Statutes of Limitation in Tax Litigation: Friend or Foe?

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1 This outline was authored by Lawrence A. Sannicandro, Esq. The views herein are the author’s own and do not necessarily reflect the position of any of the other panelists or the organizations with which they are affiliated.
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I. Introduction

Statutes of limitations are an important, yet often overlooked, aspect of tax litigation that can work to the advantage or detriment of a party. Private practitioners and government employees should in every case verify whether a proposed assessment, a pending collection action, a claim for refund, or other tax matter is time-barred by applicable statutes of limitation. This outline surveys the statute of limitations rules most likely to be encountered in civil and criminal tax litigation.

Part II of this outline examines rules relating to the periods of limitations on assessment and collection of taxes, penalties, and interest under the Internal Revenue Code (“I.R.C.” or “Code”). Part III of this outline discusses the rules relating to the period of limitations on filing administrative claims for refund with the Internal Revenue Service (“IRS”) under the Code. Part IV of this outline explores the statute of limitation issues that arise in judicial and quasi-judicial proceedings under the Code, including criminal prosecutions and suits brought by taxpayers or the Tax Division of the U.S. Department of Justice to recover an overpayment of tax or an erroneously issued refund. Finally, Part V of this outline examines statute of limitation issues that arise outside of the Code but are nevertheless relevant to tax, such as the statute of limitations with respect to foreign bank account reports and the effect of 28 U.S.C. § 2462 as establishing a default five-year statute of limitations by which all penalties must be assessed, unless specifically excepted by statute.

II. Periods of Limitation on Assessment and Collection

A. Overview

1. Policy Reasons for Statutes of Limitations:

   a. Policy Justification for Statute of Limitations: In Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945), the Supreme Court explained the policy reasons for statute of limitations:

   Statutes of limitations find their justification in necessity and convenience rather than logic. They represent expediency, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is called a “fundamental” right or what used to be called a “natural” right of the individual. He may, of course, have the protection of the policy while it exists, but
the history of pleas of limitation shows them to be

good only by legislative grace and to be subject to a

relatively large degree of legislative control.

[Citations and footnotes omitted.]

b. **Statute of Limitations Are Fundamental to a Well-Ordered Judicial System:** Although the Supreme Court stated in Donaldson that statutes of limitations are not fundamental rights, the Supreme Court has also said that “[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” Bd. Of Regents of Univ. of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980); see Artis v. Dist. of Columbia, --- U.S. ---, 138 S. Ct. 594, 607-608 (2018); Rothensies v. Elec. Battery Storage Co., 329 U.S. 296, 301 (1946).

2. **When Statutes of Limitation Are Conjured Strictly in Favor of the Government:** A taxpayer’s use of the statute of limitations offensively may cause the government to respond that statutes of limitations must be strictly construed in favor of the government. This principle is based on Badaracco v. Commissioner, 464 U.S. 386, 391-392 (1984), in which the Supreme Court stated that “[s]tatutes of limitation sought to be applied to bar rights of the government, must receive a strict construction in favor of the government.” Private practitioner must not read Badaracco in a vacuum.

a. **The Clear and Unambiguous Language of the Statute Controls:** A presumption, such as the one determined to apply in Badaracco, do not apply where a statute is unambiguous. See McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 502-503 (1991).

b. **The Presumption in Badaracco Was Appropriate Under Those Facts Because the Taxpayer Acted Fraudulently:** In Badaracco, the taxpayer intended to file a fraudulent return, so it was appropriate to construe the statute of limitations strictly for the Government. Badaracco, 464 U.S. at 386, 392. The Supreme Court explained: “it seems to us that a taxpayer who has filed a fraudulent return with intent to evade tax hardly is in a position to complain of the fairness of a rule that facilitates the Commissioner’s collection of tax due.” Id. at 400. No similar policy justification exists where a taxpayer acts without fraudulent intent.

c. **Other Equal Presumptions May Support the Taxpayer:** “Where no fraudulent conduct on the part of the taxpayer is alleged, ‘taxing acts, including provisions of limitation embodied therein, are to be construed liberally in favor of the taxpayer.’” Lauckner v. United States, No. 93-1594, 1994 WL 837464 (D. N.J. 1993).

3. **Focus of Outline:** This outline generally does not address statute of limitations issues related to excise taxes.
B. Periods of Limitation on Assessment

1. **General Rule:** Pursuant to I.R.C. § 6501(a), tax must generally be assessed within three years after a return is filed or the due date for filing the return, whichever is later. This is to say that an assessment is valid only if it is made before the expiration of the period of limitations on assessment.

a. **Time Return Deemed Filed:**

   i. **In General:** Because the period of limitations on assessment is determined by reference to when the tax return is “filed,” the filing date of a tax return is of critical importance. In general, a tax return is “filed” when it is physically delivered to the IRS office prescribed in I.R.C. § 6091, or in applicable Treasury Regulations, or in filing instructions with respect to the tax that is the subject of the tax return. See Hotel Equities Corp. v. Commissioner, 546 F.2d 725, 727 (7th Cir. 1976) (quoting Phinney v. Bank of the Sw. Nat’l Ass’n, 335 F.2d 266, 268 (5th Cir. 1964)).
   
   This delivery can occur in-person, electronically, or by post.

   1) **Electronic Filing:** Where a tax return is filed electronically with an electronic return transmitter, it is deemed filed on the date of the electronic postmark (i.e., generally the record of the date and time (in a particular time zone) that an authorized electronic return transmitter receives the transmission of a taxpayer's electronically filed document on its host system). Treas. Reg. § 301.7502-1(d).

   2) **Timely Mailing as Timely Filing: I.R.C. § 7502:**

      a) **General Rule:** I.R.C. § 7502(a): I.R.C. § 7502 generally provides that timely mailing of a tax return is treated as timely filing of the tax return if the tax return is delivered to the IRS by U.S. mail (or certain private delivery services) after the filing deadline and the postmark date stamped on the envelope is on or before the filing deadline. Thus, under I.R.C. § 7502, timely mailing is considered timely filing provides that the following are present:

      i) The postmark is the same as the due date of the tax return (or some earlier date);

      ii) The envelope in which the tax return
is mailed is properly addressed to the IRS with postage prepaid; and

iii) The tax return is delivered after the due date. See Treas. Reg. § 301.7502-1(a).

b) U.S. Postal Service Postmark Controls: The date of the U.S. Postal Service postmark is deemed to be the date of delivery and thus the date of filing for purposes of I.R.C. § 6501(a).

c) Burden of Proof and Illegible Postmarks: If the postmark is illegible, and otherwise, the taxpayer has the burden of proving when the postmark was made. Treas. Reg. § 301.7502-1(c).

d) Private Delivery Services: Under I.R.C. § 7502(f), private delivery services designated by the IRS also qualify for the timely mailing is treated as timely filing rule; namely, certain delivery services offered by DHL, Federal Express, and the United Parcel Service listed in Notice 2016-30.

ii. Early Return: As a general rule, a tax return filed before the last day for filing prescribed by law or regulations is deemed filed on the due date of the return. I.R.C. § 6501(b)(1).

iii. Return of Certain Employment and Withholding Taxes: If (1) a return relates to the FICA tax or a withholding tax on nonresident aliens, foreign corporations, or income tax from wages, and (2) if the return is before April 15 of the succeeding taxable year, then such return is deemed filed on April 15 of the succeeding year. I.R.C. § 6015(b)(2).

iv. Return Executed by the Commissioner: A tax return prepared and executed by the Commissioner pursuant to I.R.C. § 6020(b) does not start the running of the period of limitations on assessment or collection. I.R.C. § 6501(b)(3).

2. Calculating the Statute of Limitations: The following chart may be helpful to calculate the period of limitations for assessment:
<table>
<thead>
<tr>
<th>Returns Without Filing Extensions:</th>
<th>Statute Runs From:</th>
</tr>
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<tbody>
<tr>
<td>Return mailed and received on or before due date</td>
<td>Due date of return</td>
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<tr>
<td>Return mailed and received after due date</td>
<td>Date return received</td>
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<tr>
<td>Return mailed on or before due date but received after</td>
<td>Due date of return</td>
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<td>Return mailed on or before extension date but received</td>
<td>Postmark date of return</td>
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<td>after extension date</td>
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3. Exceptions in I.R.C. § 6501: There are numerous exceptions to this general rule, some of which are set forth in I.R.C. § 6501 and some of which are set forth in other provisions of the Code. The following exceptions are set forth in I.R.C. § 6501.

   a. False or Fraudulent Return: The IRS may assess the tax, or a court proceeding for the collection of such tax may be brought at any time, in the case of a false or fraudulent return with the specific intent to evade tax. See I.R.C. § 6501(c)(1). This provision applies equally to omissions of gross income on account of fraud.

      i. Amended Return Cannot Undo Fraud on Original Return: Where a taxpayer files a fraudulent return but later files a nonfraudulent amended return, the tax may be assessed at any time, even more than three years after the nonfraudulent amended return was filed. Badaracco v. Commissioner, 464 U.S. 386, 396 (1984).

      ii. Effect of Third Party Fraud on Statute of Limitations: For a discussion of the effect of third-party fraud on the statute of limitations, see infra Section II.E.

   b. Willful Attempt to Evade Tax: The IRS may assess the tax, or a court proceeding for the collection of such tax may be brought at any time, in the case of a willful attempt in any manner to defeat or evade any tax other than income, estate, or gift tax (e.g., employment or excise tax). See I.R.C. § 6501(c)(2). This
provision applies equally to omissions on account of fraud.

c. **No Return:** The IRS may assess the tax, or a court proceeding for the collection of such tax may be brought at any time, in the case of a failure to file a tax return. See I.R.C. § 6501(c)(3).

i. **Substitute Returns:** The IRS is authorized by I.R.C. § 6020 to prepare and execute a tax return for a taxpayer. These so-called substitute returns raise various procedural issues.

ii. **Section 6020(a) Returns Prepared with Taxpayer Consent:** A return prepared under I.R.C. § 6020(a), known as a “section 6020(a) return”, is prepared by the IRS on the basis of the taxpayer’s consent to disclose all the information necessary for the preparation of the return. I.R.C. § 6020(a); see also Treas. Reg. § 301.6020-1(a)(1).

iii. **Section 6020(b) Returns Prepared without Taxpayer Consent:** A return prepared under section 6020(b), also known as a “section 6020(b) return”, a “substitute for return”, or an “SFR” is a return the Service prepares with respect to a taxpayer who submits no return, a false or fraudulent return, or no information from which the taxpayer’s tax liability can be computed. See I.R.C. § 6020(b). The section 6020(b) return is prepared on the basis of the information the Service can collect on its own, which as a practical matter is usually limited to third-party information returns.

iv. **Differences Between Section 6020(a) Returns and Section 6020(b) Returns:** Fundamentally, the primary difference between a section 6020(a) return and a section 6020(b) return is that the former is prepared with the taxpayer’s input and the latter is prepared without the taxpayer’s input.

v. **Interplay Between Section 6020(b) Returns and the Statute of Limitations:** The period of limitations on assessment with respect to a section 6020(b) return does not begin to run, if at all, until the taxpayer signs the substitute return. Internal Revenue Manual (“I.R.M.”), pt. 4.19.17.1.1 (Jan. 5, 2010). The legal principles in support of this conclusion are:

1) **Section 6020(b) Returns Are *Prima Facie* Good and Sufficient for All Legal Purposes:** A section 6020(b) return is *prima facie* good and sufficient for all legal purposes, including for purposes of assessing the tax shown as due and owing. See I.R.C. § 6020(b)(2).

