc.," and that may be relevant to the time periods at issue.
4. The Service should serve a separate summons for every known potentially responsible person. For example, Corporation A has failed to pay its employment taxes for several past quarters and there are five potentially

responsible persons. The Service knows of only four of these persons. Under these circumstances, the Service should issue and serve four summonses on the third party (for example, a bank) even though one of the summonses seeks the production of all of the documents required for all four investigations. As a matter of law, the text of IRC 7609 does not require the Service to serve all four summonses. However, as a matter of policy, the Service should serve all four summonses.

5. IRC 7609(e)(1) only tolls the statute of limitation for a taxpayer who petitions to quash the summons. If only one of the four potentially responsible persons (regarding whose liabilities the Service issued four separate summonses) files a petition to quash the summons, only that petitioner's assessment statute is suspended. The statute is suspended for the period in which the proceeding and any appeals are pending.

[5.17] 6.8.1.2 (09-20-2000)

#### Bankruptcy Implications

1. Given that summonses that are served to investigate the potential liabilities of persons who may be responsible for the TFRP are not collection summonses under IRC 7609(c)(2), they are not barred by the automatic stay of Bankruptcy Code section 362(a)(6) as an act of collection. However, the Service should continue to seek information from the debtor in a Rule 2004 hearing.

[5.17] 6.8.2 (09-20-2000)

#### Third-Party Contacts Requirements of IRC 7602(c)

1. In general, IRC 7602(c) requires the Service to give reasonable advance notice to a taxpayer before contacting third parties about the determination or collection of that taxpayer's liability. Section 7602(c)(2) additionally requires the Service to maintain records of such contacts and provide them to the taxpayers periodically or upon request.
2. The advance notice requirement applies when the following five elements are present:
  - A. a Service officer or employee initiates a contact;
  - B. the contact is with a person other than the taxpayer;
  - C. the Service officer or employee discloses his or her association with the IRS;
  - D. the Service officer or employee discloses the identity of the taxpayer; and
  - E. the contact is made with respect to the determination or collection of the taxpayer's liability.
3. IRC 7602(c)(3)(A)-(C) sets forth three exceptions to the above-described requirements of IRC 7602(c)(1)-(2). They are:
  - A. third-party contacts authorized by the taxpayer;
  - B. instances in which notice of a third-party contact would jeopardize tax collection or might involve reprisal against any person; or
  - C. third-party contacts with respect to any pending criminal investigation.

[5.17] 6.9 (09-20-2000)

#### John Doe Summonses

1. Any summons which does not specify the identity of the taxpayer is considered to be a "John Doe" summons, as defined by IRC 7609(f).
2. A John Doe summons may be issued only by the official specifically authorized to do so under Delegation Order No. 4 (as revised). Revenue officers are not authorized to issue a John Doe summons. Persons authorized to do so include district directors, and the chiefs of the Examination, Collection, and Criminal Investigation Divisions.
3. A John Doe summons may be served only after an ex parte proceeding is held in the United States district court for the judicial district where the person to be summoned resides or is found. The Service must establish that:
  - A. the summons relates to the investigation of a particular person or ascertainable group or class of persons;
  - B. there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any Internal Revenue law; and
  - C. the information the Service seeks from examining the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.
4. The Service must never serve a "friendly" John Doe summons, even though a prospective summoned party may request one as a condition to providing information. Serving a John Doe summons without court approval violates the statute and may jeopardize the investigation.
5. A "dual purpose" summons is a summons that is issued to a known taxpayer as part of that taxpayer's investigation, which has the additional purpose of discovering the names of persons who may have engaged in transactions with the taxpayer. However, the identity of the other persons and their transactions with the taxpayer must be relevant to the investigation of the named taxpayer. Such summonses do not come within the definition of a John Doe summons, and court approval is not required before service. See *Tiffany Fine Arts v. United States*, 469 U.S. 310 (1985).

[5.17] 6.10 (09-20-2000)

#### Unnecessary Examinations and Barred Years

1. IRC 7605(b) prohibits unnecessary examinations or investigations of a taxpayer and limits the Service to one inspection of a taxpayer's books of account for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate after investigation, determines that further inspection is necessary and notifies the taxpayer in writing of this determination. The purpose of this section is to prohibit unnecessary, repetitive examinations and harassment of taxpayers by the Service.
2. In *United States v. Powell*, 379 U.S. 48 (1964), the Court held that IRC 7605(b) does not require the Government, on a second examination of a taxpayer, to make a showing of probable cause for suspecting fraud to obtain enforcement

of a summons, whether or not the year under investigation is barred by the statute of limitations.

3. The limitation in IRC 7605(b) to one "inspection" of a taxpayer's books of account means that once a taxpayer's books have been examined and the investigation of the taxpayer has been closed, there must be compliance with the notice provisions of IRC 7605(b) prior to a second inspection of the taxpayer's books of account. It is not necessary to comply with these notice provisions each time there is a need to look at a taxpayer's books as long as the investigation has not been closed. *U.S. v. Schwartz*, 469 F. 2d 977(5th Cir. 1972).
4. The re-examination provisions of IRC 7605(b) do not proscribe a second examination made for a different, but authorized, purpose from the original examination. For example, IRC 7602 authorizes an examination to be made for the purpose of determining tax liabilities. It also authorizes an examination to collect the tax. An examination of the taxpayer's books for the purpose of collecting the tax after an examination to determine the liability is considered to be an original examination not subject to the restrictions of IRC 7605(b). A second inspection for excise tax purposes after a completed income tax audit of the same year was held not to be a second inspection requiring notice. *United States v. Centrex Cartage Co.*, 518 F. 2d 842 (7th Cir. 1975), cert. denied, 423 U.S. 1016 (1975). Similarly, the restrictions of IRC 7605(b) do not prohibit a second examination of a year without notice when such examination relates to an investigation of a year not previously examined.
5. IRC 7605(b) does not prohibit the examination or re-examination of information obtained from other sources, such as a bank, regarding the taxpayer's liability.
6. Rev. Proc. 94-68, 1994-2 C.B. 803, provides a description of contacts with a taxpayer that do not constitute an examination, inspection, or reopening of an examination.

[5.17] 6.11 (09-20-2000)

#### Improper Purpose

1. A defense commonly raised is that the summons was issued for an improper purpose, namely, that the purpose of the investigation is the ultimate criminal prosecution of the taxpayer. This so-called "sole criminal purpose" defense has been rejected by Congress in IRC 7602(b). This section provides that a summons may be used to inquire into any offense (civil or criminal) connected with the administration or enforcement of the internal revenue laws. The Service need only establish its prima facie case by meeting the Powell requirements. The real limitation is that a summons may not be issued after a referral has been made to the Department of Justice for criminal prosecution of the taxpayer. See IRC 7602(d) for the definition of Department of Justice referral and consult district counsel for advice if a question arises about whether a referral may be in effect.

[5.17] 6.12 (09-20-2000)

#### Fair Credit Reporting Act

1. Banks and other financial institutions have argued that producing records of a taxpayer's financial transactions pursuant to a summons would violate the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq. (1970). To protect consumers' interests, the FCRA restricts the circumstances under which a "consumer reporting agency" may furnish a "consumer report" to third parties including the Service.
2. A "consumer reporting agency" is defined as ". . . any person which for fees or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility or interstate commerce for the purpose of preparing or furnishing consumer reports." A bank may be considered a "consumer reporting agency" if it meets the above definition.
3. The FCRA specifically excludes from its definition of a "consumer report" any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. 1681a. Thus, information relating only to the bank and its customer (which is generally what the Service seeks) is not covered by the Act, and the bank can produce this summoned information without violating the FCRA. *United States v. Lake County National Bank*, 75-1 USTC | 9371 (N.D. Ohio 1975); *United States v. Bremicker*, 365 F. Supp. 701 (D. Minn. 1973).
4. In general, the consumer reporting agency may only provide a consumer report to the Service if one of the permissible purposes listed in 15 U.S.C. 1681b(a) is satisfied. That section provides that a consumer reporting agency may furnish a consumer report under certain limited circumstances, which include:
  - A. responding to a court order -- (15 U.S.C. 1681b(a)(1));
  - B. acting pursuant to the consumer's written instructions -- (15 U.S.C. 1681 b(a)(2));
  - C. disclosing the report to a person the consumer reporting agency has reason to believe intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer -- (15 U.S.C. 1681b(a)(3)(A)).
5. In most cases involving collection of an assessed tax, the Service's requests for full credit reports fit within the permissible purpose provision relating to credit set forth in 15 U.S.C. 1681b(a)(3)(A).
6. Based on written opinions by the Federal Trade Commission, the Service takes the view that a credit relationship exists within the meaning of subsection 1681b(a)(3)(A) where the Service has an assessment lien against the taxpayer, has reduced a taxpayer's liability to judgment, or has entered into an offer in compromise or settlement agreement with the taxpayer. Accordingly, in many

collection cases, the Service can obtain a full credit report pursuant to subsection 1681b(a)(3)(A) without issuing a summons.

