The Role of Form 4340 in Tax Litigation

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Overview of the Assessment Process
Two Functional Boxes

**Determination**
- Regular (no review)
- Deficiency (ct. review)
- Quasi - (admin review)

**Collection**
- Admin. Proceedings (e.g. CDP)
- Court Proceedings in Tax Court
- in other Fed. Ct.

**Assessment**

**Reconsiderations:** Audit and Spouse Relief
The Administrative Process
Verification

The Big Presumptions:

- Form 4340 creates a presumption that the assessment was proper and the taxpayer must then show that the assessment was erroneous to prevail. *E.g.* *U.S. v. Korman*, 388 Fed. Appx. 914 (11th Cir. 2010)

- Administrative Regularity

TP’s Burden: Must show that the Form 4340 has incorrect entries, material discrepancies, or is missing data.

How To Meet The Burden: Verify the Form 4340 using:

- Transcripts
- FOIA Request
Verification (cont.)

- Lots of Different Transcripts:
  1. **Transcripts for outsiders**: Transcript Delivery System ("TDS")
      Return Transcripts; Account Transcripts; Records of Account; Wage and Income Transcripts; Verification of non-filing letters
  2. **Transcripts for insiders**:
      CSED Transcripts, History Transcripts, CC MFTRAX, CC TXMOD, CC BRTVU/RTVUE, CC ENMOD, CC BMFOL/IMFOL
**CSED**

- **General Rule:** The Standard 10 year CSED will be tolled during any period IRS cannot collect (I.R.C. § 6502)

- Events that will toll or suspend CSED
  - Pending OIC Request
  - Pending CDP Request
  - Leaving the country for more than 6 months
  - Signed waiver within context of an Installment Agreement
  - Pending Installment Agreement
  - Bankruptcy
Vulnerable Aspects of Form 4340

- Verify the conditions precedent for the assessment of:
  - Tax – I.R.C. §§ 6211, 6212, 6501(c), 6501(c)(4), 6502, 6331
  - Interest – I.R.C. §§ 6404 (g), 6155
  - Penalty – I.R.C. §§ 6751(b), 6155
Vulnerable Aspects of Form 4340 (cont.)

- Tax
  - Was the notice of deficiency sent and, if sent, was it sent to the taxpayer’s last known address
  - Was there a suspension (generally in collection cases) or an extension of the statute of limitations
    - Presumption of correctness does not attach to the extension of a statute of limitations in collection
    - The statute is presumed expired and the burden shifts to the Government to show it was validly extended
Vulnerable Aspects of Form 4340 (cont.)

- **Interest**
  - Was the interest suspended under I.R.C. § 6404(g)
  - For assessable penalties (e.g., I.R.C. § 6672 penalties) was there a proper notice and demand sent to the taxpayer at his/her last known address

- **Penalty**
  - Has the IRS complied with I.R.C. 6751(b)
  - Are the penalties summarily assessable
Tax Court v. District Court
Players

Form 4340 is prepared in anticipation of litigation. I.R.M., pt. 3.17.243.9.2(1), (2) (June 22, 2017) for:

- The Department of Justice in District Courts
- Office of Chief Counsel in Tax Court
- IRS Office of Appeals in CDP cases
Presumptions and Burdens of Proof

- **I.R.C. § 7491(c): Penalties**
  - “the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.”

- **I.R.C. § 6501(c)(4): ASED**
  - The presumption of correctness does not attach to the extension of a statute of limitations on assessment

- **I.R.C. § 6502: CSED**
  - The presumption of correctness does not attach to the extension of a statute of limitations on collection
Litigation – Collection Due Process Cases

- I.R.C. § 6330(c)(1) requires that an Appeals officer obtain verification from the IRS “that the requirements of any applicable law or administrative procedure have been met”

- The IRS can satisfy this showing by producing a Form 4340 and relying upon its presumption of correctness
Litigation – Collection Due Process Cases (cont.)

- Verification includes (but is not limited to):
  - Record of assessment (I.R.C. § 6203) *(i.e., the Form 4340)*;
  - Issuance of a notice of deficiency if the assessment is for more than the tax shown on the return (I.R.C. § 6212);
  - Notice and demand of payment (I.R.C. §§ 6303, 6321, 6331(a));
  - SOL on assessment has not expired (I.R.C. § 6501);
  - SOL on collection has not expired (I.R.C. § 6502);
  - Document demonstrating compliance with I.R.C. § 6751(b)(1) if a non-automatic penalty is to be collected; and
  - Verification of contacts required by I.R.C. § 6404(g) for non-suspension of interest.
Litigation – District Court

- Form 4340 creates a presumption that the assessment was proper and the taxpayer must then show that the assessment was erroneous to prevail. See *United States v. Korman*, 388 Fed. Appx. 914, 915 (11th Cir. 2010) see also *United States v. Chila*, 871 F.2d 1015, 1019 (11th Cir. 1989).

- Types of Litigation
  - Suits to reduce an assessment to judgment
  - Tax lien foreclosure actions
  - Refund litigation
Litigation – Passport Revocation

- Code Section 7345(a) provides:
  - “If the Secretary receives certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt, the Secretary shall transmit such certification to the Secretary of State for action with respect to denial, revocation, or limitation of a passport pursuant to section 32101 of the FAST Act.”

- Judicial review of the IRS’s decision to certify a seriously delinquent tax debt may be brought in the U.S. district courts or the Tax Court.
Differences in Courts Around the Country

- Discovery practice with respect to documents used to prepare the Form 4340
  - Notable rules:
    - Fed. R. Civ. Proc. 26 through 37
    - Tax Ct. R. 70 through 74, and 90

- Summary judgment