2) **Procedures with Respect to Section 6020(b) Returns**
and the Effect on the Statute of Limitations: The Service instructs its employees that (1) the amount shown as due on a section 6020(b) return must be assessed under the deficiency procedures, (2) a section 6020(b) return does not start the statute of limitations on assessment or collection, (3) a section 6020(b) return does not toll the running of the failure to file penalty under I.R.C. § 6651(a)(1), and (4) a section 6020(b) return prepared using the married filing separate filing status will not prevent taxpayers from electing a joint return under I.R.C. § 6013(b). See I.R.M., pt. 4.19.17.1.1(2) (Jan. 5, 2010); see also I.R.C. § 6501(b)(3); but see I.R.M., pt. 25.6.1.9.4.5(2) (Oct. 1, 2010) (a section 6020(b) return begins the running of the period of limitations on collection but not the period of limitations on assessment).

d. Extension by Agreement: Pursuant to I.R.C. § 6501(c)(4), the three-year statute of limitations may be enlarged if the taxpayer and the IRS agree to do so in writing.

i. Must Be Agreed to Before Expiration of Statute of Limitations: The extension is not effective unless both parties agree before the statute expires.

ii. Burden of Proof on IRS: The IRS has the burden of proving that the agreement extended the statute. The IRS must produce direct proof of signed extensions or circumstantial evidence establishing the extension.

iii. Types of Extensions: The IRS may use various forms to extend the statute of limitations. Among the more common forms are:

1) Form 872, Consent to Extend the Time to Assess Tax, which extends the statute of limitations to a particular date;

2) Form 872-A, Special Consent to Extend the Time to Assess Tax, which extends the statute of limitations indefinitely, until 90 days after the IRS or the taxpayer receives a notice of termination from the other party (Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax), or until the IRS sends a notice of deficiency;

3) Form 870-AD, Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, which waives the
taxpayer’s right to receive a notice of deficiency;

4) Form 872-P, Consent to Extend the Time to Assess Tax Attributable to Partnership Items, which extends to a specified date the time to assess partnership items;

5) Form 872-O, Special Consent to extend the Time to Assess Tax Attributable to Items of a Partnership, which extends indefinitely the time to assess partnership items; and

6) Form 872-R, Special Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation, which extends indefinitely the time to assess.

iv. The Period of Limitations on Assessment of Estate Tax May Not Be Extended by Agreement: Although the Service and the taxpayer can agree to extend the statute of limitations, the statute of limitations on assessment of the estate tax cannot be extended. See I.R.C. § 6501(c)(4). This means that an estate tax deficiency must either be assessed or a statutory notice of deficiency mailed to the taxpayer, prior to the expiration of the statute of limitations.

e. Substantial Omission of Items: Pursuant to I.R.C. § 6501(e) and Treas. Reg. § 301.6501(e)-1, the three-year period of limitations on assessment is extended to six years if:

i. Gross Income: The taxpayer omits additional gross income in excess of 25% of the amount of gross income stated in the tax return filed with the IRS, see I.R.C. § 6501(e)(1)(A)(i);

ii. Certain Items Reportable on Form 8938: The taxpayer omits in excess of $5,000 from gross income that is foreign-sourced and required to be reported on Form 8938, Statement of Specified Foreign Financial Assets. See also I.R.C. § 6038D (reporting requirements), see I.R.C. § 6501(e)(1)(A)(ii);

iii. Gross Estate or Gross Gift: The taxpayer omits from the gross estate as reported on the estate tax return, or from the total amount of the gifts made during the period for which the gift tax return was filed as reported on the gift tax return, an item or items properly includible therein the amount of which is in excess of 25% of the gross estate as reported on the estate tax return or 25% of the total amount of the gifts as reported on the gift tax return, see I.R.C. § 6501(e)(2); see also Treas. Reg. § 301.6501(e)-1(b); or
iv. **Constructive Dividends:** The taxpayer omits from gross income a constructive dividend includible under I.R.C. § 951(a) (relating to certain subpart F income), see I.R.C. § 6501(e)(1)(C).

**Note:** Special statute of limitations rules also apply with respect to amounts not properly reportable on excise tax returns. See I.R.C. § 6501(e)(3); see also Treas. Reg. § 301.6501-1(c). These special rules are not discussed in this outline.

f. **Tax Resulting From Changes in Certain Income Tax or Estate Tax Credits:**

i. **Additional Tax Resulting From Reduced Foreign Tax Credit:** The general three-year period of limitations on assessment does not apply to an assessment of additional tax resulting from an adjustment under I.R.C. § 905(c) (relating to the foreign tax credit for income taxes previously allowed as a credit). See I.R.C. § 6501(c)(5); see also I.R.C. § 905(c). The IRS takes the position that there is not a statute of limitations with respect to an assessment arising from a reduced foreign tax credit under I.R.C. § 905(c). See IRS, Chief Counsel Advice Memorandum 2014-29-026 (July 18, 2014).

ii. **Additional Estate Tax Due to Refund of State or Foreign Death Tax:** Where any amount of State or foreign death tax claimed as a credit against federal estate tax is recovered, the personal representative of the estate must notify the IRS. I.R.C. § 2016. The IRS will determine the additional estate tax due, and the estate must pay any additional tax due upon notice and demand from the IRS. 1d. Thus, I.R.C. § 6501(c)(5) creates an exception to the three-year period of limitations on assessment to permit the IRS to assess this additional amount at any time. See I.R.C. § 6501(c)(5).

1) **Repeal of the State Death Tax Credit:** The federal credit for Stated death taxes paid was repealed for decedent’s dying after December 31, 2004, and replaced with a deduction. See I.R.C. § 2011(f). The credit for foreign death taxes is still permitted pursuant to I.R.C. § 2014.

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2 Under I.R.C. § 905(c), where a taxpayer has claimed a foreign tax credit for accrued foreign tax, the taxpayer must notify the IRS if the following occurs: (a) the amount of accrued foreign tax when paid differs from the amount claimed as a credit; (b) the accrued tax is not paid before the date that is two years after the close of the taxable year for the accrued foreign tax; or (c) there is a refund of the foreign tax.
g. **Termination of Private Foundation Status:** Pursuant to I.R.C. § 6501(c)(6), in the case of a tax imposed under I.R.C. § 507 on the termination of a private foundation, such tax may be assessed, or a court proceeding for the collection of such tax may be brought, at any time.

h. **Special Rule for Amended Tax Returns Filed Within 60 Days of the Expiration of the Statute of Limitations:** If (i) a taxpayer files an amended income tax return reporting an additional income tax liability, and (ii) the IRS receives the tax return within 60 days before the expiration of the period of limitations on assessment with respect to the original tax return, then the period of limitations on assessment is extended until 60 days after receipt of the amended tax return. See I.R.C. § 6501(c)(7).

i. **Failure to Notify Secretary of Certain Foreign Transfers:**
   
i. **Background:** Statute of limitation issues frequently arise in offshore audits, and the IRS frequently seeks to audit otherwise closed years.

   ii. **I.R.C. § 6501(c)(8):** Section 6501(c)(8) of the Code provides that in the case of any information on foreign activities which is required under I.R.C. § 6038, 6038A, 6038B, 6046, 6046A, or 6048, the period of limitations on assessment does not expire until three years after the date on which the IRS is furnished the information required to be reported.

   1) **Effect on Entire Tax Return:** Even if the three-year or the six-year period of limitations on assessment has expired, I.R.C. § 6501(c)(8) holds open the statute of limitations for the entire tax return if a foreign information return was required to be filed, but was not.

   2) **Other Resources:** For a discussion of I.R.C. § 6501(c)(8), and its effect on offshore audits, see Edward M. Robbins, Jr., Posting of *You Should Worry About Section 6501(c)(8)* to TAXLITIGATOR – Tax Controversy (Civil & Criminal Report) blog, https://taxlitigator.me/2013/08/31/you-should-worry-about-section-6501c8-by-edward-m-robbins-jr/ (Aug. 31, 2013).

j. **Gift Tax on Certain Gifts Not Shown on Return:**

   i. **General Rule:** I.R.C. § 6501(c)(9) provides that if a gift is not shown on a gift tax return in a manner adequate to apprise the Service of the nature of the gift, then the gift tax may be assessed at any time with respect to that gift. Most
typically, this additional assessment occurs in connection with the filing of the estate tax return.

ii. **Adequate Disclosure Especially Important in Gift Tax Cases:** Because the failure to adequately disclose a gift on a gift tax return means that the relates gift tax can be assessed at any time, it is especially important for practitioners to adequately disclose the gift on the return.

iii. **When Is a Gift Not Adequately Disclosed:** I.R.M., pt. 4.25.11.2 (Oct. 30, 2017) instructs that a gift may be inadequately disclosed if it is:

1) Omitted completely from the return; or

2) Shown on the return, but the manner in which it is shown is not adequate to apprise the Service as to the nature of the gift.

iv. **Protective Returns:** In situations in which the taxpayer contends that a gift was not made (i.e., in a bona fide sale for adequate consideration such as a promissory note), it is usually advisable to file a gift tax return reporting a zero tax liability with respect to the “sale”. The protective return should disclose all facts and supporting documentation surrounding the “sale”. The purpose of filing this protective return is to have the statute of limitations with respect to that “sale” expire from a gift tax perspective.

k. **Listed Transactions:**

i. **General Rule:** Pursuant to I.R.C. § 6501(c)(10), the three-year period of limitations on assessment is extended where a taxpayer fails to include on any tax return any information required to be reported under I.R.C. § 6011 with respect to a listed transaction. Specifically, the period of limitations on assessment is extended until one year after the earlier of:

a. The date on which the Commissioner is furnished the required information; or

b. The date that a material advisor meets the requirements of I.R.C. § 6112 with respect to a request by the Commissioner under I.R.C. § 6112(b) relating to such transaction with respect to such taxpayer.

ii. **Listed Transactions Defined:** A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined
to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction. Treas. Reg. § 1.6011-4(b)(2).³

1) Subsequently Designated Listed Transactions: If a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer’s tax return (including an amended return) reflecting the taxpayer’s participation in the listed transaction or transaction of interest and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed, regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction or a transaction of interest, with the Office of Tax Shelter Analysis (“OTSA”) within 90 calendar days after the date on which the transaction became a listed transaction or a transaction of interest. Treas. Reg. § 1.6011-4(e)(2)(i).

iii. Disclosure:

1) Disclosure Requirements for Listed Transactions: Certain disclosure requirements apply to so-called “reportable transactions.” The term “reportable transaction” means, among other things, listed transactions. See Treas. Reg. § 1.6011-4(b). The failure to make the required disclosures can suspend the statute of limitations until one year after the IRS is provided with the required information. Thus, the sufficiency of the disclosure may affect whether the statute of limitations remains open pursuant to I.R.C. § 6501(c)(10).

2) Form and Content of Disclosure: A taxpayer will be deemed to have adequately disclosed a listed transaction only if the taxpayer attaches to the taxpayer’s tax return for each year the taxpayer participated in the transaction the required information on Form 8886, Reportable Transaction Disclosure Statement (or a successor form). Treas. Reg. § 1.6011-4(d), (e)(1).

³ As of the time of this writing, there are 36 listed transactions. See IRS, Recognized Abusive and Listed Transactions, https://www.irs.gov/businesses/corporations/listed-transactions (last updated Feb. 28, 2019). Most recently, basket option and syndicated conservation easement transactions were added as listed transactions in 2015 and 2017, respectively. See id.
a) **Adequacy of Disclosure:** To be considered complete, the information provided on Form 8886 must describe the expected tax treatment and all potential tax benefits expected to result from the transaction, describe any tax result protection (as defined in Treas. Reg. § 301.6111-3(c)(12)) with respect to the transaction, and identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the transaction and the identity of all parties involved in the transaction. Treas. Reg. § 1.6011-4(d). An incomplete Form 8886 (or a successor form) containing a statement that information will be provided upon request is not considered a complete disclosure statement. Id.