7. Some collection cases begin as tax delinquency investigations, i.e., the investigation begins before there is an assessed tax liability. In these cases, the Service must issue a summons to obtain a credit report; it cannot lawfully request a credit report under 15 U.S.C. 1681b(a)(3)(A). The Service can obtain a full credit report by issuing a summons because this action satisfies the permissible circumstance requirement of 15 U.S.C. 1681b(a)(1), which provides that a consumer reporting agency may furnish a full credit report "in response to the order of a court having jurisdiction to issue such an order ... ." The Service takes the position that a third-party recordkeeper summons satisfies the court order requirement in subsection 1681b(1)(a) because IRC 7609 specifically requires a credit bureau to respond to the summons if the person entitled to notice of the summons does not file a timely motion to quash with the district court. Subsection 1681b(a)(1) does not require the Service to be a creditor of the taxpayer before acquiring a full credit report by summons.
8. Any questions concerning the scope of the Fair Credit Reporting Act or its application to specific situations should be referred to district counsel.

[5.17] 6.13 (09-20-2000)

#### Fourth Amendment

1. The Fourth Amendment to the Constitution protects against unreasonable searches and seizures. This is a personal guarantee and protection under this amendment may not be claimed on behalf of another person. Unlike the Fifth Amendment, discussed *infra*, corporations and other organizations are entitled to the protection afforded by the Fourth Amendment.
2. An internal revenue summons directed to a third-party bank is not a violation of the Fourth Amendment rights of the taxpayer under investigation. *Donaldson v. United States*, 400 U.S. 517 (1971). Accordingly, a taxpayer has no standing under the Fourth Amendment to prevent the enforcement of a summons requiring the production of a bank's records of its transactions with the taxpayer. *United States v. Miller*, 425 U.S. 435 (1976). A person may not claim the protection of the Fourth Amendment regarding his property in the possession of a third party unless he has a legitimate expectation of privacy in that property. The necessary expectation of privacy does not exist, for example, in a taxpayer's records in the possession of an accountant to be used to prepare his return. *Couch v. United States*, 409 U.S. 322 (1973).
3. In *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 208 (1946), the Supreme Court reasoned that a subpoena served by an administrative body does not constitute an unreasonable search or seizure so long as:
  - A. the investigation is conducted pursuant to a lawfully authorized purpose, within the power of Congress to command, and

B. the documents sought are relevant to the inquiry and the specification of the documents to be produced [must be] adequate, but not excessive, for the purposes of the relevant inquiry.

4. In light of *United States v. Powell*, 379 U.S. 48(1964), it appears clear that an examination of a barred year is not per se "unreasonable" within the meaning of the Fourth Amendment. However, the summoned party may base an objection on the grounds of relevance and materiality. Therefore, the summons must meet the statutory requirement that the information sought may be relevant to the purpose of the investigation. Courts have held that where the documents sought were immaterial and irrelevant to the investigation their production would be unreasonable.

[5.17] 6.14 (09-20-2000)  
Fifth Amendment

1. The Fifth Amendment to the Constitution affords a person a privilege against self-incrimination. Like the Fourth Amendment, this is a personal guarantee and may not be claimed on behalf of another person.
2. The Fifth Amendment applies to both documentary requests and requests for oral testimony. There are different analyses for each type of request.
3. In many cases, the Fifth Amendment does not prevent the compelled production of pre-existing documents simply because the contents of the documents may be incriminating. *United States v. Doe*, 465 U.S. 605 (1984). The reason for this is that a summons only compels a witness to produce the document; the summons does not compel the witness to write the incriminating statements in the pre-existing documents. In *Fisher v. United States*, 425 U.S. 391 (1976), the Supreme Court stated that the privilege applies only when there is a compulsion of a testimonial communication that is incriminating. However, in the *Fisher* decision, the Supreme Court acknowledged that the act of production has communicative aspects of its own, wholly aside from the contents of the papers sought to be produced. When a witness produces summoned records, he tacitly admits that: (1) the summoned records exist, (2) he has possession or control of the records, and (3) he believes that the records produced are those described in the summons. This last element is known as implicit authentication. To the extent any of these "statements" by the witness may be potentially incriminating, the privilege may apply. Sometimes, the first two elements are foregone conclusions (as was true in *Fisher*), in which event, there would be no privilege involved. The third element does not apply when the documents are authored by persons other than the witness. To overcome a valid assertion of the privilege, the Attorney General may authorize a narrow grant of immunity as to the incriminating aspects of the act of production.
4. Regarding oral testimony, the Supreme Court has reasoned that "to sustain the privilege, it need only be evident from the implication of the question and the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered

might be dangerous because injurious disclosure could result." *Hoffman v. United States* 341 U.S. 479 (1951). The dangers must be real and not merely remote or speculative. *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472 (1972).

5. The privilege is a personal one. It does not apply to the records of business entities, such as corporations, partnerships and sole proprietorships--except to the extent that a witness can show that his act of production comes within the coverage of *Fisher*, supra and *Doe*, supra. The privilege also does not apply to records of an entity that has a recognized legal existence apart from its members.
6. In *Braswell v. United States*, 487 U.S. 99 (1988), the Supreme Court held that the custodian of the records of a collective entity, such as a corporation or partnership, cannot resist a demand for the records on the ground that the act of production would personally incriminate him. The Court reasoned that the custodian held the records in a representative rather than in a personal capacity so that the custodian's act of production "is not deemed a personal act, but rather an act of the corporation." However, the Court also accorded the custodian protection from any evidentiary use of the admissions implicit in his representative act of production. Particularly, the Government may not introduce into evidence before a jury that the records of the collective entity were produced by a particular person or that the subpoena was served on such a person for the purpose of incriminating that person.
7. To properly claim the Fifth Amendment privilege against self-incrimination, a person is required to present herself for questioning and, as to each question asked, elect to raise or not to raise the defense. A blanket refusal to answer all questions is unacceptable. *United States v. Edelson*, 604 F.2d 232, 234 (3d Cir. 1979). Accordingly, all questions should be asked to allow a witness to properly assert the privilege, even though the witness states she intends to plead the Fifth Amendment as a defense to each and every question. Only in this manner can a court determine whether the claim of self-incrimination is well-founded. Furthermore, advice from a witness that she will plead the Fifth Amendment to each and every question should not be the basis for an agreement that the witness need not appear in response to a summons.
8. A taxpayer may raise a Fifth Amendment privilege during civil investigations of his or her tax liabilities, such as tax delinquency investigations. The taxpayer needs to show that a substantial and real danger of incrimination exists and the act of answering the question or producing the requested documents would constitute testimonial incrimination.

[5.17] 6.14.1 (09-20-2000)

#### Notification to Witness of Constitutional Rights

1. The type of information sought by a revenue officer through the issuance of a summons generally does not tend

to develop criminal potential of a case. Therefore, it is not mandatory that the person summoned be informed of his constitutional privilege against self-incrimination. In any case in which the revenue officer believes the criminal potential is so manifest that a warning may be appropriate, district counsel should be contacted.

2. Notwithstanding the privilege against self-incrimination, information or evidence voluntarily furnished by a summoned person may be used even though that information is incriminating. The mere fact that the person would not have appeared before the revenue officer had it not been for the summons does not mean that his testimony or evidence is inadmissible. To preserve the Fifth Amendment privilege, the summoned person must properly assert the privilege in response to a specific question or a request for a particular document.

