Tax Collection and CDP – Principles and Recent Developments

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1 This outline was authored by Lawrence A. Sannicandro, Esq. It is provided, with Mr. Sannicandro’s permission, as supplemental materials for the panel entitled, Recent Developments in Tax Collection, Enforcement, and Bankruptcy. The views herein are the author’s own and do not necessarily reflect the position of the Internal Revenue Service or any of the panelists or the organizations with which they are affiliated.
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I. Administrative Collection

A. How A Tax Liability Arises – The Assessment Process

1. 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).


2. 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:
   a. 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.2

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2 Treasury Regulations provide how the recording of a liability occurs. Applicable Treasury Regulations provide:
b. 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.

(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: Subject to the limitations discussed below, 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 issues a notice of deficiency to assess additional tax assessing the 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.

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, 502-03 (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 for attorneys to understand these legal doctrines for numerous reasons. First, the IRS can (and will) apply payments to unassessed penalties and interest. 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.
c. Through the jeopardy assessment process of I.R.C. § 6861 and 6862 or through the termination assessment processes of I.R.C. § 6851;
d. Through the TFRP assessment process (discussed below); or
e. As otherwise allowed by I.R.C. §§ 6201 through 6207.

3. Limitations on Assessment:
   a. Period of Limitations:
      (1) General Rule: Pursuant to I.R.C. § 6501, tax must 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.
      (2) Exceptions: There are a number of exceptions to this general rule, the most important of which in a collection context are:
         (a) 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. Note the following:
            (1) Must Be Agreed to Before Expiration of Statute: The extension is not effective unless both parties agree before the statute expires.
            (2) 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.
            (3) Types of Extensions: The IRS may use various forms to extend the statute of limitations. Among the more common forms are:
                (i) Form 872 extends the statute of limitations to a particular date.
                (ii) Form 872-A 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) or until the IRS sends a notice of deficiency.
                (iii) Form 872-P extends the time to assess the tax attributable to partnership items.
         (b) False or Fraudulent Returns: 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:

1. A false or fraudulent return with the intent to evade tax, see I.R.C. § 6501(c)(1);3
2. A willful attempt to evade tax, see I.R.C. § 6501(c)(2); or
3. The failure to file a return, see I.R.C. § 6501(c)(3).

(c) 25% Omission and Foreign Financial Assets:
Pursuant to I.R.C. § 6501(e) and Treas. Reg. § 301.6501(e)-1, the period of limitations on assessment is extended to six years if:

1. 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, or
2. The taxpayer omits in excess of $5,000 from gross income that is foreign-sourced and required to be reported, see I.R.C. § 6038D (reporting requirements).

b. The Notice of Deficiency:
(1) In General: 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).

(a) 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.

(b) 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).

(c) 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).

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3 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 (1984).
(2) Effect of Tax Court Case on Statute of Limitations: I.R.C. § 6503 provides that the statute of limitations for a tax year is tolled (suspended) during any time that the Service is prohibited from making an assessment (i.e., during the time a notice of deficiency is outstanding). 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.

4. 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).

B. Collection Devices

1. Authority to Collect: The Code directs the Commissioner to collect the taxes imposed by the internal revenue laws. I.R.C. § 6301.
   a. Liens and Levies as Primary Means of Collection: In furtherance of the Commissioner’s collection authority, Congress has authorized the Commissioner to effect the collection of tax by, in addition to other methods, liens and levies.

2. Liens: The Code imposes a lien in favor of the United States on all property and property rights of a taxpayer who is liable for taxes after a demand for the payment of the tax has been made and the taxpayer fails to pay the taxes. I.R.C. § 6321. The lien arises at the time the assessment is made and continues until the assessed amount is satisfied or is unenforceable by lapse of time. I.R.C. § 6322.
   a. Additional Discussion: For a more thorough discussion of liens, see infra Section III.A.