3) **Time for Providing Disclosure:**

a) **Original Returns:** The disclosure statement for a reportable transaction, including a listed transaction, must be attached to the taxpayer’s tax return for each taxable year for which a taxpayer participates in a reportable transaction. Treas. Reg. § 1.6011-4(e)(1).

   i) **Pass-Through Entities:** In the case of a taxpayer that is a partnership, an S corporation, or a trust, the disclosure statement for a reportable transaction, including a listed transaction, must be attached to the partnership, S corporation, or trust's tax return for each taxable year in which the partnership, S corporation, or trust participates in the transaction. Id.

b) **Amended Returns, Carrybacks, and Tentative Carrybacks:** A disclosure statement for a reportable transaction, including a listed transaction, must also be attached to each amended return that reflects a taxpayer’s participation in the transaction. Id. If a reportable transaction, including a listed transaction, results in a loss which is carried back to a prior year, the disclosure statement for the transaction must be
attached to the taxpayer’s application for tentative refund or amended tax return for that prior year. Id.

c) With a Copy to OTSA: A copy of the disclosure statement must be sent to the OTSA at the same time that any disclosure statement is first filed by the taxpayer pertaining to a particular reportable transaction. Id.

l. Certain Orders or Criminal Restitution: Amounts of restitution ordered to be paid pursuant to 18 U.S.C. § 3556 for the failure to pay any tax may be assessed, or a court proceeding for the collection of such amount may be brought, at any time. See I.R.C. § 6501(c)(11).

m. Certain Taxes Attributable to Partnership Adjustments:

i. In General: Congress enacted special statutes of limitation with respect to assessments of various pass-through items.

ii. Partnership and Affected Items Under TEFRA:

1) In General: Section 6229 may extend the period of limitations on assessment applicable to a partner. As interpreted by the courts, I.R.C. § 6229(a) provides that each partner’s assessment period for tax attributable to partnership and affected items under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 646, as amended (“TEFRA”), shall not expire before the date that is three years after the later of:

a. The date on which the partnership return for the taxable year was filed; or

b. The last day for filing the return for that year (determined without regard to extensions). See Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533, 542-543 (2000).

2) Exceptions: The foregoing general rule is subject to numerous exceptions, including:

a. The period of limitations on assessment can be extended as to any partner pursuant to a written agreement between the IRS and that partner, see I.R.C. § 6229(b)(1);

b. In the case of a fraudulent tax return where a partner signs or participates in the
preparation of the return with the intent to evade tax, the period of limitations on assessment (i) is unlimited as to such partner, and (ii) is six years as to all other partners who did not sign the return or participate in its preparation, see I.R.C. § 6229(c)(1);

c. The period of limitations on assessment is six years in the case of an omission of an item of gross income in excess of 25% of the amount of gross income reported on the return, see I.R.C. § 6229(c)(2);

d. The period of limitations on assessment is six years in the case of an omission of an item from gross income in excess of $5,000 that is foreign-sourced and required to be reported on Form 8938, see I.R.C. §§ 6229(c)(2), 6501(e)(1)(A)(ii);

e. The period of limitations on assessment is unlimited in the where the partner fails to file a tax return, see I.R.C. § 6229(c)(3); and

f. Where the IRS issues a notice of final partnership administrative adjustment, the period of limitations on assessment is suspended for the period during which the partnership can file a petition with the Tax Court and, if a petition is filed, for one year after the decision of the Tax Court becomes final, see I.R.C. § 6229(d).

iii. BBA Self-Employment and Net Investment Income Taxes: Pursuant to I.R.C. § 6501(c)(12), where there is an adjustment to a partnership item pursuant to the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (“BBA”), the period of limitations with respect to the assessment of self-employment tax or the net investment income tax extended until one year after:

1) In the case of an adjustments pursuant to the decision of a court in a proceeding brought under I.R.C. § 6324, such decision becomes final; or

2) In any other case, 90 days after the date on which the notice of the final partnership adjustment is mailed under I.R.C. § 6231.

iv. Other Pass-Through Items: For other pass-through items, including those attributable to S corporations, partnerships
not subject to TEFRA or BBA, and certain trusts and estates, the period of limitations on assessment is determined by reference to the individual’s separate tax return and not the return of any entity generating the item in dispute. See I.R.C. § 6501(a) (final sentence); see also Bufferd v. Commissioner, 506 U.S. 523, 533 (1993).

n. **PHC Tax:** The personal holding company (“PHC”) tax imposed by I.R.C. § 541 can be assessed, or a court proceeding to collect such tax may be brought, at any time within six years after a PHC files a tax return and fails to file with the tax return:

i. A schedule setting forth the items of gross income and adjusted ordinary gross income (as defined in I.R.C. § 543) received during the year; and

ii. The names and addresses of the individuals who owned at any time during the last half of the year more than 50% in value of the stock. See I.R.C. § 6501(f).

o. **Incorrect Tax Returns Filed in Good Faith:**

i. **Trusts or Partnerships:** Where an entity determines in good faith that it is a trust or partnership and files an income tax return as such, and if such entity is thereafter held to be a corporation for the taxable year for which the partnership or trust tax return is filed, then such tax return shall be deemed to be the return of the corporation for purposes of I.R.C. § 6501. See I.R.C. § 6501(g)(1).

ii. **Exempt Organizations:** Where an entity determines in good faith that it is an exempt organization and files a tax return as such pursuant to I.R.C. § 6033, and if such entity is thereafter held to be a taxable organization for the taxable year for which the exempt organization tax return is filed, then such return shall be deemed to be the return of the organization for purposes of I.R.C. § 6501. See I.R.C. § 6501(g)(2).

iii. **DISCs:** Where a corporation determines in good faith that it is a domestic international sales corporation (“DISC”) and files a tax return as such pursuant to I.R.C. § 6011(c)(2), and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the DISC return is filed, then such tax return shall be deemed to be the return of the corporation which is not a DISC for purposes of I.R.C. § 6501. See I.R.C. § 6501(g)(3).

p. **NOL or Capital Loss Carryovers:** A deficiency attributable to the reduction of a net operating loss (“NOL”) carryback or a capital
loss carryback can be assessed at any time prior to the expiration of the period within which a deficiency for the taxable year of the NOL or net capital loss may be assessed. See I.R.C. § 6501(h).

i. **Impacted Years:** If the time to assess a deficiency for the taxable year in which the loss occurred has expired, but the carryover year or carryback year is open by reason of a written agreement between the taxpayer and the IRS pursuant to I.R.C. § 6501(c)(4), the IRS can still issue a notice of deficiency with respect to the open year. See Calumet Indus., Inc. v. Commissioner, 95 T.C. 257, 279-280 (1990).

ii. **Tentative Carryback Adjustments Assessment Period:** The same rules also apply to deficiencies assessed pursuant to I.R.C. § 6213(b)(2), relating to corrections in amounts applied, credited, or refunded as tentative carryback and refund adjustments under I.R.C. § 6411. See I.R.C. § 6511(k). Thus, such deficiencies can be assessed at any time before the expiration of the time for assessing additional tax for the year of the loss. Id.

q. **Foreign Tax Carrybacks:** A deficiency attributable to the reduction of a foreign tax credit carryback under I.R.C. § 904(c) can be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year of the foreign tax credit carryback. I.R.C. § 6511(i).

4. **Period of Limitations on Assessment With Respect to Joint Return Filed After Separate Returns:** The period of limitations on assessment is extended for one year following the date of the filing of a joint tax return, regardless of when the tax return is filed. See I.R.C. § 6013(b)(4).

5. **DSUE Not Subject to Statute of Limitations on the First to Die Spouse:** Review of a Deceased Spouse’s Unexcused Exclusion Amount (“DSUE”) is not subject to the statute of limitations on the first to die, which means that the Service can examine a predeceased spouse’s DSUE on audit of the surviving spouse’s death. See I.R.C. § 2010(c)(5)(B).

6. **Prompt Assessment Requests:**

a. **In General:** Pursuant to I.R.C. § 6501(d), the personal representative of an estate or a liquidating trustee of a liquidating corporation may make a request for prompt assessment that will shorten the period of limitations on assessment from three years to 18 months from the date of the written request therefor.

b. **Taxes to Which the Prompt Assessment Relates:** For an estate, the prompt assessment procedures apply to any tax (other than estate tax) for which a return is required and for which the decedent or
the estate may be liable.

c. **Making the Request for Prompt Assessment on Form 4810:** The prompt assessment request is made by filing with the IRS Form 4810, *Request for Prompt Assessment Under Internal Revenue Code Section 6501(d)*.

d. **The Request for Prompt Assessment Does Not Extend the Three-Year Period of Limitations on Assessment in the Second Circuit:** In *Estate of Callaway v. Commissioner*, 231 F.3d 106, 121 (2d Cir. 2000), the Court of Appeals for the Second Circuit held that the 18-month period for making a prompt assessment does not extend the period of limitations on assessment beyond the normal three-year period. Under the facts of the case, taxpayers, husband (H) and wife (W), timely filed their income tax return for 1988 on April 15, 1988. In 1990, H died. On Dec. 23, 1991, W, acting as personal representative of H’s estate, filed a prompt assessment request with respect to taxpayers’ 1988 return. The Court held that the time for making an assessment expired on April 15, 1992, three years after the filing of the 1988 return, not on June 23, 1993, 18 months after the filing of the prompt assessment request. This was because, the Court held, the 18-month period for assessment (ending on June 23, 1993) does not extend the period for making the assessment beyond the date three years after the filing of the return (April 15, 1992).

e. **The Request for Prompt Assessment Does Not Limit a Statute Extension:** In *Greenfield v. Commissioner*, 95 T.C.M. (CCH) 1080, T.C. Memo. 2008-16 (2008), the Tax Court held that a request for prompt assessment does not limit an agreement entered into by the taxpayer.

f. **Transferee Liability is Not Affected by a Request for Prompt Assessment:** In *Gen. Couns. Mem. 32904 (Aug. 27, 1964)*, the Service addressed whether transferee liability statutes are affected by a request for prompt assessment. The Service held that I.R.C. §§ 6501(d) and 6901(e), when read together, reveal that for purposes of computing the period of limitations on assessment against a transferee, the period of assessment against a deceased person, or dissolved corporation as a transferor, regardless of the fact that a request for prompt assessment has been made, is the period that would be in effect had death or termination not occurred (i.e., the normal 3-year period from the date the return was filed rather than the 18-month period prescribed in I.R.C. § 6501(d)).

7. **Discharge of Personal Representative From Liability After Nine Months:**

a. **General Rule for Liability:**
i. **Regulatory Liability:** Section 20.2002-1 of the Treasury Regulations provides that a personal representative is generally personally liable for the tax debts of a decedent or estate. That section provides as follows:

   Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

ii. **Discharge From Personal Liability for Income and Gift Taxes:** Section 6905(a) of the Code provides, that after a decedent’s individual (but not fiduciary) income or gift tax return has been filed, a personal representative may make written application to the Service office where the estate tax return is filed for release of the PR’s personal liability for such income or gift tax.

b. **Overview of Mechanisms to Discharge a Personal Representative From Liability:** There are various provisions by which a personal representative can limit his or her personal liability. Generally, the personal representative invokes the benefits of these statutory provisions by filing with the Service Form 5495. As suggested by the name of the form, *Request for Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905*, the types of requests that can be made (and the statutory predicates) are as follows:

   i. **Discharge From Personal Liability for Estate Tax:** Section 2204 of the Code provides that a fiduciary other than a personal representative (e.g., a trustee of a revocable trust) may apply for discharge of personal liability for estate tax. The statute provides:

      If the executor makes written application to the Secretary for determination of the amount of the tax and discharge from personal liability thereof, the Secretary (as soon as possible, and in any event within 9 months after the making of such application, or, if the application is made before the return is filed, then within 9 months after the return is filed, but not after the expiration of
the period prescribed for the assessment of the tax in I.R.C. § 6501) shall notify the executor of the amount of the tax. The executor, on payment of the amount of which he is notified (other than any amount the time for payment of which is extended under I.R.C. §§ 6161, 6163, or 6166), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

c. **Effect of Filing Form 5495**: If, in response to the filing of a Form 5495, the personal representative pays the additional tax or if no notice is received from the Service within nine months from the date of filing Form 5495, then the personal representative is discharged from personal liability.

d. **When to File**: Practitioners or personal representatives should file Form 5495 separately but at the same time as the Form 4810.

e. **Time for Service to Respond**: If Form 5495 is properly filed, the Service has nine months to notify the personal representative of any deficiency for decedent’s applicable income or gift tax returns.