[5.17] 6.15 (09-20-2000)

#### Privileges Based On Confidential Relationships

1. Certain confidential relationships between a taxpayer and a witness or another person may give rise to a claim of a privilege from testifying or providing information pursuant to a summons. In the context of IRS summonses, the determination of whether a particular matter is privileged is governed by federal law. Questions concerning the validity of a privilege or its applicability to a particular situation should be referred to district counsel.
2. A person cannot successfully refuse to testify or provide information solely on the basis that she stands in a confidential relationship with another person. The burden is on the witness first to establish the facts on which the asserted privilege is based and then to demonstrate how, and the extent to which, the requested information is covered by the privilege. *United States v. Kovel*, 296 F. 2d 918 (2d Cir. 1961). A person may forfeit a privilege either by expressly waiving it or failing to assert it.

[5.17] 6.15.1 (09-20-2000)

#### Attorney-Client Privilege

1. In general, communications from a taxpayer to an attorney made in confidence for the purpose of obtaining legal advice are privileged, and the attorney cannot be compelled to disclose that information to the Service. Also, if the taxpayer creates records to facilitate the exchange of privileged communications with the attorney, those records are privileged. However, if a taxpayer turns over pre-existing records to an attorney, the Service can obtain those records by summons, unless the records were otherwise privileged from production while in the taxpayer's possession.
2. As the foregoing information suggests, the attorney-client privilege is not all-inclusive and does not protect everything an attorney may do for a client. The privilege is confined to communications made in confidence by the client for the purpose of obtaining legal advice from an attorney. *United States v. Rockwell International*, 897 F.2d 1255 (3d Cir. 1990). The client in a corporate

setting may be any officer or employee of the corporation. *Upjohn v. United States*, 449 U.S. 383 (1981). Also, underlying factual information can be obtained from the employees whether or not this same information has been communicated to the corporation's attorney. Books and records of a taxpayer are not privileged merely because they are in the hands of his attorney. If the records were compellable from the taxpayer, the taxpayer cannot cloak them with the privilege by transferring them to an attorney. *Fisher v. United States*, *supra*.

3. Ministerial or clerical services are not within the attorney-client privilege. Records of financial transactions involving monies paid by or on behalf of a client to an attorney are not covered by the privilege. Similarly, the fact that an attorney prepared a deed for a client or prepared documents in connection with the formation or activities of a corporation have been held not to come within the privilege. When an attorney acts as the client's business advisor, or agent for the receipt or disbursement of money or property to or from third parties, the attorney is not acting in a legal capacity and records of such transactions are not privileged. *United States v. Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981). The identity of a client or the fact that a given individual has become a client are matters which are not usually within the privilege in the absence of special circumstances. *Hodge & Zweig*, *supra*; see also *In re Grand Jury Investigation No. 83-2-85*, 723 F.2d 447 (6th Cir. 1983).
4. This privilege encompasses communications made by a taxpayer to an accountant employed by an attorney to assist in providing legal advice to the taxpayer. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Otherwise, a taxpayer's communications to an accountant are not privileged if made merely to obtain accounting services and not legal advice. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).
5. The preparation of a tax return is primarily an accounting service. When an attorney prepares his or her client's tax returns, the workpapers produced by the attorney while preparing the returns and the tax records on which they are based are not shielded by the attorney-client privilege. The same is true of the communications between the client and the attorney about the return being prepared. *United States v. Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981).

[5.17] 6.15.2 (09-20-2000)

#### Federally Authorized Tax Practitioner-Taxpayer Privilege

1. RRA 1998 created a new confidentiality privilege in IRC 7525 for communications between taxpayers and "any federally authorized tax practitioner" concerning "tax advice." "Federally authorized tax practitioners" are the persons described in Circular 230 as subject to regulation. "Tax advice" means any advice given "with respect to a matter which is within the scope of the individual's authority to practice." The new privilege may be asserted both in "any noncriminal tax matter before the

Internal Revenue Service" and in "any noncriminal tax proceeding in Federal court with respect to such matter." It may be asserted "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney," except for written communications made "in connection with the promotion of the direct or indirect participation of such corporation in any tax shelter."

2. The new privilege does not arise automatically but must be asserted by the taxpayer. Service employees may still seek the same information in the same manner as before. The only difference is that taxpayers may now assert, in noncriminal proceedings, a confidentiality privilege for communications made on or after July 22, 1998 (the date on which RRA 1998 was enacted).
3. When questions of statutory interpretation arise, revenue officers should consult district counsel.

[5.17] 6.15.3 (09-20-2000)

#### Physician-Patient Privilege

1. In general, there is no federally recognized privilege as to communications between a taxpayer and a physician. *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992). Accordingly, a hospital cannot refuse to produce hospital records, nor can a physician refuse to produce records which may be relevant or material to the determination or collection of a tax, on the ground that their production would violate the physician-patient privilege. *United States v. Kansas City Lutheran Home*, 297 F. Supp. 239 (W.D. Mo. 1969).

#### NOTE:

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court ruled that communications between a psychotherapist and a patient are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. This privilege includes communications made by patients to psychiatrists, psychologists, and licensed social workers.

[5.17] 6.16 (09-20-2000)

#### Rights Claimed by Summoned Persons

1. A witness appearing in response to an administrative summons will frequently claim other rights. Two frequently encountered are the rights to be represented by counsel and to make an audio recording of the summoned interview.

[5.17] 6.16.1 (09-20-2000)

#### Right to Counsel

1. A witness appearing in response to a summons is clearly entitled to be represented by counsel of her choice. 5 U.S.C. 555(b). Whether she may be entitled to any counsel of her choice has been the subject of some controversy. If a taxpayer's counsel appears to represent persons with conflicting interests, such as representing both the taxpayer and a summoned third-party witness, consult the *Summons Handbook* at 109.1.5.5 and district counsel.

[5.17] 6.16.2 (09-20-2000)

#### Right to Make an Audio Recording of the Proceeding

1. Taxpayers or their representatives may ask to make audio-tape recordings of the proceedings. If the taxpayer asks to record the interview, the Service employee must also record the meeting. Cameras or videotape equipment are not permitted. At no time should employees try to physically confiscate this equipment. Revenue officers should follow the requirements of IRC 7521 and the procedures set forth elsewhere in the IRM concerning audio-taped interviews.

[5.17] 6.17 (09-20-2000)

#### Witness Fees

1. IRC 7610(a)(1) provides that persons who are summoned are entitled to receive witness fees and travel expenses. Such persons may be taxpayers or third parties, and they may obtain payment upon request. It should be noted that the conditions under which a summoned person may obtain payment for witness fees and travel expenses are separate and distinct from those under which payment for other costs associated with summons compliance may be authorized.
2. Section 7610(a)(2) of the Code provides that the Service will pay certain third parties for the direct costs incurred in locating, reproducing or transporting records in compliance with a summons.
3. The costs for which such third parties may claim payment are in addition to, and not a substitute for, witness fees and travel expenses.
4. Refer to Treas. Reg. § 301.7610-1(c)(2) for specific payment rates for search, reproduction, and transportation costs.

[5.17] 6.18 (09-20-2000)

#### Injunctive Relief

1. In general, neither the witness, nor a third party, including the taxpayer, is entitled to declaratory or injunctive relief through a suit brought to quash a summons. Such persons have an adequate remedy at law by a challenge to the summons before the examining agent and before the district court at the summons enforcement proceeding. *Reisman v. Caplin*, 375 U.S. 440 (1964). Under IRC 7609, a noticee of a summons issued to a third-party has a right to bring a proceeding to quash the summons in a United States district court. The summoned party has the right to intervene in any such proceeding brought by the noticee against the United States. Also, the noticee has the right to intervene in any enforcement action brought by the United States against the summoned party. However, a taxpayer or other interested person has no absolute right to intervene in a non-IRC 7609 summons enforcement proceeding. *Donaldson v. United States*, 400 U.S. 517 (1971).

[5.17] 6.19 (09-20-2000)

#### Criminal Proceedings

1. IRC 7210 makes it a crime for a person to refuse or neglect to testify or appear when summoned. That section

provides for a fine of not more than a thousand dollars or imprisonment for not more than one year, or both, together with costs of prosecution, upon conviction. The possibility of criminal prosecution under this section is, of course, a weapon at the disposal of the Internal Revenue Service to compel compliance with the administrative summons. However, a conviction under IRC 7210 does not accomplish the primary purpose of the summons, namely, obtaining the needed information, because any proceedings to enforce the summons would be held in abeyance pending the outcome of the criminal proceedings. However criminal proceedings may be effective when the person summoned falsely claims the documents have been destroyed.