3. Levies: The Code also authorizes the Commissioner to levy upon all property or property rights of any taxpayer who is liable for any tax and neglects or refuses to pay that liability within 10 days after notice and demand for payment was made. I.R.C. § 6331.
   a. Statutory Prohibition on Levies: The IRS is prohibited from levying under certain circumstances:
      (1) During the period that an offer for an installment agreement under I.R.C. § 6159 is made or if such offer is rejected, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);
      (2) During the period that an offer-in-compromise is pending and if such offer is rejected by the IRS, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);
      (3) During the period after a request for relief from joint and several liability (i.e., an innocent spouse claim is made). I.R.C. §§ 6015(e)(1)(B)(i); 6331(k).
   b. Practical Prohibition on Levies: Levy action is not suspended by
law, but is generally suspended by policy in the following instances:
(1) During a timely CDP lien hearing;
(2) During a timely CDP levy hearing; or
(3) During an Equivalent Hearing (“EH”).
c. **When Levy May Proceed Despite CDP Request:** The IRS collection division may deem levy action appropriate even though a CDP or EH hearing is pending if:
(1) Collection is at risk (e.g., the collection statute expiration date is imminent and the taxpayer is dissipating assets or pyramiding additional liabilities);
(2) The taxpayer raises only frivolous issues; or
(3) The taxpayer is solely seeking to delay the collection process.

4. **Collateral Sanctions to Facilitate Collection:** A recent trend among some States has been to impose collateral sanctions, such as the suspension of driver’s licenses or the refusal to renew car registration, to facilitate collection of delinquent taxes. Perhaps following the lead of these States, in December 2015, Congress enacted I.R.C. § 7345(e), which authorizes the IRS to certify seriously delinquent tax debts to the U.S. Department of State for (i) denial of a passport application, or (ii) revocation of a current passport.

Note: The topic of Passport Revocation is discussed in a separate paper presented at this conference, *The Seriously Delinquent Tax Debt: IRC § 7345 and Passport Denial and Revocation: The State Department and 22 USC § 2714A*. To avoid unnecessary duplication of materials, this outline does not separately discuss this topic.

5. **International Collection Devices:** In addition to the revocation of passports, there are several other administrative and judicial collection tools available to the United States to enforce collection internationally. The other devices available include:
   a. *Writ ne exeat republica* actions and customs or prevent departure orders;
   b. Levies on domestic branches of a financial institution;
   c. Repatriation orders;
   d. Mutual collection assistance requests under applicable treaties; and
   e. Title 18 asset forfeitures.

Note: These international collection devices are discussed in a separate paper presented at this conference, *International Collection – Beyond Passport Revocation*. This outline does not separately discuss this topic, but instead refers readers to the outline on international collection.

6. **Other Collection Devices:** The IRS has available other collection tools,
including but not limited to jeopardy levies, seizures, forced sales, and wage garnishments. A detailed discussion of these collection devices is outside the scope of this Outline.

7. **IRS Notices:**
   
a. **Overview:** As noted, after the IRS assesses the tax, if the taxpayer fails to pay the tax liability within ten days thereof, then the IRS will begin enforced collection action by typically issuing three notices. The IRS issues many types of collection notices, and we summarize below the notices the taxpayer may receive in connection with a collection case. The taxpayer should respond to every notice received from the IRS.

   b. **Notice CP501:**
      
      (1) **In General:** The Notice CP501, *You have unpaid taxes*, is the taxpayer’s first notice that there is a tax balance due and owing.

      (2) **Response:** The tax practitioner should first determine whether or not the tax amount is correct or still due.

      (a) **Grounds for Abating or Reducing Tax:** The grounds on which the tax may be challenged include, but are not limited to:

         (1) The underlying tax liability is incorrect;

         (i) If the taxpayer did not receive a notice of deficiency and has not had a prior administrative or judicial opportunity to challenge the amounts assessed, then the taxpayer may challenge the liability in connection with the CDP hearing. *Montgomery v. Commissioner*, 122 T.C. 1 (2004).

         (ii) Penalties are included in the underlying tax liability. *Id.* at 8-9.