8. **Period of Limitations for Assessments Against Transferees**:


b. **Initial Transferees**: The period of limitations on initial transferee assessment under I.R.C. § 6901 expires on the date that is one year after the expiration of the period of limitations on assessment against the transferor. See I.R.C. § 6901(c)(1).

c. **Transferees of Transferees**: The period of limitations on assessment for a transferee of a transferee expires on the date that is one year after the expiration of the period of limitations on assessment against the preceding transferee, except the period of limitations on assessment against a transferee of a transferee does not expire more than three years after the expiration of the period of limitation for assessment against the initial transferor. See I.R.C. § 6901(c)(3).

9. **Special Statute of Limitations Rules for Current and Former Service Members**:

a. **In General**: Where a service member may be affected by a statute of limitations, special attention should be given to whether I.R.C. §
7508(a) provides him or her with relief.

b. **I.R.C. § 7508(a) Generally**: Section 7508(a) of the Code permits a postponement of certain time-sensitive acts for individuals serving in the U.S. Armed Forces or serving in support of such Armed Forces in an area designated by the President as a combat zone under I.R.C. § 112(c)(2), serving with respect to a contingency operation as defined in 10 U.S.C. § 101(a)(13), or who is hospitalized as a result of injury received while serving in such area or operation during such time, and the next 180 days thereafter. I.R.C. § 7508(a).

   i. **Combat Zone Defined**: The term “combat zone” means any area which the President of the United States by Executive Order designates as an area in which Armed Forces of the United States are or have (after June 24, 1950) engaged in combat. See I.R.C. § 112(c)(2).

   ii. **Contingency Operation Defined**: The term “contingency operation” means a military operation that (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations or hostilities against an enemy of the United States or against an opposing military force; or (2) generally results in the call or order to, or retention on, active duty of members of the uniformed services under any provision of law during a war or during a national emergency declared by the President or Congress. See 10 U.S.C. § 101(a)(13).

c. **Covered Time-Sensitive Acts**: As relevant to statutes of limitations, time-sensitive acts covered by I.R.C. § 7508(a) include:

   i. The filing of any income, estate, gift, employment or excise tax return;

   ii. The payment of any income, estate, gift, employment or excise tax or any installment thereof or of any other liability to the United States in respect thereof;

   iii. The filing a petition with the Tax Court for redetermination of a deficiency or for review of a decision rendered by the Tax Court;

   iv. The allowance of a credit or refund of any tax;

   v. The filing a claim for credit or refund of any tax;

   vi. The bringing of suit upon any such claim for credit or refund;

   vii. The assessment of any tax;
viii. The giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;

ix. The IRS’s collection, by levy or otherwise, of the amount of any liability in respect of any tax; and

x. The bringing of suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax. See I.R.C. §§ 7508A(a)(1), 7508(a)(1).

C. Period of Limitations on Collection After Assessment

1. How A Tax Liability Arises – The Assessment Process:
   a. In General: Before discussing the collection of tax liabilities, it is important to first understand the tax assessment process. Professor Steve Jonson has aptly described the process as follows:

   The IRS lacks legal authority to assess and collect certain major taxes—income, estate, gift, and some excise taxes—until the taxpayer has had the opportunity to contest the liabilities in Tax Court. In brief, the process is as follows: First, the taxpayer files a return. Second, the IRS selects the return for examination. Third, if the IRS agent believes that correct liability exceeds liability reported on the return (that is, that a deficiency exists), the agent issues to the taxpayer a preliminary document (the Revenue Agent’s Report or thirty-day letter) setting out proposed adjustments. Fourth, if the taxpayer disagrees, she can obtain administrative review by filing a protest with the IRS Appeals Office. Fifth, if Appeals Office consideration is not requested or no resolution is reached at Appeals, the IRS issues a notice of deficiency (also called a ninety-day letter). Sixth, the taxpayer may contest the determinations in the notice of deficiency by filing a timely petition with the Tax Court. Seventh, if the taxpayer fails to file a timely petition or if the Tax Court holds against the taxpayer in whole or part, the IRS may then assess and collect the deficiency (and interest and penalties, if any). [Steve R. Johnson, Reasoned Explanation and IRS Adjudication, 63 DUKE L.J. 1771, 1794 (Oct. 2013) (footnotes omitted).]

   b. The Assessment Process: In order for the IRS to begin collections, the tax must first be assessed. The basic authority and procedure for assessing tax is set forth in I.R.C. §§ 6201 through 6207. Taxes, including interest, additional amounts, additions to tax, and assessable penalties, are most typically assessed pursuant to one of
the following methods:

i. Assessment under I.R.C. § 6201(a) on the basis of a liability determined by the taxpayer and reported on his or her tax return (i.e., by recording the liability of the taxpayer pursuant to a filed original or amended tax return showing tax due);

   1) **Assessment Process:** An assessment of tax is “the formal recording of a taxpayer’s tax liability” on the IRS’s records. Baltic v. Commissioner, 129 T.C. 178, 183 (2007). Thus, in the voluntary assessment process, the taxpayer voluntarily files a tax return reporting a tax due and owing, and the IRS records that liability.\(^4\)

ii. Through the special deficiency procedures of I.R.C. § 6212, et seq., for income, estate, and gift taxes;

   1) **Traditional Audits:** Subject to the limitations discussed below, the IRS may propose to assess additional tax in a notice of deficiency that is issued in connection with an audit.

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\(^4\) Treasury Regulations provide how the recording of a liability occurs:

The district director and the director of the regional service center shall appoint one or more assessment officers. … The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer.

Treas. Reg. § 301.6203-1. Tax liabilities arise as a matter of law, independent of whether the IRS assesses them. See Ewing v. United States 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991) (rejecting taxpayer’s argument that, prior to assessment, there can be no tax liability and therefore no “payment” of taxes); Lewis v. Reynolds, 284 U.S. 281 (1932) (in suit for refund the question is whether the taxpayer overpaid his liability and thus IRS entitled to revise theory of liability even after assessment limitations period has run). Practitioners may state that taxpayers “self-assess” their liability, but this is a colloquial phrase intended to reflect that the U.S. tax system is a system of self-reporting (not self-assessment). For an excellent discussion of the reasons taxpayers do not “self-assess” liabilities, see Bryan T. Camp, ‘Loving’ Return Preparer Regulation, 140 Tax Notes 457, 462-466 (July 29, 2013).

It is important to understand these legal doctrines for numerous reasons. First, the IRS can (and will) apply payments to unassessed penalties and interest. See Stevens v. United States, 49 F.3d 331, 336 (7th Cir. 1995) (proceeds from forced sale of taxpayer’s building could be applied against accrued interest and penalty liabilities even though the IRS had not assessed those liabilities). Second, transferee liability does not depend on a proper or timely assessment being made against the transferor. See Espinosa v. Commissioner, 24 Fed. Appx. 825, 826-827 (9th Cir. 2001) (transferee liability upheld even though assessment against transferor was improper). These cases are not exhaustive of the various ways in which technicalities matter in tax, but they certainly are illustrative of the fact that specific legal doctrines apply in certain tax situations, and accordingly, that attorneys must use precise language in collection matters.
2) **Automated Underreporter Program:** Subject to the limitations discussed below, the IRS continues to rely increasingly upon third-party matching to detect tax noncompliance. The IRS matches information returns with a taxpayer’s tax identification number and discovers income that was not included on a return and issues a notice of deficiency determining additional tax.

3) **Substitute Returns:** Where the taxpayer fails to file a return and the IRS matches information returns with taxpayer’s tax identification, the IRS can prepare a substitute return under I.R.C. § 6020(b) and issue a notice of deficiency to assess additional tax.

4) **Excise Taxes and Employment Taxes Exempt:** The special deficiency procedures set forth in I.R.C. § 6212, et seq. do not apply to excise taxes or employment taxes.

iii. Through the jeopardy assessment process of I.R.C. § 6861 and 6862 or through the termination assessment processes of I.R.C. § 6851;

iv. Through the TFRP assessment process (discussed below);

v. As otherwise allowed by I.R.C. §§ 6201 through 6207.

c. **Collection Follows Assessment:** Once the tax is assessed and the taxpayer fails to pay the tax liability, the IRS begin the collection process (the types of notices the IRS typically issues are discussed below).

2. **The Period of Limitations on Collection Generally:** The IRS generally has ten years to collect a tax debt. See I.R.C. § 6502(a).

a. **Effect of Proceeding on CSED:** Pursuant to I.R.C. § 6502(a), if a court action is brought against the taxpayer prior to the collection statute expiration date (“CSED”), the collection period is extended until the liability for the tax (or the judgment against the taxpayer) is satisfied or becomes unenforceable.

3. **Date on Which Levy is Considered Made:** The date on which a levy on property or rights to property is made is the date on which the notice of seizure provided in I.R.C. § 6335 is given.

4. **Period of Limitations on Collection With Respect to Joint Return Filed After Separate Returns:** Like the period of limitations on assessment, the period of limitations on collection is also extended for one year following the date of the filing of a joint tax return, regardless of when the tax return
is filed. See I.R.C. § 6013(b)(4).

5. **Period of Limitation on Collection Against Transferees:** The normal ten-year period of limitations on collection applies with respect to a transferee assessment. See I.R.C. § 6502.

6. **Tolling of the Period of Limitations on Collection:**
   a. **Tolling of the Period of Limitations on Collection:** The period of limitations on collection is tolled (i.e., suspended) for any period that the IRS is statutorily barred from pursuing collection against the taxpayer. The most common reasons the CSED may be tolled include:
      i. For the period during which an offer in compromise is pending and, if the offer in compromise is rejected, for 30 days thereafter, see I.R.C. § 6331(k)(1);
      ii. For the period during which an installment agreement is pending and, if the offer in compromise is rejected, for 30 days thereafter, see I.R.C. § 6331(k)(2)(A), (B);
      iii. For the period during which an installment agreement is in effect (unless the terms of the installment agreement provide otherwise), see I.R.C. § 6331(k)(2)(C);
      iv. For the period during which an installment agreement is in effect and, if terminated, for 30 days thereafter, see I.R.C. § 6331(k)(2)(D);
      v. Signing a waiver to extend the period of limitations on collection in the context of an installment agreement or otherwise, see I.R.C. § 7121;
      vi. During the time within which a collection due process (“CDP”) hearing request is pending, see I.R.C. § 6330(e)(1), or generally during the time within which an equivalent hearing (“EH”) request is pending, see I.R.M., pt. 8.22.4.3(4) (Mar. 29, 2012);
      vii. Bankruptcy, see I.R.C. § 6503(h);
      viii. Leaving the country for more than six months, see I.R.C. § 6503(c);
      ix. Request for a Taxpayer Assistance Order, see I.R.C. § 7811(d);
      x. In the case of the estate tax, during the time that an extension of time for payment is granted under the provisions of I.R.C. §§ 6161, 6163, or 6166, see I.R.C. § 6503(d); and
xi. In the case of the estate and gift tax, (a) for the 90-day period during which the IRS is barred from assessing or collecting tax under I.R.C. § 6213(a) (if a notice of deficiency is mailed but a petition is not filed with the United States Tax Court (“Tax Court”)), (b) for the period during which the IRS is barred from assessing or collecting tax under I.R.C. § 6213(a) (if a case is docketed before the Tax Court and until the Tax Court’s decision becomes final), and (c) for 60 days after either date, see I.R.C. § 6503(a)(1).

D. Suspensions of Running of Periods of Limitation on Assessment and Collection

1. In General: Numerous provisions of the Code suspend the running of the periods of limitation on assessment and collection. The policy rationale for these extensions is that the Government should not be harmed where it is barred by law from making an assessment or collecting a tax. These tolling provisions, which are discussed below, effectively allow additional time for the Government to assess or collect a particular tax.