[5.17] 6.20 (09-20-2000)  
Civil Enforcement

1. The judicial device for enforcing the administrative summons is provided by IRC 7402(b) and 7604. These sections provide a means of requiring the person summoned to comply.
2. IRC 7604(a) and 7402(b) provide that jurisdiction to compel summons compliance is in the United States District Court for the district in which the summoned person resides or is found. The effect of a proceeding under IRC 7604 is to obtain the assistance of the court in forcing the summoned person to give the desired information to the Service by having the court issue an order to that effect. Disobedience of such an order would be a civil contempt punishable by the court.
3. Disobeying a court's summons enforcement order can be addressed by both civil and criminal contempt proceedings. Civil contempt is designed to coerce compliance. Criminal contempt is designed to punish disobedience.

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Internal Revenue Hndbk. 5.17 Chap. 6 (09-20-2000)  
Manual Summons

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[Tax Professional's Corner]

Handbook 5.17  
Legal Reference Guide for Revenue Officers

Chapter 7

## Liability of Third Parties for Unpaid Employment Taxers

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### [5.17] 7.1 (09-20-2000)

#### Trust Fund Recovery Penalty: Overview

1. The Trust Fund Recovery Penalty (TFRP) is based on I.R.C. § 6672, which provides as follows:
  - "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax on the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."
2. The purpose of the penalty is to:

- A. Encourage prompt payment of withheld and other collected taxes.
  - B. Facilitate collection of such taxes from secondary sources.
3. A person is liable for TFRP if two statutory requirements are met:
- 1. The person is "responsible" -- had the duty to account for, collect, and/or pay over the trust fund taxes to the government.
  - 2. The person "willfully" failed to collect or pay over trust fund taxes to the government.
4. Refer to Policy Statement P-5-60 and IRM Handbook 5.7, Trust Fund Compliance Handbook.

[5.17] 7.1.1 (09-20-2000)

#### Persons Subject to Trust Fund Recovery Penalty

1. The term "person" in section 6672 includes, but is not limited to:
- o officer or employee of a corporation
  - o partner or employee of a partnership
  - o corporate director or shareholder
  - o another corporation
  - o surety or lender
2. Regardless of a person's corporate title, a person will not be held liable for TFRP unless he or she has the duty to account for, collect, and pay over the trust fund taxes to the government.
3. A determination of liability must take into account all facts and circumstances.

[5.17] 7.1.1.1 (09-20-2000)

#### Corporate Officers

1. Majority of TFRP cases involve corporate officers.

[5.17] 7.1.1.2 (09-20-2000)

#### Corporate Directors

1. A director who is not an officer or employee of the corporation may be responsible for TFRP if he was responsible for the corporation's failure to pay taxes that were due and owing. *United States v. Graham*, 309 F.2d 210 (9th Cir. 1962)

[5.17] 7.1.1.3 (09-20-2000)

#### Partners

1. In accordance with the statute, a member of a partnership, Limited Liability Company (LLC) or Limited Liability Partnership (LLP) may be liable for the TFRP.
2. Because partners are individually liable for the debts of the partnership (the assessment is made in the name of the partnership and the names of the general partners), there is generally no reason to make a separate TFRP assessment against the various partners.

[5.17] 7.1.1.4 (09-20-2000)

#### Employees

1. Employees are generally under the dominion and control of an employer. Instructions from a supervisor not to pay

taxes, however, do not relieve an otherwise 'responsible person' from section 6672 liability. *Gephart v. United States*, 818 F.2d 729 (6th Cir. 1987).

2. An employee may be liable for TFRP if he made the decision not to pay the taxes due. *Brainstein v. United States*, 979 F.2d 952 (3d Cir. 1992).
3. Allegations that an employee is a responsible person should be thoroughly investigated.

[5.17] 7.1.2 (09-20-2000)

#### Responsibility

1. A responsible person need not be responsible for all three duties listed in the statute, which requires collecting, truthfully accounting for, and paying over such taxes. *Slodov v. United States*, 436 U.S. 238 (1978).
2. The statute does not impose upon the responsible person an absolute duty to pay over amounts that should have been collected and withheld by prior responsible persons. *Slodov v. United States*, 436 U.S. 238 (1978).
  - A. After-acquired assets may be used to pay other creditors.
  - B. If funds are available to pay delinquent taxes at the time a responsible person assumes control of the business and the responsible person fails to use those funds to pay the delinquent taxes, that person will be liable under section 6672 to the extent of the funds available to pay the trust fund taxes.
3. One or more persons may be responsible persons within the meaning of section 6672 for the same quarter. *Thomas v. United States*, 41 F.3d 1109 (7th Cir. 1994).

#### NOTE:

If the determination is made that more than one person is liable under section 6672, the revenue officer may recommend that individual assessments of the penalty be made against each person.

[5.17] 7.1.3 (09-20-2000)

#### Willfulness

1. Section 6672(a) requires willfulness on the part of the responsible person.
2. Definition of willful -- intentional, deliberate, voluntary, reckless, knowing (not accidental). No evil intent or bad motive is required. *Domanus v. United States*, 961 F.2d 1323 (7th Cir. 1992)
3. To show "willfulness," the government must show that the responsible party was aware of the outstanding taxes and either intentionally disregarded the law or was plainly indifferent to its requirements. *United States v. Landeau*, 155 F.3d 93 (3d Cir. 1998)
4. A responsible person's failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid satisfies section 6672 "willfulness" requirement. *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997).
5. Failure to remit collected trust fund taxes constitutes prima facie evidence of willfulness.

[5.17] 7.1.4 (09-20-2000)

#### Examination of Corporate Records

1. The revenue officer has the initial duty of determining the identity of officers and employees who had the duty to collect or pay over the taxes.
2. Records to be examined:
  - o articles of incorporation
  - o by-laws of the Corporation
  - o minute books
  - o payroll records
  - o canceled checks and bank records
  - o tax return
3. The articles of incorporation should contain the names and duties of all officers and directors of the corporation.
4. Corporate by-laws and minute books may disclose the names of persons responsible for the filing of the returns and payment of taxes. They may show who has the authority to sign checks, deposit money, or make loans on behalf of the corporation.
5. Bank records and canceled checks should be examined for payment of other financial obligations after the taxes became due.
  - A. Signature card should identify a person authorized to sign corporate checks.
  - B. Bank records may disclose possible diversion of corporate funds.
  - C. Financial statements provided to the bank in connection with a bank loan may provide additional information regarding responsibility and financial solvency of the corporation.
6. Tax return, if filed, may provide the name of the person responsible for filing.

[5.17] 7.1.5 (09-20-2000)

#### Interview of Witnesses

1. Interviewing of witnesses is an important factor in TFRP investigation.
2. The revenue officer should prepare for the interview prior to the meeting with the witness. This will increase the chances that the interview will be successful.
3. When conducting an interview with a potentially responsible person, the revenue officer should determine:
  1. Whether the person had a duty to account for, collect, or pay over trust fund taxes.
  2. Whether he or she willfully failed to perform this duty.
4. If a potentially responsible person asserts a defense for failure to comply with the statutory requirements, all of the details surrounding the defense should be thoroughly questioned and subsequently verified.

[5.17] 7.1.6 (09-20-2000)

#### Extent of Liability

1. Section 6672 is limited in application to the trust fund portion of the tax; that is, to the tax that is required to be collected or withheld from a person other than the person required to collect, account for, and pay over the tax.
  1. To determine the application of payments and other

credits for purposes of determining TFRP, follow the guidelines in IRM Handbook 5.7, chapter 7, section 7.1.

2. After the application of payments has been made, the TFRP is based on the remaining amount of withheld income tax and employee's FICA tax. Refer to Policy Statement P-5-60.
2. TFRP does not apply to direct taxes such as the employer's portion of FICA or FUTA. Neither does it apply to noncollected excise taxes.
3. If during the investigation, the revenue officer becomes aware of facts which indicate that a lender, surety or third party may have indirectly or directly provided funds for the payment of employee wages, the revenue office should consider assertion of liability under I.R.C. § 3505(a) or (b).