         (iii) A self-assessed tax liability on a tax return may be reviewed *de novo*. *Id.*

         (iv) The United States Tax Court (“Tax Court”) reviews the underlying liability *de novo*. *Id.*

      (2) The additions to tax for failure to file or to pay may be abated based on an administrative waiver, see Internal Revenue

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4 The IRS used to issue five collection notices, but has recently limited that practice to issuing three notices before beginning enforced collection action. As discussed, the IRS sometimes issues more than three notices before seeking enforced collection. Practitioners and taxpayers should read and respond to all notices the IRS sends.

5 For recent litigation concerning the prior opportunity to dispute an underlying liability, see discussion of *Keller Tank Servs. II, Inc. v. Commissioner*, 854 F.3d 1178 (10th Cir. 2017), *James v. Commissioner*, 850 F.3d 160 (4th Cir. 2017), and *Flume v. Commissioner*, T.C. Memo. 2017-21.
Manual ("I.R.M."), pt. 20.1.1.3.3 (Nov. 25, 2011), or reasonable cause, see I.R.C. § 6651(a)(2), (3).

(3) The taxes were discharged in bankruptcy. See 11 U.S.C. §§ 727, 1141;

(4) The taxpayer is entitled to relief from joint and several liability for the taxes (i.e., the taxpayer may be an innocent spouse). See I.R.C. § 6015. In these cases, a Form 8857, Request for Innocent Spouse, should be filed at the earliest possible time.

(5) The period of limitations on assessment under I.R.C. § 6501 has expired;
   (i) General Rule for Assessments: In general, a tax assessment is invalid if not made within 3 years of the filing of the tax return. See I.R.C. § 6501(a).
   (ii) Exceptions: There are a number of situations, the most common which may arise in connection with a collection case are:
      i. 25% Omission and Foreign Financial Assets: Pursuant to I.R.C. § 6501(e) and Treas. Reg. § 301.6501(e)-1, the period of limitations on assessment is extended to six years if:
         (1) 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, or
         (2) The taxpayer omits in excess of $5,000 from gross income that is foreign-sourced and required to be reported, see I.R.C. § 6038D (reporting requirements).

(6) The period of limitations on collection under I.R.C. § 6502 has expired; and
   (i) As a general rule, the IRS has 10 years from the date of a timely assessment to collect the tax by levy
or to begin a proceeding in court. See I.R.C. § 6502.

(7) In trust fund recovery penalty ("TFRP") cases, the taxpayer is not the Responsible Person for the failure to remit employment taxes and the IRS failed to notify the taxpayer in writing by mail to his/her "last known address." (IRC § 6672(b)(1)). Mason v. Commissioner, 132 T.C. 301 (2009); Barry v. Commissioner, T.C. Memo. 2010-57.

(3) Tools to Confirm Validity of Assessment: The tools a practitioner will need to ascertain the validity of the assessment include:

(a) Power of Attorney: Prepare and file Form 2848, Power of Attorney and Declaration of Representative;

(b) Transcripts: Request IRS account and wage and income transcripts through IRS e-services (https://www.irs.gov/Individuals/Get-Transcript), or through the Practitioner’s Priority Service hotline ((866) 860-4259).

(c) Administrative Requests for Information: Request the IRS’s administrative file through a Freedom of Information Act Request, 5 U.S.C. § 552, as amended ("FOIA"). Also, request third party contacts under I.R.C. § 7602(c).

c. Notice CP503: The Notice CP503, Second Reminder, may be a second notice to the taxpayer that there is a tax due and owing.

(1) Issuance Less Common Than In the Past: The IRS has been issuing the Notice CP503 less frequently than in past years (it is instead proceeding directly to issue Notice CP504 (discussed below)). However, in some instances, especially for older liabilities that may arise from partnership action, the IRS is still issuing Notice CP503.

(2) Response: Once the tax practitioner determines that the tax is valid and owing, the tax practitioner will need to determine the appropriate collection alternative.

(a) Collection Alternatives: The taxpayer has the right to propose a collection alternative at any time.

(1) Consider Requesting an Installment Agreement if the Taxpayer is Able to Pay the Tax in Full: If an installment agreement is appropriate because the taxpayer is fully collectible, a response to the second notice is an ideal time to have the taxpayer enter into
an installment agreement and avoid the additional costs associated with a prolonged collection case.