2. Issuance of Notice of Deficiency:
   a. Background on Deficiency Proceedings: If the IRS determines there is a deficiency in tax, he is authorized to send a notice of the deficiency to the taxpayer by registered or certified mail. I.R.C. § 6212(a).
      i. Effect on Validity of Assessment: As a general rule, a notice of deficiency is valid only if it is issued before expiration of the appropriate statute of limitations.
      ii. Effect on Collections: Except in the case of certain jeopardy or termination assessments, the IRS may not assess a deficiency until:
         1) A notice of deficiency has been mailed to the taxpayer; and
         2) The time for filing a petition with the Tax Court has expired (i.e., 90 days generally or 150 days if addressed to a person outside the United States). I.R.C. § 6503(a)(1).
      iii. Effect of Tax Court Petition on Assessment and Collection: If a petition with the Tax Court is filed, then the IRS may not assess the deficiency until 60 days after the Tax Court decision has become final (i.e., for 150 days if no petition has been filed). I.R.C. § 6213(a).
   b. Effect of Issuance of Notice of Deficiency: Pursuant to I.R.C. § 6503(a)(1), the three-year period of limitation on assessment and the ten-year period of limitations on collection are suspended when
the IRS issues a notice of deficiency. If the taxpayer petitions the Tax Court in response to the notice of deficiency, the period of limitations on assessment is tolled until 60 days after the decision of the Tax Court becomes final.  Id.

i. Finality of Tax Court Decisions: A decision of the Tax Court will become final 90 days from the date the decision is entered, unless either party files a timely notice of appeal. I.R.C. § 7481. If an appeal is filed, then the following matrix shows when a Tax Court decision will become final:

<table>
<thead>
<tr>
<th>If</th>
<th>Then</th>
</tr>
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<tbody>
<tr>
<td>the court of appeals affirms the Tax Court’s decision or dismisses the appeal, and a petition for writ of certiorari is not filed by either party within the 90-day period for filing the petition,</td>
<td>the Tax Court decision will become final upon the expiration of the certiorari period (90 days from the date the judgment of the court of appeals is entered).</td>
</tr>
<tr>
<td>the court of appeals affirms the Tax Court’s decision or dismisses the appeal, and either party petitions for a writ of certiorari and the petition is denied,</td>
<td>the Tax Court decision becomes final upon the denial of the petition.</td>
</tr>
<tr>
<td>the petition for certiorari is granted and the Supreme Court affirms the Tax Court’s decision (which has been affirmed by the court of appeals),</td>
<td>the Tax Court decision will become final 30 days from the date of the issuance of the mandate of the Supreme Court.</td>
</tr>
<tr>
<td>the petition for certiorari is granted and the Supreme Court modifies or reverses the Tax Court’s decision (which has been affirmed by the court of appeals),</td>
<td>the Tax Court will be required to enter a new decision in accordance with the mandate of the Supreme Court. This new decision will become final upon the expiration of 30 days from the date it is entered, unless within such 30 days either party institutes proceedings to have the decision corrected to accord with the mandate. In the latter event, the decision will become final when it is corrected.</td>
</tr>
<tr>
<td>the court of appeals modifies or reverses the Tax Court’s decision,</td>
<td>the Tax Court will be required to enter a new decision in accordance with the mandate of the court of appeals (unless the Supreme Court subsequently reverses the court of appeals).</td>
</tr>
<tr>
<td>the court of appeals modifies or reverses the Tax Court’s decision, the certiorari period has expired and neither party has petitioned for a writ of certiorari, or if certiorari has been denied,</td>
<td>the Tax Court will then enter a new decision in accordance with the mandate of the court of appeals. This new decision will become final upon the expiration of 30 days from the date it is entered, unless within such 30 days either party institutes proceedings to have the decision corrected to accord with the mandate. In the latter event, the decision will become final when it is corrected.</td>
</tr>
<tr>
<td>the Supreme Court grants certiorari and affirms the Tax Court’s decision (which was reversed or modified by the court of appeals),</td>
<td>the decision, as already entered, will become final 30 days after the issuance of the Supreme Court’s mandate.</td>
</tr>
<tr>
<td>If</td>
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<tr>
<td>the Supreme Court affirms the court of</td>
<td>the Tax Court will be required to enter a new decision in</td>
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<tr>
<td>appeals (which modified or reversed the Tax Court’s decision) or</td>
<td>accordance with the mandate of the court of appeals or in</td>
</tr>
<tr>
<td>itself modifies or reverses the Tax Court decision,</td>
<td>accordance with the mandate of Supreme Court, respectively. This new decision will become final upon the expiration of 30 days</td>
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<td>from the date it is entered, unless either party institutes proceedings to have the decision corrected to accord with the mandate. In</td>
</tr>
<tr>
<td></td>
<td>the latter event, the decision will become final when it is corrected.</td>
</tr>
</tbody>
</table>

the court of appeals or the Supreme Court remands a case to the Tax Court for a rehearing, the decision entered as a result of the rehearing will become final in the regular manner as if there had been no prior proceedings; i.e., after the expiration of the 90-day appeal period.

See I.R.M., pt. 36.2.5.3 (May 2, 2012).

ii. Effect of Waiver of Period of Limitations on Assessment: Most Tax Court cases are settled by the parties via a stipulated decision. These stipulated decisions typically contain a provision in which the taxpayer waives the restrictions on assessment (i.e., the taxpayer agrees the IRS can assess the tax before 60 days after the stipulated Tax Court decision becomes final). Notwithstanding any waiver by the taxpayer, the IRS still receives the benefit of a suspension of the period of limitations on assessment until 60 days after the Tax Court decision becomes final. See, e.g., Pesko v. United States, 918 F.2d 1581, 1583-1584 (Fed. Cir. 1990); Sherry Frontenac, Inc. v. United States, 868 F.2d 420, 423-424 (11th Cir. 1989).

c. Effect of Invalidly Issued Notice of Deficiency on Statute of Limitations: Section 6503 of the Code provides that the statute of limitations for a tax year is tolled (i.e., suspended) during any time that the IRS is prohibited from making an assessment (e.g., during the time a notice of deficiency is outstanding).

d. Invalidly Issued Notice of Deficiency Does Not Suspend the Notice of Deficiency: No exception is made in I.R.C. § 6503 for an invalidly issued notice of deficiency. Thus, the statute of limitations is not suspended for an invalidly issued notice of deficiency.

3. Assets of Taxpayer in Control or Custody of Court: Pursuant to I.R.C. § 6503(b), the ten-year period of limitations on collection is suspended while all or substantially all of the taxpayer’s assets are in control or custody of a court, and for six months thereafter.

a. Bankruptcy Proceedings Controlled by I.R.C. § 6503(h): By its terms, I.R.C. § 6503(b) also applies to bankruptcy proceedings, but the more specific provision of I.R.C. § 6503(h) generally controls.
4. **Taxpayer Outside of United States:** Pursuant to I.R.C. § 6503(c), the three-year period of limitations on collection is suspended where a taxpayer is outside of the United States for a continuous period of at least six months.

   a. **United States Defined:** For purposes of I.R.C. § 6503(c), the United States included the 50 States and the District of Columbia. See I.R.C. § 7701(a)(9).

5. **Extension of Time for Payment of Estate Tax:** Pursuant to I.R.C. § 6503(d), where the time for paying the federal estate tax has been extended pursuant to I.R.C. § 6161, 6163(a), or 6166, the ten-year period of limitations on collection is suspended for the period of the extension.

6. **Extension of Time for Payment of Tax Attributable to Recoveries of Foreign Expropriation Losses:** Pursuant to I.R.C. § 6167, where a corporation obtains an extension of time to pay the tax attributable to its recovery of foreign expropriation losses, the ten-year period of limitations on collection with respect to the tax attributable to the recovery is suspended for the period of the extension.

   a. **Expropriation Considered:** Expropriation is the act of a government taking privately owned property, ostensibly to be used for public purposes. It is similar to the concept of eminent domain. A corporation may deduct losses attributable to such appropriation. Where a corporation recovers foreign expropriation losses, the corporation generally owes tax with respect to those recovered losses under the tax benefit rule or otherwise.

7. **Wrongful Seizure of Property:** Pursuant to I.R.C. § 6503(f)(1), where the IRS wrongfully seizes or receives property of a third party, the ten-year period of limitations on collection is suspended from the date the property is taken or received until the 30 days after the date on which (a) the IRS returns the property pursuant to I.R.C. § 6343(b), or (b) a judgment secured under I.R.C. § 7426 becomes final.

   a. **Extent of Suspension:** The suspension of the period of limitations on assessment applies only to so much of the assessment as is equal to the amount of money or the value of specific property returned. I.R.C. § 6503(f)(1).

8. **Wrongful Lien on Property of Third Party:**

   a. Pursuant to I.R.C. § 6503(f)(2), where the IRS asserts that a lien attaches to property, the ten-year period of limitations on collection is suspended from the date on which the person becomes entitled to a certificate of discharge pursuant to I.R.C. § 6235(b) with respect to such property and ending on the date which is 30 days after the earlier of:

   i. The IRS no longer holds any amount as a deposit or bond provided in I.R.C. § 6235(b)(4) by reason of such deposit
of bond being used to satisfy the unpaid tax or being refunded or released; or

ii. A judgment secured under I.R.C. § 7426 becomes final.

b. **Extent of Suspension:** The suspension of the period of limitations on assessment applies only to so much of the assessment as is equal to the value of the interest on the United States in the property, plus interest, penalties, additions to tax, and additional amounts attributable thereto. I.R.C. § 6503(f)(2).

9. **Suspension Pending Correction:** Pursuant to I.R.C. § 6503(g), where certain exempt organizations are permitted time to take corrective action to avoid the excise taxes imposed by I.R.C. § 507, 4940 through 4955, 4971, or 4975, the three-year period of limitations on assessment and the ten-year period of limitations on collection is suspended for any period described in I.R.C. § 507(g)(2) or for any extension of time granted to take corrective action under I.R.C. § 4963.

10. **Title 11 Bankruptcy Cases and Receiverships:**

   a. **Bankruptcy Proceeding:** Pursuant to I.R.C. § 6503(h), the periods of limitation on assessment and collection are suspended for the period during which the IRS is prohibited from making an assessment or collecting tax, plus 60 days thereafter for assessments and six months thereafter for collection.

   b. **Receivership Proceeding:** Pursuant to I.R.C. § 6503(h), the periods of limitation on assessment is suspended from the date of the institution of the receivership to 30 days after the date on which the IRS receives notice from the receiver of the receiver’s qualification as required by Treas. Reg. § 301.6036-1(a)(2).

      i. **Suspension Limited to Two-Year Overall Cap:** In any event, the suspension of the period of limitations on assessment cannot be for more than two years. See I.R.C. § 6872.

11. **Extension of Time for Payment of Undistributed PFIC Earnings Tax Liability:** Pursuant to I.R.C. § 6503(i), the running of the period of limitations on collection with respect to any undistributed passive foreign investment company (“PFIC”) earnings tax liability (as defined in I.R.C. § 1294(b)) is suspended for the period of any extension of time to pay such amount under I.R.C. § 1294.

12. **Extension in Case of Certain Summonses:**

   a. **Summonses to Third-Parties:** Pursuant to I.R.C. § 7609(e)(1), where a taxpayer or an agent or nominee of a taxpayer intervenes in a summons enforcement proceeding or begins a proceeding to quash a third-party summons, such intervention or institution suspends the periods of limitation on assessment (under I.R.C. §
6501) and on criminal prosecutions (under I.R.C. § 6531). The suspension continues until a final resolution is reached with respect to the summons. See I.R.C. § 7609(e)(2).

b. **John Doe Summonses:** Pursuant to I.R.C. § 7609(e)(2), the periods of limitation on assessment and collection are also suspended where a John Doe summons is issue under I.R.C. § 7609(f).

i. **Notice Required:** Pursuant to I.R.C. § 7609(i)(4), a summoned party must give notice to the persons involved of any suspension under I.R.C. § 7609.

c. **Other Summonses:** Where a summons is issued pursuant to I.R.C. § 7602, but the summons is not a third-party summons under I.R.C. § 7609 or a designated summons under I.R.C. § 6503(j), there is no suspension of the periods of limitation on assessment or collection.