[5.17] 7.1.7 (09-20-2000)

#### Limitation Period on Assessment

##### 1. Withholding and FICA Taxes

- A. I.R.C. § 6671 provides that the TFRP is required to be assessed and collected in the same manner as taxes.
- B. I.R.C. § 6501(a) states that, except as otherwise provided in section 6501, any tax imposed by the Code shall be assessed within three years after the return was filed.
- C. Generally, the TFRP must be assessed within the three year period set forth in I.R.C. § 6501(a).

##### NOTE:

Under I.R.C. § 6672(b)(3), the assessment statute shall not expire before the later of (1) 90 days after the L-1153 and supporting documents were mailed or hand delivered to the responsible person or (2) if the person files a timely protest of the proposed TFRP, the date 30 days after Appeals makes a "final administrative determination" regarding the proposed penalty. Refer to IRM Handbook 5.7, section 4.11.0.

- D. A return of withholding and FICA taxes filed on or before the prescribed due date is deemed to have been filed on the due date. Thus, the three year period commences on the date the return was due or filed, whichever is later.
  - E. A return executed by the revenue officer is not considered the taxpayer's and, therefore, the assessment statute does not run.
  - F. If the return is fraudulent, the tax may be assessed at any time.
2. The assessment period may be extended prior to its expiration by consent of the person against whom the penalty is to be assessed.

[5.17] 7.1.8 (09-20-2000)

#### Assessment Procedure and Appellate Rights

1. Refer to IRM Handbook 5.7, Trust Fund Compliance Handbook, and IRM 8.11.1.8, Trust Fund Recovery Penalties.

[5.17] 7.1.9 (09-20-2000)

## Collection of TFRP

1. It is the Service's policy to collect the unpaid trust fund taxes only once.
2. If, after the assertion of the TFRP, the corporation pays the delinquent tax, the TFRP assessment will be abated.
3. Similarly, if an amount that has been collected from the responsible person(s) exceeds the amount that the corporation failed to pay, the excess will be refunded.  
Refer to IRM Handbook 5.7, Chapter 7.

[5.17] 7.1.10 (09-20-2000)

### Limitation Period for Collection

1. TFRP may be collected by levy or by a proceeding in court, but only if begun within ten years after the assessment was made. I.R.C. § 6502(a).
2. The Service may no longer obtain waivers of the collection period except for those waivers secured in conjunction with an installment agreement. I.R.C. § 6502.

[5.17] 7.1.11 (09-20-2000)

### Collection of TFRP in Bankruptcy

1. Section 507(a)(8)(C) of the Bankruptcy Code grants eighth priority to all taxes "required to be collected or withheld and for which the debtor is liable in whatever capacity." This includes TFRP under I.R.C. § 6672.
2. Except for a section 1328(a) superdischarge, an individual debtor is not discharged from liability for the TFRP. See B.C. § 523(a)(1)(A). Thus, the Service may collect any unpaid TFRP outside of bankruptcy.

[5.17] 7.1.12 (09-20-2000)

### Collection of TFRP when Corporation is in Bankruptcy

1. The automatic stay provisions of the Bankruptcy Code do not prevent the Service from assessing and collecting the TFRP penalty from responsible persons who are not themselves in bankruptcy. B.C. § 362.
2. Responsible persons, therefore, may not enjoin assessment and collection of the TFRP against them when only the corporation is in bankruptcy. Matter of Becker's Motor Transportation, Inc. , 362 F.2d 242 (3rd Cir. 1980).

[5.17] 7.2 (09-20-2000)

### Liability of Third parties Paying or Providing for Wages

1. In some cases, lenders, sureties, or persons other than employers may be personally liable for withheld taxes due. While employers are primarily liable for paying withheld taxes, in some cases they may be without sufficient resources. As a result, recourse against them may be fruitless. I.R.C. § 3505 may provide an alternative means of collecting the withheld taxes.

[5.17] 7.2.1 (09-20-2000)

### Liability for Direct Payment of Wages -- I.R.C. § 3505(a)

1. I.R.C. § 3505(a) makes third parties personally liable for the payment of withholding taxes where they pay wages directly to employees of another.

2. Section 3505(a) applies to lenders, sureties, or other persons.
  - A. "Other persons" includes anyone similar to a lender or surety who pays the wages of employees of another out of its own funds.
  - B. Section 3505(a) does not apply to a person who is acting only as agent of the employer or as agent of the employees (such as a union agent).
3. Liability under section 3505(a) extends to withholding under:
  - o income tax laws
  - o social security laws
  - o railroad retirement laws
4. Liability does not extend to the employer's share (because the person liable under this section is not an employer), nor does liability extend to penalties which the Service may impose on the employer.
5. Section 3505(a) does not relieve an employer from responsibilities with respect to withholding taxes. The responsibilities continue even though a lender may be paying the employees' wages. The liability of the lender in such a case is to pay the taxes only where the employer does not do so.
  - A. The employer is obligated to file an employer's tax return (Form 941) and comply with other requirements imposed on employers generally.
  - B. The lender's liability is a sum equal to the taxes (together with interest) required to be deducted and withheld from the wages by the employer.

[5.17] 7.2.2 (09-20-2000)

Liability When Funds are Supplied -- I.R.C. § 3505(b)

1. I.R.C. § 3505(b) provides that a lender, surety, or other person may be personally liable for any unpaid withholding taxes even though this person does not directly pay the wages of employees of the employer.
2. Before a person can be liable under section 3505(b), two conditions must exist:
  - A. the person must know that the advanced funds are to be used for the payment of wages (this does not include an ordinary working capital loan), and
  - B. the supplier of funds must have "actual notice or knowledge" at the time such funds are advanced that the employer does not intend to, or will not be able to make timely payment or deposit of taxes required to be withheld.

NOTE:

The burden of establishing actual notice or knowledge in such cases is on the Government.

3. Under section 3505(b), the liability of the third party may not exceed 25 percent of the amount supplied to the employer for the specific purpose of paying wages.
  - A. The 25% limitation applies to accrued interest. *O'Hare v. United States*, 878 F.2d 953 (6th Cir. 1989).
  - B. Example: a lender advances \$100,000 to Employer A for the purpose of paying net wages. The employer fails to pay withholding taxes, and is assessed with a

liability of \$25,000, plus an additional \$10,000 in accrued interest. The Service may file suit against the lender for \$25,000, which is 25% of the amount supplied to the lender. If the assessment had been \$20,000 plus an additional \$10,000 in interest, the Service still could have brought suit for \$25,000 (\$20,000 in tax and \$5,000 in accrued interest).

- C. The lender's liability does not include penalties which the Service may impose on the employer.
4. The employer remains responsible for filing returns (Form 941).
  5. Payments by the lender of withholding taxes reduces the liability of an employer. Similarly, payments by an employer of the withholding taxes reduces the liability of the lender.
  6. Under both I.R.C. § 3505(a) and (b), if the person liable does not voluntarily satisfy the liability, the Government may collect such liability by a court proceeding only.
    - A. The suit must be instituted within 10 years after the assessment against the employer.
    - B. In *Jersey Shore State Bank v. United States*, 479 U.S. 442 (1987), the Supreme Court held that I.R.C. § 6303(a) does not require the Government to provide notice and demand for payment to a lender before bringing a civil suit against the lender to collect sums for which it is liable under I.R.C. § 3505. In so holding, the court drew a distinction between the employer, who is liable for the unpaid taxes, and the lender who has a separate liability under section 3505 but is not liable for the taxes.
  7. Do not overlook the possibility that alternative remedies exist, particularly the assertion of the Trust Fund Recovery Penalty. See *Security Pacific Business Credit, Inc.*, 956 F.2d 703 (7th Cir. 1992); *Muller v. Nixon*, 470 F.2d 1348 (6th Cir. 1972), cert. denied 412 U.S. 949 (1973); *Turner v. United States*, 423 F.2d 448 (9th Cir. 1970).
    - A. Section 6672 has advantages over section 3505, such as:
      - + the ability to assess the liability
      - + the ability to administratively collect

[5.17] 7.3 (09-20-2000)

#### Liability of Sureties -- Bond on Public Works Contracts

1. The Miller Act, 40 U.S.C. § 270a, provides that every performance bond on federal construction projects shall specifically guarantee payment of Federal payroll taxes. The obligation of the surety on the performance bond must guarantee the payment of taxes which are required to be collected, deducted, or withheld from wages by the contractor, whether or not the contractor does in fact collect, deduct or withhold such taxes.
2. Notice of Unpaid Taxes
  - A. The Government must give notice to the surety, with respect to the unpaid taxes attributable to any period, within 90 days after the date when the contractor in fact files a return for such period.
  - B. Notice to a surety for the unpaid taxes must in any

event be given no later than 180 days from the date when such return was required to be filed, whether or not such return was ever filed.