(2) **Voluntary Payments:** The taxpayer may want to make voluntary tax payments to reduce the tax and interest until a formal installment agreement is granted.

(b) **Penalty Abatements:** If penalties or additions to tax or imposed, and they were not challenged in response to the first notice, then practitioners may want to challenge the penalties and additions to tax in response to the second notice.

d. **Notice CP504:** The Notice CP504, *Notice of intent to seize (levy)* *your state tax refund or other property*, is the next notice to the taxpayer that there is a tax balance due and owing, and it usually signals that enforced collection (*i.e.*, the filing of a lien or the issuance of a levy is forthcoming).

(1) **Contents of Notice:** In the Notice CP 504, the taxpayer is given notice that unless the tax is paid in full, the IRS will soon issue a Notice of Federal Tax Lien (“NFTL”) and file a related lien;

(a) **The Lien:** The lien is public, and has detrimental effects on the taxpayer’s credit, business reputation, ability to secure bonding, or ability to sell or transfer property.

(b) **Requests to Withdraw the Lien:** Once the lien is filed, pursuant to I.R.C. § 6323(j), the taxpayer may seek to have the lien withdrawn for any of the following reasons:

(1) Notice was filed prematurely;

(2) The taxpayer entered into an installment agreement and the tax liability is less than $50,000;

(3) Withdrawal may facilitate tax collection; or

(4) Best interest of taxpayer and government.

*See also I.R.M., pt. 5.12.9 (Dec. 7, 2015)* (discussing the grounds under which a lien may be withdrawn).

(2) **Response:** How to respond to the CP504 depends upon how the taxpayer intends to resolve the taxes due.

(a) **Full-Pay Taxpayers:** If the taxpayer is in a full-pay situation (*i.e.*, he or she does not qualify for an offer in compromise (“OIC” or “offer”) or currently not collectible status), then the taxpayer may want to respond to the Notice CP504 by filing with the IRS a Form 9423, *Collection Appeal Request*, and
proposing collection alternatives.

(1) **Other Reasons to File Form 9423:** Some taxpayers may desire to file Form 9423 in response to the Notice CP504 to (i) resolve the liabilities at the earliest possible stage, or (ii) to show a willingness to resolve the liabilities so as to reduce the likelihood of a criminal case being brought. We discuss the collection appeal proceedings (sometimes, “CAP”) more fully below.

e. **The Final Notice:**

(1) **In General:** In addition to the IRS issuing to the taxpayer a notice and demand for payment, the IRS must provide notice to the taxpayer concerning his/her right to a collection due process (“CDP”) hearing under I.R.C. § 6330 or 6320 after it has:

(a) Filed the first lien; or
(b) Before its first intended levy for the particular tax and tax period.

(2) **The Forms of Final Notices:** Traditionally, the Final Notice took one of two forms: (a) “Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing”; or (b) “Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320”. However, the IRS has recently started issuing automated collection notices, which also inconspicuously provides taxpayers with the opportunity for a hearing.

(a) **BEWARE OF AUTOMATED FINAL NOTICES:** In automated collection cases, the IRS issues Letter 11 (LT 11), in which it advises taxpayers of a balance due and owing, and offers to taxpayers the opportunity to request a hearing. This letter takes a different format than has previously been used as a final notice, and does not advise taxpayers of the right to a hearing until the second page of the letter. Practitioners should request a CDP hearing in response to a LT 11, the same way as done for traditional final notices.

(3) **Requirements of the Notice:** The final notice must comply with the following requirements:

(a) Sent to taxpayer’s last known address (Graham v. Comm’r, T.C. Memo. 2008-129);
(b) By certified mail, return receipt requested;
(c) For a NFTL filing, the IRS notice must be sent not more than five business days after the day of filing the lien notice. I.R.C. § 6320(a)(2); and
(d) For levy notices, the IRS notice must be issued at least thirty days before the day of the proposed levy. I.R.C. § 6330(a)(2).