13. **Claims Against Fiduciaries:** For a discussion of the period of limitations on assessment related to fiduciaries, see *infra* at Section V.C.

14. **Certain Tax Return Preparer Penalties:**

a. **Period of Limitations on Assessment:** The statute of limitations with respect to preparer penalties under I.R.C. § 6694(a) for unreasonable positions and under I.R.C. § 6695 is three years from the later of the due date of the underlying tax return or the date on which the return was filed. See I.R.M., pt. 20.1.6.21(1)(a) (July 26, 2017). Arguably, there is no statute of limitations with respect to preparer penalties under I.R.C. § 6694(b) for willful or reckless conduct or with respect to penalties under I.R.C. § 6700, 6701, 6708, 6713. See I.R.M., pt. 20.1.6.21(1)(b) (July 26, 2017); but see 28 U.S.C. § 2462.

b. **Assessment of Penalties Under I.R.C. § 6694:** Pursuant to I.R.C. § 6694(c)(3), the ten-year period of limitations on collection is suspended for the period during which the Commissioner is prohibited from collecting such penalty on account of the special claim procedures of I.R.C. § 6694(c)(1).

E. **The Effect of Third-Party Fraud on the Statute of Limitations: Allen and BASR:**

1. **The Issue:** An issue currently percolating through the Court is whether the fraud of a third-party, such as the taxpayer’s tax return preparer, extends the three-year period of limitations on assessment under I.R.C. § 6501(c)(1) even if the taxpayer did not act fraudulently.

2. **Split Between the Tax Court and the Claims Court:** Courts take varying views as to whether the fraud of a third party extends the statute of limitations under I.R.C. § 6501(c)(1).

a. **The Tax Court:** In *Allen v. Commissioner*, 128 T.C. 37, 42 (2007), the Tax Court held that a preparer’s fraudulent intent to evade tax
was sufficient to indefinitely extend the period of limitations on assessment under I.R.C. § 6501(c).

b. The Claims Court: In BASR Pship v. United States, 113 Fed. Cl. 181 (Fed. Cl. 2013), aff’d, 795 F.3d 1338 (Fed. Cir. 2015), the Claims Court rejected the reasoning in Allen and held that the I.R.C. § 6501(c) provision extending the statute of limitations for an unlimited time in fraud cases requires an “intent to evade tax” by the taxpayer, and was not extended to fraudulent behavior by a third party.


4. Forum Shopping Opportunities: Practitioners facing this issue should be mindful of the split in the court’s decisions when selecting the litigation forum. They should also check to see whether the Court of Appeals for the Federal Circuit has spoken on the issue.

III. Periods of Limitation on Credits or Refunds

A. The Refund Process

1. In General: The Commissioner is authorized, within the applicable period of limitations, to credit taxpayers for any overpayment of tax. See I.R.C. § 6402(a). The first step for a taxpayer to obtain a credit or refund of an overpayment is the taxpayer must file with the IRS an administrative claim for refund. See I.R.C. § 7422(a). If the IRS determines that the refund claim is timely and has merit, then the IRS will allow the credit or refund. See generally I.R.M., pt. 21.5.3.4.7.2 (Aug. 4, 2010). If the IRS denies the administrative claim for refund, or does not act on within at least six months, then the taxpayer can bring a lawsuit in the appropriate U.S. district court (generally, “District Courts”) or the United States Court of Federal Claims (“Claims Court”) to determine the existence of an overpayment and decide that the taxpayer is entitled to the requested credit or refund.

a. Overpayment Defined: In order for the Commissioner to be authorized to make a refund to a taxpayer, there must be an overpayment of tax. The Code contains detailed rules regarding overpayments, which are set forth in I.R.C. § 6401. Under these rules, an overpayment includes:

5 The IRS may, and often does, determine an overpayment of tax and refund such overpayment to the taxpayer without the taxpayer filing an administrative claim for refund. See generally I.R.C. §6402. This outline does not address situations in which the IRS refunds overpayments without prompting from the taxpayer in the form of an administrative claim for refund.
i. That part of the amount of the payment of any tax which is assessed or collected after the expiration of the applicable statute of limitations, see I.R.C. § 6401(a); and

ii. The amount by which the refundable credits under I.R.C. §§ 31 through 37 exceeds the taxpayer’s income tax, as that income tax is reduced by the credits allowable under I.R.C. §§ 21 through 30D, 38 through 45R, and §53.

b. Subject Matter Jurisdiction of District Courts and the Claims Court: The District Courts have subject matter jurisdiction over tax refund suits pursuant to 28 U.S.C. § 1346(a)(1). The Claims Court has subject matter jurisdiction over tax refund suits pursuant to 28 U.S.C. § 1491(a)(1).

2. Periods of Limitation on Credits of Refund Generally: The Code contains various periods of limitation concerning the time by which an administrative claim for refund must be filed with the IRS and/or a tax refund suit must be filed.

B. Period of Limitations on Administrative Refund Claims

1. I.R.C. § 6511(a) Generally:

   a. The Statute: Section 6511(a) of the Code provides in relevant part:

      Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

   b. Refund Claims With Respect to Taxes for Which a Return is Required: Where the claim for credit or refund of an overpayment of tax concerns a tax for which the taxpayer is required to file a tax return, and where the taxpayer did file a tax return for such tax, then section 6511(a) of the Code provides an administrative claim for refund must be filed, if at all, by the later of:

      i. Three years from the date on which the tax return was filed, or

      ii. Two years from the date on which the tax was paid.

   c. Refund Claims With Respect to Taxes for Which No Return is Filed: Where the claim for credit or refund of an overpayment of tax concerns a tax for which the taxpayer is not required to file a tax return, or where the taxpayer did not file a tax return for such tax, then section 6511(a) of the Code provides an administrative claim for refund must be filed, if at all, within two years from the
date on which the tax was paid.

2. Dates on Which the Statute of Limitations Begins to Run:
   a. Date Return is Filed: In general, a tax return filed before its due date is deemed filed on its due date. See I.R.C. § 6513(a). Special rules exist for returns of Social Security tax and income tax withholding. See generally I.R.C. § 6513(c)(1).
   b. Date Tax is Paid:
      i. Date of Receipt Generally Controls: The date of payment for voluntary payments of tax by cash, check, money order or other certifiable funds is the date on which the IRS receives those funds, not the date on which the check or money order is deposited by the IRS. See Qureshi v. United States, 75 F.3d 494, 496-497 (9th Cir. 1996).
         1) Mailbox Rule: Where a payment is required to be made on or before a prescribed date or within a prescribed period, and the taxpayer satisfies the timely mailing as timely filing requirements of I.R.C. § 7502, the mailing date is deemed to be the date of payment.
      ii. Overpayments Through Offset: Where an overpayment of tax is applied to an alleged tax liability for another tax year, the date of payment is deemed to be the date on which the IRS applied the overpayment to the earlier liability. See I.R.C. § 7422(d).
      iii. Credit Card Payments: The date of payment for voluntary payments of tax by credit card is the date on which the issuer of the card authorizes the payment. See Treas. Reg. § 301.6311-2(b).
      iv. Tax Paid Through Withholding: The date of payment for payments made through withholding is the fifteenth day of the fourth month of the close of the taxable year (i.e., generally, on April 15 of the following year). See I.R.C. § 6513(b)(1).
      v. Other Rules: Other rules exist for estimated tax payments, see I.R.C. § 6513(b)(3), Social Security withholding, see I.R.C. § 6513(c)(2), and certain credits, see, e.g., I.R.C. § 6401(b)(1) (earned income credit). A discussion of these more nuanced rules is outside the scope of this outline.
   3. Limitation on Allowance of Amount of Credits and Refunds:
      a. General Rule: Section 6511(b) of the Code generally provides that no refund may be allowed or made unless the administrative claim for refund is filed within the time prescribed by I.R.C. § 6511(a)
(i.e., by the later of (1) three years from the date on which the tax return was filed, or (2) two years from the date on which the tax was paid). The Code also includes two lookback rules, which may modify the amounts which can be recovered.

b. **Lookback Rule #1: Allowable Credits and Refunds Within Three-Year Period:** In general, where an administrative claim for refund is filed within three years of filing of the tax return, the taxpayer can recover taxes paid within three years immediately preceding the filing of the refund claim. I.R.C. § 6511(b)(2).

c. **Lookback Rule #2: Allowable Credits and Refunds Within Two-Year Period:** In general, where an administrative claim for refund is not filed within that three-year period, the taxpayer can recover taxes paid during the two years immediately preceding the filing of the refund claim. I.R.C. § 6511(b)(2).

**Note:** The foregoing lookback rules are subject to very nuanced rules, which should be consulted in connection with any refund claim where these rules are implicated.

4. **Requirements for a Valid Claim for Refund:** There are numerous hypertechnical requirements for there to be a valid administrative claim for refund.

a. **Separate Refund Claims Required for Each Period:** Taxpayer must submit a separate administrative claim for refund for each type of tax for each tax period at issue. See Treas. Reg. § 301.6402-2(d)

b. **Forms to be Used:** Administrative claims for a credit or refund of income tax must be made either on the original tax return or on an amended tax return. Treas. Reg. § 301.6402-3. Administrative claims for a credit or refund of other taxes generally must be filed on a Form 843, *Claim for Refund and Request for Abatement*.

c. **Legal Theories and Factual Bases Required:** An administrative claim for refund must set forth all legal theories and factual bases upon which the taxpayer relies to support the refund claim. As discussed below, the failure to do so can have drastic consequences administratively and in subsequent litigation.

d. **Submitted Under Penalty of Perjury:** An administrative claim for refund should be submitted under penalties of perjury. See Treas. Reg. § 301.6402-2(b). Despite this regulatory requirement, in certain limited circumstances and as discussed above, courts have allowed “informal claims.”

5. **Amendments to Claim for Refund and the Variance Doctrine:** Ensuring a timely administrative claim refund is of paramount importance. Where a practitioner is short on time, he or she file a refund claim timely and amend or supplement it as soon as possible.
a. **Amending Administrative Claims for Refund:** In general, a taxpayer may supplement or amend a previously filed administrative refund claim after the expiration of the time to file an administrative claim so long as: (i) the original refund claim was timely filed, see I.R.C. § 6511(a); (ii) the IRS has not issued a notice of disallowance, see United States v. Kales, 314 U.S. 186, 197-198 (1941); or (iii) the IRS has not allowed the claim in full. However, an amendment or supplement filed after the period of limitations on the administrative claim for refund has run cannot be used to obtain a refund on a new ground. See United States v. Andrews, 301 U.S. 517, 527 (1938).

b. **Variance Doctrine:** It is important that taxpayers present in their administrative refund claim all legal theories and factual bases they intend to rely upon in a subsequent litigation. The “variance doctrine” bars taxpayers from presenting claims in a refund suit that substantially vary from the legal theories and factual bases set forth in the administrative refund claim presented to the IRS. Lockheed Martin Corp. v. United States, 210 F.3d 1366, 1371 (Fed. Cir. 2000); see also I.R.C. § 7422(a) (statutory requirements); Treas. Reg. § 301.6402-2(b)(1).

6. **Special Rules in Case of an Extension by Agreement:** Where the taxpayer and the IRS have entered into a written agreement under I.R.C. § 6501(c)(4) to extend the time to assess tax, the rules regarding the date on which the claim must be filed (and the amount allowable as a claim) are modified in accordance with I.R.C. § 6511(c).

a. **Time for Filing Claim:** The time for filing an administrative claim for refund does not expire until six months after the expiration of the period for making an assessment as prescribed in the written agreement to extend the period of limitations on assessment (and any extension thereto).

b. **Limit on Amount:** Where the general period of limitations under I.R.C. § 6511(a) is extended pursuant to an agreement between the taxpayer and the IRS as set forth in I.R.C. § 6501(c)(4), the amount of the allowable credit or refund is limited to the portion of the tax paid after the execution of the agreement and before the filing of the claim or the making of the credit or refund, plus the portion of the tax paid that would be refundable if a claim for refund had been filed on the date of the extension agreement. I.R.C. § 6511(c)(2).