- C. The notice requirements apply to each calendar quarter or other taxable period. The following examples will illustrate the notice requirement periods:
1. The contractor on a federal construction project files a Form 941 for the third quarter 2000 on October 15, 2000. While the return was not due until October 31, 2000, the contractor did in fact file on October 15, 2000. Thus, the 90 day period would commence on October 16, 2000, and the notice must be given on or before January 13, 2001.
  2. The same contractor files a Form 941 for the third quarter 2000 on January 29, 2001. The Government has until April 30, 2001, to notify the surety of the unpaid taxes. If the contractor had failed to file a return, April 30, 2001, would still be the last date of notification to the surety because the 180 day period begins to run from the date the return was required to be filed (October 31, 2000).
  3. The Government may offset any funds still due the prime contractor. In this case, because of the limited time in which notice can be given to the surety, the Revenue Officer should still consider notifying the surety for the purpose of holding the surety liable under the provisions of the Miller Act.
  4. The only other way to collect is by bringing suit against the surety within one year after the day on which timely notice of the unpaid tax liability was given to the surety.

**EXAMPLE:**

If the surety is given timely notice on July 1, 2001, that the contractor failed to pay over the taxes applicable to a taxable period, the Government must commence suit on or before July 1, 2002, to enforce the obligation under the performance bond. Because of this short statute of limitations, the Revenue Officer should be alert for the necessity of prompt action.

5. The Government will continue to assert its rights under a surety bond on other than federal construction projects, but only where the available evidence clearly and convincingly shows the bond was intended for the direct benefit of the United States.

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[Tax Professional's Corner]

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Legal Reference Guide for Revenue Officers

Chapter 12  
Investigations and Reports

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[5.17] 12.1 (09-20-2000)

Overview

1. This chapter illustrates the type of investigation to be performed upon receipt of an account for collection which may require a legal proceeding to assist in the collection of the account, and type of report to be prepared.
2. This chapter is also designed to aid the Revenue Officer in securing all the necessary facts by obtaining testimony and documentary evidence.

[5.17] 12.2 (09-20-2000)

General

1. A thorough investigation requires the following:
  - o Familiarity with the preceding chapters.
  - o A working familiarity with basic theories and principles of both federal and state law.
  - o Some knowledge of the law of evidence.
  - o Knowledge of the manner in which business and financial transactions occur and are conducted.
  - o Full development of facts.
2. Be impartial and thorough in conducting the investigation. Thorough development of facts may enable the United States to avoid unnecessary litigation, and may enable the United States to anticipate and be prepared for the taxpayer's and third parties' defenses. Full development of facts may enable District Counsel to advance other theories to support a position.

[5.17] 12.3 (09-20-2000)

Identification, Evaluation and Analysis of Issues and Problems

1. Review existing material in the file to determine the issues in the case and those issues which, though not raised, are suggested by the information in the file. Inquire about the existence of other files not in your possession, such as, Examination and Criminal Investigation Division files. The discovery of other files or material may aid substantially in narrowing or enlarging issues, in providing leads and establishing a complete background to the case.
2. Examine the file, or files, to determine the facts which have already been developed, and to determine whether further development is required. Determine the extent to which such facts can be proven in a court of law by evidence contained in the files.
3. Ascertain contentions or defenses of the taxpayer and other parties to the contemplated legal action and make a listing of those facts relied upon by such parties.

[5.17] 12.4 (09-20-2000)  
Work Plan

1. Once the file has been thoroughly examined, prepare a work plan summarizing the issues, facts and evidence (oral and documentary) which remain to be developed.
2. Oral evidence consists of testimony that is given by word of mouth. Documentary evidence includes, but is not limited to the following.
  - o papers.
  - o letters.
  - o books of account.
  - o canceled checks.
  - o official records.
  - o deeds.
  - o contracts.
  - o maps.
  - o photographs.
  - o computer disks and computer files.
  - o email messages.

[5.17] 12.5 (09-20-2000)  
Methods of Obtaining Evidence

1. Voluntary
  - A. If possible, evidence should be obtained voluntarily. Make no promise that the witness will or will not be called as a witness. If the witness raises the issue, it is sufficient to indicate that the witness may or may not be called as a witness.

NOTE:  
In obtaining evidence, whether testimonial or documentary, from persons other than the taxpayer, follow all statutory requirements and internal guidelines concerning third party contacts in order to comply with I.R.C. § 7602(c).
2. Use of Summons
  - A. If the witness does not voluntarily give oral testimony or documentary evidence, use the administrative summons to obtain the necessary testimony or documents. If the case is already pending in court, clear the use of the summons with District Counsel. See Chapter 6 for a discussion on the proper use of a summons and problems relative thereto.

NOTE:  
In obtaining testimonial evidence from witnesses, it is desirable that the initial conversation be informal so that the witness will feel at ease. In the event of an obviously recalcitrant witness, place the witness under oath to take testimony.
3. Taking Testimony
  - A. The witness should respond to the questions in his or her own words.
  - B. Let the witness do most of the talking.
  - C. Avoid having the witness respond "yes" or "no" to all questions.

- D. Do not ask leading questions; i.e. questions that suggest an answer in the witness's mind.
- E. Witnesses are sometimes forgetful and not entirely accurate. Therefore, solicit the testimony of other persons or documentary evidence to corroborate the testimony of the witness.
- F. Establish that the witness has personal knowledge of the facts with respect to which the witness is testifying. Otherwise, the testimony may not be admissible as evidence in a court of law.
- G. Consider the credibility of the witness.
  - + How logical is the testimony?
  - + What is the witness's reputation for truth and veracity?
  - + Is the witness in any way involved in the case?
  - + Is the witness biased for or against or related to the taxpayer?

[5.17] 12.6 (09-20-2000)

#### Admissions and Hearsay

1. Record any statement by a party against the party's own interest, because the admission of an unfavorable fact will be of value in proving the truth of the fact.
2. Hearsay is evidence that does not come from the personal knowledge of the witness, but from the mere repetition of what the witness has heard said by others, or what others have told the witness. Exercise care to insure that the witness has actual knowledge of the facts stated. Hearsay may not be used as evidence, but hearsay may lead you to the witness with actual knowledge of the facts.

[5.17] 12.7 (09-20-2000)

#### Documentation of Testimony

1. Make a written memorandum of an interview immediately thereafter even though it does not appear that the person will be called as a witness or that the information will be of any immediate value.
2. A formal affidavit (notarized) may be solicited which should contain a complete summary of the desired information. For example, if there is reason to believe the witness may change the testimony at a later date, request the witness to give a formal affidavit.
3. Attempt to obtain the signature of the witness on a typed or handwritten summary of the desired information, if the witness is unwilling to give a formal affidavit.
4. Consider using an administrative summons and having a stenographer prepare a verbatim transcript of the questioning if the witness is unwilling to sign a statement.
5. The interview may also be recorded.

#### NOTE:

Also, consult I.R.C. § 7521 for procedures to follow involving taxpayer interviews.

[5.17] 12.8 (09-20-2000)

#### Documentary Evidence

1. Wherever possible, obtain the original or copies of documents. If not available, make photostats of the

originals. In all cases, show the source from which the document was obtained. Obtain necessary documents at the outset, removing the possibility they will be later lost or otherwise unavailable.

2. Consider the authenticity of documents. If there are circumstances which raise a doubt as to authenticity, the Office of the Assistant Commissioner (Criminal Investigations) and the National Bureau of Standards may be of assistance.
3. Pay attention to verification of documents. When a mortgage, deed, assignment, conditional sales contract, or other security device is a material factor in the case, verify the alleged facts on the face of any such instrument. Do not rely on information provided in a letter, by telephone, or orally. Examine the document itself.
4. Determine whether all filing and recording requirements of state law have been complied with to validate the document against third parties. Carefully scrutinize family transactions to determine whether consideration actually passed. When the outstanding balance on a mortgage remains unchanged over a period of time, it could mean that it is a sham.