7. **Inaction by the IRS and the Little Tucker Act:** At times, the IRS will take no action on the claim (neither grant nor disallow). Historically, it has been understood that in those situations, no statute of limitations governs when a refund suit may be filed, although the government could claim laches if the delay is excessive.

8. **Equitable Tolling in Refund Cases:** “Equitable tolling” cannot extend refund claim and refund suit statutes of limitation. *United States v. Brockamp*, 519 U.S. 347, 350-354 (1997). However, as discussed below, tolling may arise pursuant to I.R.C. § 6511(h) with respect to a “financially disabled” taxpayer.

9. **Questionable Strategies: Paying Tax After the Expiration of the Period of Limitations on Assessment and Suing for a Refund:** If the period of limitations on assessment with respect to a given tax period has arguably expired before the IRS issues a notice of deficiency, it may be unwise to pay the liability and commence a refund action in District Court. The *sine qua non* of a valid refund claim is an *overpayment* of tax. *Lewis v. Reynolds*, 284 U.S. 281 (1932); see also *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947). A taxpayer may volunteer to pay an uncollectible tax, but the IRS need not (and will not) allow a refund unless and until the taxpayer proves an overpayment, regardless of whether the IRS could have assessed and collected the tax in the first place.

C. **Limitations in Case of Petition to Tax Court**

1. **The Tax Court’s Overpayment Jurisdiction:** I.R.C. § 6512(b)(1) authorizes the Tax Court to determine whether a taxpayer has made an overpayment of tax and the amount of the overpayment.

2. **Payment of Credit or Refund From IRS:** Once the Tax Court’s decision that there is an overpayment in the taxpayer’s tax liability, the IRS must credit or refund the amount of the overpayment. See I.R.C. § 6512(b)(1).

3. **Limitation on Amount to be Credited or Refunded:** The amount to be credited or refunded to the taxpayer under I.R.C. § 6512(b)(1) is limited to:
   a. Tax paid after the mailing of the notice of deficiency, see I.R.C. § 6512(b)(3)(A);
   b. If, on the date of the mailing of the notice of deficiency, a claim had been filed stating the grounds upon which the Tax Court finds that there is an overpayment, then the tax paid within the period applicable under I.R.C. § 6511(b)(2), (c), or (d) (discussed above), see I.R.C. § 6512(b)(3)(B);
   c. Tax paid within the period applicable under I.R.C. § 6511(b)(2), (c), or (d) with respect to any administrative claim for refund filed within the applicable period specified in I.R.C. § 6511 and before
the date of the mailing of the notice of deficiency, see I.R.C. § 6512(b)(3)(C). The foregoing claim must: (i) not have been disallowed before the date of the mailing of the notice of deficiency, or (ii) have been disallowed before the date of the mailing of the notice of deficiency and in respect of which a timely suit for refund could have been commenced as of the date of the mailing of the notice, or in respect to which a suit for refund was started before the date of the mailing of the notice and within the period specified in I.R.C. § 6532.

4. Proceedings to Enforce Overpayment: Taxpayers may commence a proceeding to enforce an overpayment determination by the Tax Court.
   a. Commencement of Proceeding: A proceeding to enforce an overpayment determined by the Tax Court is commenced by filing a motion with the Court.
   b. Contents of Motion (Rule 260(a) and (b)): A motion to enforce an overpayment shall include a copy of the docket number of the case in which the overpayment was determined, and shall include the following:
      i. The taxpayer’s name and current mailing address;
      ii. A statement whether any dispute exists between the parties regarding the fact or amount of interest payable in respect of the overpayment determined;
      iii. A copy of the Court’s decision, together with a copy of any computation filed under Rule 155;
      iv. A copy of the taxpayer’s written demand to the Commissioner to refund the overpayment; and
      v. A statement as to whether the taxpayer requests an evidentiary or other hearing.
   c. Response Required (Rule 260(c)): The Commissioner must file a written response within 30 days of the date on which the motion is served.
   d. Disposition of Motion (Rule 260(d)): A motion will typically be disposed of without a hearing unless it is clear that there is a bona fide factual dispute that cannot be resolved.


D. Suspension and Exceptions to the Running of the Period of Limitations for Credit
or Refund

1. Unable to Manage Financial Affairs Due to Disability: Pursuant to I.R.C. § 6511(h), the period of limitations for filing a refund claim is suspended during any period that an individual taxpayer is “financially disabled” (i.e., “unable to manage his financial affairs by reason of a medically determinable physical or mental impairment ... which can result in death which has lasted or can be expected to last for a continuous period of 12 months.”). I.R.C. § 6511(h).

2. Wrongfully Incarcerated Individuals – Off-Code Provisions of I.R.C. § 139F: An exception to the general rule under I.R.C. § 6511 applies for wrongfully incarcerated individuals who claim a refund with respect to remuneration they received as a result of the wrongful incarceration, which remuneration is excludible from gross income under I.R.C. § 139F. For those individuals: “[i]f the credit or refund of any overpayment of tax resulting from the application of this Act to a period before the date of enactment of this Act [December 18, 2015] is prevented as of such date by the operation of any law or rule of law (including res judicata) [e.g., by I.R.C. § 6511], such credit or refund may nevertheless be allowed or made if the claim therefor is filed before the close of the 3-year period beginning on the date of the enactment of this Act [i.e., by December 18, 2018].” Consolidated Appropriations Act, 2016, Pub. L. 114-113, div. Q, title III, § 304(d), 129 Stat. 3088 (Dec. 18, 2015); see also Bipartisan Budget Act of 2018, Pub. L. 115-123, div. D, title II, § 41103(a), 132 Stat. 155 (Feb. 9, 2018).

3. Other Exceptions: There are many other exceptions, including those for bad debts and worthless securities, NOLs and capital loss carrybacks, foreign tax credits, etc. See generally I.R.C. § 6511. This outline does not address these other exceptions.

E. Setoff and Equitable Recoupment

1. Overview: The government may assert a setoff to an otherwise time-barred adjustments as a defense in refund litigation (which it cannot assert in deficiency cases in Tax Court).


a. Using the Doctrine of Equitable Recoupment in Refunds:

i. Issue: A separate issue is whether the doctrine of equitable recoupment might also be used to invoke the jurisdiction of a refund court.

ii. The Doctrine of Equitable Recoupment: The doctrine of equitable recoupment allows the bar of an expired statutory limitation period to be overcome to prevent inequitable windfalls resulting from inconsistent tax treatment of the same transaction, item, or event affecting the taxpayer or a sufficiently related taxpayer. See United States v. Dalm, 494 U.S. 596, 605-06 n.5 (1990); Rothensies v. Elec. Storage Battery Co., 329 U.S. 296 (1946); Stone v. White, 301 U.S. 532 (1937).

iii. Elements of Equitable Recoupment: In Estate of Mueller v. Commissioner, 101 T.C. 551, 552 (1993), the Tax Court ruled that the party claiming the benefit of equitable recoupment must prove:

1) The overpayment or deficiency for which recoupment is sought is barred by an expired period of limitation;

2) The time-barred overpayment or deficiency arose out of the same transaction, item, or taxable event as the overpayment or deficiency before the Court;

3) The transaction, item, or taxable event has been inconsistently subjected to two taxes; and

4) If the transaction, item, or taxable event involves two or more taxpayers, there is sufficient identity of interest between the taxpayers that they should be treated as one.

F. Mitigation

1. The Issue: A Court Lacks Jurisdiction to Grant Refund or Determine Overpayment for Years Not Before It: Where a court denies a tax benefit for a certain tax year on the ground that the benefit was claimed for the wrong year, the courts lacks jurisdiction to decide whether the deduction is allowable for a subsequent year not before it. See I.R.C. § 6214(b) (stating that, in redetermining a deficiency for a given year, the Tax Court “shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid”).

2. Revival of Disallowed Tax Benefits Through the Mitigation Provisions: A disallowed tax benefit in one year may be revived for another year in a refund forum or as part of a closing agreement with the IRS with respect to both years. The basis for this theory is found in the byzantine
mitigation provisions of I.R.C. §§ 1311 through 1314.

a. **Introduction to the Mitigation Provisions:** Section 1311(a) of the Code generally provides:

   If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

b. **Parsing the Statute:** Section 1311 of the Code requires readers to navigate a maze of related statutory provisions, but for the determined practitioner, it provides a way to revive a tax benefit that is otherwise disallowed as being claimed for the wrong tax year.

   i. **Determination Defined:** Section 1313(a) of the Code specifies that a “determination” for purposes of I.R.C. §§ 1311 and 1312 includes, among other things, a Tax Court decision which has become final, a closing agreement, a final disposition by the Commissioner of a claim for refund.

   ii. **When Mitigation Claim Authorized:** Section 1312(4) of the Code, in turn, clarifies that a mitigation claim is authorized if “[t]he determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.” Thus, if the Tax Court determines that a deduction for a particular year is disallowed on the grounds that the deduction was claimed prematurely, then the Tax Court’s determination in that regard would give rise to a refund claim with respect to the deduction for the later (proper) year.

3. **Using the Mitigation Provisions to Open a Closed Year:** Section 1314(b) of the Code answers how the mitigation provisions apply to reopen an otherwise closed year. That section provides:

   The adjustment authorized in section 1311(a) shall be made by assessing and collecting, or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the
taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years. If, as a result of a determination described in section 1313(a)(4), an adjustment has been made by the assessment and collection of a deficiency or the refund or credit of an overpayment, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis of such alteration or revocation and any overpayment or deficiency resulting from such redetermination shall be refunded or credited, or assessed and collected, as the case may be, as an adjustment under this part...[I.R.C. § 1314(b).]

Thus, under I.R.C. § 1314(b), an adverse determination from the Tax Court with respect to the tax benefit opens the period of limitations for claiming a refund in the later year for one year from the date of the adverse determination (i.e., from one year from the date on which the adverse determination of the Tax Court becomes final). In such circumstances, as explained immediately below, the tax benefit can be revived through a related refund claim.

4. How Much of the Benefit Can Be Revised Using Mitigation: Section 1314(a) of the Code specifies the rules for calculating the amount of the adjustment allowed under the mitigation provisions. That section provides the following steps for determining the amount of the benefits that can be revived:

a. First, the taxpayer’s liability for the taxable year with respect to which the error was made must first be determined;

b. Second, the increase or decrease in tax previously determined which results solely from the correct treatment of the item that was subject of the error, must be figured;

c. Third, the amount(s) of the increase or decrease in tax for each taxable year is the amount of the adjustment for that taxable year;

d. Fourth, the adjustment under I.R.C. § 1314 is determined on a year-by-year basis. See El Paso CGP Co., L.L.C. v. United States, 748 F.3d 225, 231 (5th Cir. 2014). Thus, the full amount of the disallowed deduction for the earlier year could potentially be allowed for the later year.

IV. Periods of Limitations in Judicial and Quasi-Judicial Proceedings

A. Suits by Taxpayers for Refunds

1. Statute of Limitations:
a. **The Statute:** Section 6532(a) of the Code specifies the time during which a taxpayer may commence a suit for a refund of tax under I.R.C. § 7422(a). The statute provides:

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

b. **Parsing the Statute:** Section 6532(a) of the Code provides a that a taxpayer may bring a suit for a refund of tax may be brought on the earlier of: (1) six months from the date the administrative claim for refund is filed; or (2) the date on which the IRS disallows the claim. The statute further provides that a refund suit must be brought, if at all, no later than two years from the date on which the IRS sends the taxpayer a notice of disallowance by certified or registered mail. I.R.C. § 6532(a); see Treas. Reg. § 301.6532-1.