[5.17] 12.9 (09-20-2000)

#### Third Party Sources for Documentary Evidence

1. Public Records -- Public records such as copies of mortgages or assignments, deeds, or conditional sales contracts, may be obtained from the county recorder or other appropriate officer with whom they are required to be filed under state recording statutes. If the taxpayer, or other party, has testified in any court relative to the transaction in question, a certified copy of the relevant portion of the transcript may be desirable. If the taxpayer is a corporation, the files of the state custodian of corporate records may provide valuable information.
2. Within the Service -- Special or revenue agents' reports, the taxpayer's income, estate, gift, or employment tax returns for prior years, and tax returns of related entities or parties may be of assistance.  
NOTE:  
Discussing the case with special or revenue agents who have worked the case may be valuable, as they may have knowledge of information not contained in the written report.
3. Other Federal and State Agencies -- State and Federal agencies such as the State Insurance Commissioner, the Small Business Administration, and the State or Federal Securities and Exchange Commission may have information of a non-public nature which may be of assistance.
4. Commercial Institutions -- Life insurance companies may provide copies of policies; banks may provide canceled checks in some cases or transcripts of account; and loan companies or loan departments of banks may provide copies of financial statements prepared by the taxpayer.

NOTE:

Different facts must be obtained for different cases.

The facts needed to establish transferee liability would be different from the facts needed to establish liability for failure to honor a levy.

[5.17] 12.10 (09-20-2000)

#### Suits to Reduce Tax Claims to Judgment

1. Probability of Litigating the Merits -- In cases where suits for judgment are recommended, taxpayers often deny liability for the taxes involved. You should anticipate such cases at an early stage and take steps to obtain the tax returns and revenue agents' reports for the years in question to avoid their destruction. Forward the administrative files to District Counsel at the time the recommendation is made. Discuss the probability of litigation on the merits in the suit recommendation.
2. Previous Court Litigation and Appellate Division Settlements -- Often the liability in question has been determined in the Government's favor by proceedings in the Tax Court, by the allowance of tax claims in Bankruptcy and Receivership proceedings, or by other court action. In such cases, the taxpayer may not contest the case on the merits again. Similarly, where a case has been settled by mutual concessions in the Appeals Division, the taxpayer may be precluded from raising the merits. Make reference to any court decisions or settlements in the suit recommendation, and to copies of settlement agreements.
3. Collectibility of the Judgment -- Discuss the taxpayer's earning power, age, health, business connections, marital status, dependents, and the possibility of inheriting or acquiring assets from others.

[5.17] 12.11 (09-20-2000)

#### Suits to Set Aside Fraudulent Conveyances

1. Constructive Fraud -- Constructive fraud occurs when a taxpayer (or other person liable for the tax) makes a conveyance or incurs an obligation and such taxpayer or person is or will be thereby rendered insolvent when the conveyance is made or the obligation is incurred without fair consideration. Since the Government bears a heavy burden of proof in these cases, discuss in detail the facts pertaining to:
  - o The transfer of assets made or the obligation incurred.
  - o The insolvency of the taxpayer as of the date of transfer, or immediately thereafter.
  - o The absence of fair consideration.
  - o The value of the assets (fair market value) on the date of transfer.
2. Transfer With Actual Intent To Hinder, Delay or Defraud Creditors --- The proof must be clear and convincing to set aside a conveyance on the ground of actual intent to defraud the Government. Usually it is impossible to prove actual fraudulent intent by direct evidence because the facts relating to the fraudulent transfer are within the knowledge of the taxpayer or other transferor. Proof of the fraud must, therefore, usually come by inference from circumstances surrounding the transaction, and the relationship and interest of the parties thereto. To

establish actual intent to defraud creditors, thoroughly analyze and discuss the facts and evidence relating to:

- A. Knowledge of the transferor's intent by the transferee, the parties involved, and their relationship.
  - B. The property transferred or obligation incurred, the value of the property at the time of the transfer and its current value.
  - C. Competing claims to the property by bona fide lien holders or security holders.
3. State law may provide that other types of transfers may be attacked as fraudulent such as:
- A. bulk sales.
  - B. transfers by a person leaving the person with unreasonably small capital.
  - C. transfers not accompanied by a change of possession.
  - D. transfers made as a part of a scheme to avoid debts.

Consult with Counsel for advice in cases involving issues of this type.

[5.17] 12.12 (09-20-2000)  
Lien Foreclosure Actions

1. Property Involved
  - A. Accurately describe the property. Appraise the property and state the current forced sale and fair market values. Indicate what steps can be taken, if any, to generate interest among prospective buyers.
2. Competing Claims or Liens
  - A. Where copies of the claims or liens are attached to the report, number them as exhibits and refer to them in the pertinent paragraph of the report.
  - B. Identify the owners of competing claims or liens and state their current addresses.
  - C. Describe the type of claim or lien (for example, mortgage, trust deed, contract for sale, state tax lien).
  - D. Give the date the claim or lien arose.
  - E. State the date of the instrument.
  - F. Give recording data (date and place of filing, and book and page number, where lien is filed).
  - G. State the original amount of claim.
  - H. Give the outstanding balance, including amount of principal, interest and other charges separately stated.
  - I. Discuss the validity of an opposing claim or lien or any of its terms or conditions that are questionable.
  - J. Discuss whether any action has been taken or is to be taken to enforce an opposing claim or lien, the nature of such action, the court in which it is pending, and its current status.

[5.17] 12.13 (09-20-2000)  
Suits for Failure to Honor Levy

1. Include the following information in the suit recommendation:
  - o Name and address of person failing to honor levy.

- o Dates on which all collection notices were served.
- o Dates of contact for purpose of requesting payment.
- o A full description of the property or rights to property levied upon.
- o A discussion of the facts establishing the taxpayer's interest in the property or right to property.
- o Information as to whether the debt is disputed.
- o Contentions advanced by the person levied upon.
- o Facts tending to controvert the contentions of the person levied upon.

NOTE:

If there are competing claims to the property or right to property levied upon, it may be necessary for the Government to institute an action to foreclose its liens, rather than to bring an action to enforce the levy, in which case you should provide information necessary for lien foreclosure actions.

[5.17] 12.14 (09-20-2000)

Interpleader Suits

1. The complaint of the stakeholder-plaintiff will usually describe the property in question and the parties claiming rights to it. Analyze the complaint to determine what type of action the Government should take to protect its rights.
2. On occasion, you will learn of litigation between the taxpayer and other parties, the result of which may add to or diminish the taxpayer's assets. In such cases, where administrative remedies are not sufficient protection or are impractical, determine whether intervention is desirable or necessary.

[5.17] 12.15 (09-20-2000)

Other Suits Where Government or Employee Is Defendant

1. In some cases, such as injunction proceedings, quiet title actions, or suits for damages where the Government is the defendant, you may be requested to make reports of events which have culminated in litigation or to investigate and make reports on some feature of the litigation. In such cases, use the same general principles set forth in this chapter to prepare the report.

[5.17] 12.16 (09-20-2000)

Other Suits: Where Affirmative Action is Sought To Be Taken

1. On occasion, you may recommend the institution of miscellaneous types of proceedings such as:
  - o Suits against sureties under the performance bond provisions of the Miller Act.
  - o Suits against third parties paying or providing wages.
  - o Suits on bonds.
  - o Proceedings to obtain writs of entry.
  - o Suits to recover erroneous refunds.
  - o Proceedings to obtain permission to seize the principal residence of a taxpayer.

Use the general principles set forth in this chapter to prepare the report.

[5.17] 12.17 (09-20-2000)

#### Preparation of the Report: Initial Steps

1. Consultation With Superior
  - o Discuss findings and proposed recommendation.
  - o Discuss difficult problems and questions encountered in the investigation.
  - o Re-read appropriate earlier chapters and other material relevant to the particular case.
  - o Special Procedures Function and Counsel may also be consulted for advice.

[5.17] 12.18 (09-20-2000)

#### Follow An Outline

1. Reduce material gathered to an outline before preparing the narrative report.
2. Organize material in a sequential or chronological form.
3. Focus on significant points.
4. Form 4478 is a useful check list, but is not a substitute for a well developed narrative report.

[5.17] 12.19 (09-20-2000)

#### The Narrative Report

1. Purpose -- To present in a logical sequence all pertinent facts so that appropriate legal action may be taken. The report must be written so that the reader understands the significance of its contents and is persuaded to act on it.
2. Qualities of a Good Report
  - o Impartiality.
  - o Accuracy.
  - o Completeness.
  - o Conciseness.
  - o Logical arrangement of material.
  - o Coherence.
  - o Emphasis on important facts.

[5.17] 12.20 (09-20-2000)

#### Contents of the Narrative Report

1.
  - o A separate narrative statement of the case.
  - o The check list data contained on any applicable form.
  - o Exhibits identified by number. Tables, transcripts and summaries should show the source of the information.
  - o A list of witnesses and proposed defendants, together with the complete address of each.

##### NOTE:

Forms 4477 through 4481 are not a substitute for a complete narrative report in recommending litigation of any type. The notation "See Report" should appear in the appropriate blocks on the forms.

[5.17] 12.21 (09-20-2000)

#### Format of the Narrative Report

1. Use standard U.S. Government memorandum stationery.

## 2. Introduction

- A. Type of suit recommended.
- B. Amount of money expected to be recovered.
- C. Type of tax and outstanding balance. Details can be incorporated by reference to Form 4477 or accompanying transcript.
- D. Date the statute of limitations on collection will expire.
- E. Statement that administrative remedies are impractical, or that administrative remedies have been exhausted, and the reasons why administrative remedies have not been effective.
- F. Statement that urgent action is required when necessary, and the reasons therefor.

## 3. Body

- A. All relevant facts presented in chronological order, with references to exhibits where appropriate.
- B. A brief personal history of the taxpayer. Include taxpayer's age, health, marital status, occupation or business activity, tax payment history, and other facts that might have a bearing on the suit.
- C. Reasons why suit is justified, particularly in a suit to reduce a tax claim to judgment when there is no immediate prospect of recovery on the judgment.
- D. If the taxpayer is a corporation, provide the location of the principal executive office, date of incorporation, state of incorporation, and the name and address of the statutory agent for service.
- E. The basis for the assessment to the extent that information is available to you. If administrative files are not available, SPf should incorporate on Form 4481 additional details concerning the assessment such as whether the assessment is:
  - + Tax Liability as shown on the tax return.
  - + Deficiency based on Tax Court decision.
  - + Deficiency that taxpayer agreed to.
  - + Deficiency not agreed to and petition not filed with Tax Court. Give basis for the deficiency by furnishing a copy of the Revenue Agent's Report.
  - + Fraud case. If so, state whether there was criminal prosecution.
  - + Jeopardy assessment. If so, state the basis of the tax determination.
- F. Timeliness of the assessment. If the assessment was made after the normal period for assessment had expired, explain why the assessment was nevertheless timely. This may include information that fraud was involved, that a return was not filed, that a waiver extending the time for assessment was secured, or that other appropriate justification exists.

### NOTE:

For suits to foreclose a tax lien and interpleader suits involving liens notice of which are filed on or after January 19, 1999, provide in the narrative report the following additional information to show that the requirements of I.R.C. § 6320 and § 6330 have been complied with:

- + Date Collection Due Process Notice (CDP Notice) was sent or served.
- + The address to which the notice was sent (if hand delivered, the name of the person served and the address where the notice was served or left).
- + Method of service of the notice (certified mail, certified mail with return receipt requested, or hand delivery).
- + If mailed, whether the notice was returned either as unclaimed or as undeliverable.
- + Date the taxpayer's request, if any, for a Collection Due Process Hearing or an equivalent hearing was received.
- + A copy of any Notice of Determination or Decision Letter issued by Appeals.
- + Date, if any, taxpayer filed for judicial review of Appeals Notice of Determination and a discussion of the court's disposition of the case.
- + Computation of the statute of limitations for collection.

- G. If there are any related cases, provide a brief summary.
- H. If trust fund taxes are involved, state whether the Service made trust fund recovery penalty assessments and, if not made, indicate reason that assertion of the penalty would not be a suitable means of collecting. If the Service made a trust fund recovery penalty assessment, state the facts and circumstances giving rise to the assessment and the collection status of the assessment. Also, discuss why the revenue officer believes the responsible person is deemed to have willfully failed to pay over the tax.
- I. The date statute of limitations for collection will expire. If the normal period for collection has expired, explain why the filing of the proposed suit will be timely. Obtain copies of waivers, offers in compromise, etc., and incorporate them as exhibits when appropriate.
- J. Give the names of witnesses, present addresses, and titles or other identification, as appropriate. Discuss any evidence the witnesses may be expected to give or have already given.
- K. Discuss any weaknesses in the evidence or unreliability of witnesses. Discuss any evidence to controvert possible weaknesses, if available, including efforts made to verify assertions of the taxpayer or other party involved. Also discuss contentions of the taxpayer and third parties.
- L. State the forced sale and fair market values of the property where the case will result in the sale of assets subject to a tax lien and basis for these values. If you recommend the appointment of a receiver, set forth the factors warranting this action.
- M. Provide the name and address of the taxpayer's representative. Provide the names of representatives

of any competing lienors, claimants or other parties when available. When appropriate, this may be done by reference to Form 4479.

4. In addition to the items mentioned in (3) above, incorporate certain other specific information depending on the type of suit involved.
5. A suit for Failure to Honor a Levy should include:
  - A. Name and address of person failing to honor notice of levy.
  - B. Reason levy not honored. An effort should be made to determine the reason, since the party may be justified in not honoring the levy.
  - C. Date Form 668-A, Notice of Levy, personally served. Do not recommend suit until a notice of levy has been personally served, even though the third party may have agreed to service of notices of levy by mail.
  - D. Date Form 668-C, Final Demand, served.
  - E. Dates the party served was contacted to request payment and the manner of contact.
  - F. Description of property or rights to property subject to levy.
  - G. Whether collection of tax can be made from other sources. Normally, if the tax can be collected by other means, suit should not be recommended.
  - H. If the 50-percent penalty is proposed, give basis for recommendation.
6. Suit to Establish Transferee Liability or to Set Aside a Fraudulent Transfer should include:
  - A. Whether administrative procedures under IRC 6901 can be used. Administrative procedures are less costly and should be used whenever possible instead of recommending suit.
  - B. Name and address of transferee.
  - C. Description of property (use Form 4480).
  - D. Whether transferor was insolvent at time of transfer or immediately thereafter. Also furnish financial statement, if possible.
  - E. Evidence that transfer was made to hinder, delay, or defeat payment of tax.
  - F. Date property acquired by transferee.
  - G. How acquired by transferee.
  - H. Consideration given by transferee. If none, so state.
  - I. Fair market value on date acquired by transferee.
  - J. Basis for determining fair market value.
  - K. Relationship between transferor and transferee.
  - L. Date tax liability of transferor assessed. If the tax was not assessed before the transfer, information should be furnished to show that parties involved were aware that assessments were being proposed or in process of being made.
  - M. Actions taken to collect tax from transferor.
7. Suit to Recover an Erroneous Refund should include:
  - A. The type of tax and the period(s) involved.
  - B. The amount of the erroneous refund.
  - C. Date return was filed and date erroneous refund was made.
  - D. Administrative efforts to collect the erroneous refund.

- E. Computation of the statute of limitations for filing suit to collect.
  - F. A description of the events that resulted in the erroneous refund.
8. Suit for Damages for Failure to Release Lien, for Unauthorized Collection Actions, or for Actions in Violation of the Automatic Stay and Discharge Provisions of the Bankruptcy Code Under I.R.C. k§ 7432 and 7433 should include:
- A. Date administrative claim for damages was filed, and office where claim was filed.
  - B. Amount of damages claimed.
  - C. Name of taxpayer or third party making claim.
  - D. Description of collection activity upon which the claim is based.
  - E. Information concerning administrative review of the claim by the Service.
  - F. Date on which district director received request for certificate of release of lien, or date on which claimant alleges that lien became fully satisfied or unenforceable.
  - G. Description of the damages claimed.
  - H. Statement as to whether you believe that suit was commenced within the 2-year statute of limitations period.
  - I. Statement as to whether the claimant could have mitigated the damages claimed.
9. Application for Writ of Entry should include:
- A. Prepare a data sheet (Exhibit 12-8) containing all pertinent information necessary to provide a complete background of the case.
  - B. Prepare affidavit (Exhibit 12-9) using accurate factual information about the case; subjective opinions should not be included.
10. Provide a brief analysis of the case, including any theories or principles which support the recommendation in the conclusions and recommendation portion of the report.
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