2. **The Flora Full-Payment Rule:** A refund court’s jurisdiction is typically predicated on full payment of the tax. Under the so-called full-payment rule, a taxpayer must pay tax liabilities in full before District Court may acquire jurisdiction over a refund suit. 28 U.S.C. § 1346(a)(1); Flora v. United States, 362 U.S. 145, 150-151 (1960).

a. **Estate and Gift Taxes:** The “full payment” rule also applies to estate and gift tax refund suits. See, e.g., Rocovich v. United States, 933 F.2d 991, 994-995 (Fed. Cir. 1991); but see I.R.C. § 7422(j) (allowing a refund suit where the sole reason the estate tax has not been fully paid is because of an election under I.R.C. § 6166).

b. **Penalties and Interest:** However, the taxpayer may not need to first pay the interest or penalties, unless the computation of either is in dispute. See Flora, 362 U.S. at 174 n. 37.

c. **Divisible Taxes:** In cases of divisible taxes (e.g., employment taxes or excise taxes), only a divisible portion of the tax assessment need be paid. Boynton v. United States, 566 F.2d 50, 52-54 (9th Cir. 1977). The United States will then typically counterclaim for the remaining liability.

3. **Does 28 U.S.C. § 2401 Establish a Six-Year Outside Limit on Refund Suits in District Court?**
a. **In General:** The IRS has taken the position that 28 U.S.C. § 2401, which provides that every civil action commenced against the United States must be commenced within six years after the right of action first accrues (i.e., in the refund suit context, six and one-half years after the administrative refund claim is filed). The Claims Court and some District Courts are split on the issue.

b. **Claims Court:** The Claims Court takes the position that I.R.C. § 6532(a) is a statutory override to 28 U.S.C. § 2401. See, e.g., See Detroit Trust Co. v. United States, 131 Ct. Cl. 223 (1955) (rejecting the Government’s claim that the general six-year statute of limitations for bringing suit under 28 U.S.C. § 2501 against the Government barred the taxpayer’s suit).

c. **The IRS and Some District Courts:** The IRS has taken the position, and some District Courts have agreed, that district court suits for refund also are subject to the six-year statute of limitations in 28 U.S.C. §2401(a). See, e.g., Finkelstein v. United States, 943 F. Supp. 425, 432 (D.N.J. 1996).

4. **Extension by Agreement:** Pursuant to I.R.C. § 6532(a)(2), the two-year period for commencing a refund suit can be extended by a written agreement between the IRS and the taxpayer. For this purpose, the IRS uses Form 907, *Agreement to Extend the Time to Bring Suit*.

5. **Waiver of Notice of Disallowance:** Pursuant to I.R.C. § 6532(a)(3), where a taxpayer waives the requirement that the IRS must mail a notice of disallowance, the two-year period begins to run on the date the waiver is filed. A taxpayer waives the requirement for a notice of claim disallowance by executing Form 2297, *Waiver of Statutory Notification of Claim Disallowance*. See I.R.M., pt. 8.7.7.6 (June 2, 2015).

6. **Reconsideration After Mailing of Claim Disallowance Notice:** Pursuant to I.R.C. § 6532(a)(4), whether the IRS agrees to reconsider its decision to disallow a refund claim after issuing a disallowance note, the reconsideration does not extend the time for filing suit under I.R.C. § 6532(a)(1).

7. **Premature Refund Suits:** Premature refund suits are dismissed without prejudice for lack of subject matter jurisdiction. See Lewis v. United States, 208 Ct. Cl. 969, 972 (1975).

B. **Suits by United States to Recover Erroneous Refunds**

1. **In General:** When the IRS determines that it has made an erroneous refund, it may:

   a. Issue a notice of deficiency or, if not applicable, make an additional assessment (assuming these options are not otherwise time-barred); or

   b. Institute a suit against the taxpayer to recover the erroneous refund
under I.R.C. § 7405.

2. **Credits or Refunds After the Period of Limitations – I.R.C. § 6532(b):**
   
a. **The Statute:** Section 6532(b) of the Code provides:

   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 the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

b. **Parsing the Statute:** Pursuant to I.R.C. § 6532(b), a suit to recover an erroneous refund must be brought, if at all, within two years of the date on which the refund is made, except that the statute of limitations is extended to five years if the refund was made on account of fraud or misrepresentation of a material fact.

3. **“Making of the Refund”:** The two-year statute of limitations to file suit under I.R.C. § 7405 begins on the date on which the refund is made. A refund is “made” on the date of payment or the date of receipt of the refund check. See United States v. Wurts, 303 U.S. 414, 418 (1938).

C. **Periods of Limitation on Criminal Prosecutions**

1. **General Rule:** Section 6531 of the Code provides that the period of limitations on criminal prosecutions statutes of limitations for finding an indictment or instituting an information is three years after the commission of the offense, except that the period of limitations is six years:

   a. For offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

   b. For the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, see I.R.C. § 7201;

   c. For the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document), see I.R.C. § 7206(2);

   d. For the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations, see I.R.C. §§ 7202, 7203;

   e. For offenses described in I.R.C. §§ 7206(1) and 7207 (relating to
false statements and fraudulent documents);

f. For the offense described in I.R.C. § 7212(a) (relating to intimidation of officers and employees of the United States);

g. For offenses described in I.R.C. § 7214(a) committed by officers and employees of the United States; and

h. For offenses arising under 18 U.S.C. § 371, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

2. Date From Which Statute Begins to Run: The general rule is the statute of limitations begins to run from the later of the due date of the return or the last affirmative act of evasion.

a. Delinquent Tax Filings: If the delinquent filing of a false return is the method of attempting to evade, the statute will being to run on the date the return if filed. United States v. Habig, 390 U.S. 222, 225 (1968).

3. The Continuing Offense Doctrine and the Last Act of Evasion: The date of filing a fraudulent return is normally the date from which to measure the start of the statute of limitations for criminal prosecution for tax evasion. However, this date is not necessarily the last act in furtherance of the evasion. Any subsequent act, such as making false statements to an agent in an audit in order to further hide the evasion, can revive the statute of limitations on the original evasion (as well as constitute a separate crime under 18 U.S.C. § 1001). United States v. Beacon Brass Co., 344 U.S. 43, 45-46 (1952).

V. Special Rules


1. In General: Certain penalties in the Code can be assessed at any time. See, e.g., I.R.C. §§ 6700 (relating to promoting abusive tax shelters); 6701 (relating to penalties for aiding and abetting an understatement of tax liability). However, certain taxpayers have recently argued that, absent a specific exception to the contrary, 28 U.S.C. § 2462 places an outside date of five years by which all penalties must be asserted. See, e.g., Groves v. United States, No. 16 C 2485 (N.D. Ill. May 5, 2017).


   Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United
States in order that proper service may be made thereon.

3. Civil Tax Penalties Assessed by the IRS Do Not Arise From an “Action, Suit or Proceeding”: By its terms, § 2462 governs only an “action, suit or proceeding for the enforcement of” a fine or penalty. In Capozzi v. United States, 980 F.2d 872, 874 (2d Cir. 1992), the Court of Appeals for the Second Circuit stated that the terms “action,” “suit,” and “proceeding” implicate some adversarial adjudication, be it administrative or judicial.” The courts to have considered whether penalties asserted under I.R.C. §§ 6700 and 6701 arise in an adversarial proceeding have all held that the proceedings with the IRS are ex parte and therefore excepted from the provisions of 28 U.S.C. § 2462. See, e.g., Capozzi, 980 F.2d at 874-875; Lamb v. United States, 977 F.2d 1296, 1297 (8th Cir. 1992); Mullikin v. United States, 952 F.2d 920, 928 (6th Cir. 1991).

B. Statutes of Limitation Under the Bank Secrecy Act (as Most Relevant to Tax)

1. Background on FBARs: The Bank Records and Foreign Transactions Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970), better known as the Bank Secrecy Act (“BSA”), generally requires each United States person having a financial interest in, or signature or other authority over, one or more bank, securities, or other financial accounts in a foreign country with an aggregate value greater than $10,000 at any point during a particular calendar year to report such relationship to the IRS (and provide such information as the IRS may require) for each year during which such relationship exists. See 31 U.S.C. § 5314; 31 C.F.R. § 1010.350; 31 C.F.R. § 1010.306(c). This relationship and information is required to be reported on Financial Crimes Enforcement Network (“FinCEN”) Form 114, Report of Foreign Bank Accounts and Financial Accounts (“FBAR”). Stated differently, an FBAR is generally required to be filed if:
   a. The filer is a United States person;
   b. Who had one or more bank, securities, or other financial accounts during the calendar year;
   c. The financial account is in a foreign country;
   d. The person had a financial interest in or signature authority over the financial account; and
   e. The aggregate amount of the value of the financial account or financial accounts in U.S. dollars exceeded $10,000 at any point during the calendar year.

2. Applicable Penalties:
   a. Overview: The civil penalties that apply to violations of the BSA and certain related statutes are set forth in 31 U.S.C. § 5321. These civil penalties are: (1) negligence penalties under 31 U.S.C. § 5321(a)(6)(A); (2) pattern of negligent activity penalties under 31 U.S.C. § 5321(a)(6)(B); (3) penalties for nonwillful violations
under 31 U.S.C. § 5321(a)(5)(A) and (B); and (4) penalties for willful violations under 31 U.S.C. § 5321(a)(5)(A) and (C). The most commonly asserted penalties are the willful and nonwillful penalties for failure to file

b. Willful Failure to File FBARs: Under 31 U.S.C. § 5321(a)(5)(A) and (C), the IRS is authorized to impose a civil penalty on any person who willfully violates or causes a violation of any provision of 31 U.S.C. § 5314 (requiring the filing of FBARs). The maximum civil penalty that can apply to a person who willfully violated the FBAR reporting requirements is the greater of $100,000 or 50% of the value of the account at the time of the violation. See 31 U.S.C. § 5321(a)(5)(C), (D).

c. Nonwillful Failure to File FBARs: Pursuant to 31 U.S.C. § 5321(a)(5)(A) and (B), the Secretary of the Treasury (or his delegate) is authorized to impose a civil penalty of up to $10,000 on any person who violates or causes to be violated any provision of 31 U.S.C. § 5314 (requiring the filing of FBARs). See 31 U.S.C. § 5321(a)(5)(A), (B).

3. Statute of Limitations With Respect to Assessments of FBAR Penalties: Pursuant to 31 U.S.C. § 5321(b)(1), the period of limitations on assessment with respect to penalties for failure to file an FBAR is six years from the date of the “transaction.”

a. “Transaction” Defined: Per I.R.M, pt. 4.26.17.3.1(2)(d) (May 5, 2008), the transaction referenced in 31 U.S.C. § 6321(b) is the due date of the FBAR (i.e., June 30 of the calendar year following the year to which the reporting relates).

4. Statute of Limitations With Respect to Collection of FBAR Penalties: The Government has an unlimited period of time within which to obtain payment of the FBAR by offsetting payments. See 31 U.S.C. § 3716(e)(1). However, it is often more expedient for the government to file suit to reduce an FBAR assessment to judgment because the collection devices available to the government with respect to judgments are much broader. Pursuant to 31 U.S.C. § 5321(b)(2), the Government has two years in which to file a civil action to recover an FBAR penalty.

C. Fiduciary Liability

1. Periods of Limitation Applicable to Liability of Fiduciaries: The liability of a fiduciary under 31 U.S.C. § 3713(b) expires on the date that is the later of (a) one year after the liability arises, or (b) not later than the expiration of the period for collection of the tax in respect of which such liability arises. See I.R.C. § 6901(c)(3); see also I.R.M., pt. 4.11.52.4 (Nov. 1, 2004).

2. Interplay of 31 U.S.C. § 3713(c) and I.R.C. § 6901(c)(3): 31 U.S.C. § 3713(b) creates the underlying liability for the fiduciary and I.R.C. §
6901(a)(b) and (c)(3) authorizes the IRS to use its standard assessment and collection methods for the liability (i.e., the notice of liability).

D. Wartime Suspension of Periods of Limitation – 28 U.S.C. § 3287:

1. **The Statute:** Section 3287 of title 28 of the United States Code provided:

   When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, …the running of any statute of limitations applicable to any offense …involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not …shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.