(4) Opportunity for a Hearing: If a taxpayer desires to request a CDP hearing in response to the issuance of a final notice, no later than 30 days after the date of the final notice, the Taxpayer must submit to the IRS a Form 12153, Request for a Collection Due Process or Equivalent Hearing. The Form 12153 is discussed below.

C. Collection Alternatives

1. In General: Enforced collection by the IRS is an extraordinary measure. Depending upon the specific facts of a case, taxpayers may have available various collection alternatives to payment in full.

2. Offers in Compromise:
   a. In General: I.R.C. § 7122 authorizes the IRS to compromise a taxpayer’s Federal tax liabilities. Pursuant to I.R.C. § 7122(d), the Commissioner has developed guidelines for evaluating whether an OIC is adequate and should be accepted to resolve a civil tax dispute.
      (1) Grounds for an Offer: Under existing guidelines, grounds for compromise include doubt as to collectibility (sometimes, “DATC”), doubt as to liability (sometimes, “DATL”), and to promote effective tax administration. See Treas. Reg. § 301.7122-1; see also I.R.M., pt. 5.8.11.2 (Aug. 5, 2015).

      The Service will accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential. An OIC is a legitimate alternative to declaring a case currently not collectible or a protracted installment agreement. The goal is to achieve collection of what is potentially collectible at the earliest possible time and at the least cost to the Government.

b. TIPRA and Deemed Acceptances:
   (1) Background on TIPRA: The Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (“TIPRA”) was enacted on May 17, 2006. TIPRA made major changes to the OIC program effective for all offers received by the IRS on or after July 16, 2006.
   (2) Deemed Acceptance: Under TIPRA, if the IRS does not
make a determination on an offer within 24 months, the offer will be deemed accepted. I.R.M., pt. 5.8.1.11 (May 5, 2017).

(a) If a liability included in the offer amount is disputed in any court proceeding, that time period is omitted from the calculation of the two-year period.

(b) Once a determination letter is issued by the offer examiner or offer specialist, the 24-month time frame will be considered stopped.

c. **Withdrawal:** Any failure to make an installment (other than the first installment) due under an OIC during the period such offer is being evaluated by the Secretary may be treated by the Secretary as a withdrawal of the offer. I.R.C. § 7122(c)(1)(B)(ii).

d. **DATL:**

(1) **When Allowed:** The IRS may compromise a tax liability based on doubt as to liability where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. I.R.M., pt. 4.18.2.2 (Dec. 9, 2008). Doubt as to liability does not exist where the liability has been established by a final court decision or judgment concerning the existence or amount of the tax liability. Treas. Reg. § 301.7122-1(b)(1); I.R.M., pt. 4.18.2.6 (Feb. 28, 2017).

(2) **When Acceptable:** Whether the amount offered by the taxpayer is adequate for a DATL offer to be accepted will depend upon the degree of doubt established by the taxpayer. I.R.M., pt. 4.18.2.6 (Feb. 28, 2017).

(3) **Application Fee:** There is no filing fee for submitting an OIC on the ground of DATL.

(4) **Jurisdiction Over Offers:**

(a) **Jurisdiction for Offers Not Related to the TFRP or Excise Taxes:** The IRS’s Examination Division has jurisdiction over DATL offers other than those related to the TFRP or personal liability for excise taxes. I.R.M., pt. 4.18.2.3 (Dec. 9, 2008).

(b) **Jurisdiction for Offers Related to the TFRP or Excise Taxes:** The IRS’s Collection Division has jurisdiction over DATL offers involving the TFRP and personal liability for excise tax. I.R.M., pt. 4.18.2.3 (Dec. 9, 2008). Liability offers concerning assessments made during bankruptcy proceedings may also fall under the jurisdiction of Collection Division.

(c) **Counsel Approval for Liabilities of $50,000 or More:** Under I.R.C. § 7122(b), if the total liability for an offer is $50,000 or more the IRS Office of
Chief Counsel must provide an opinion to ensure that the offer meets the legal requirements for compromise and conforms to the Service’s policy and procedure. I.R.M., pt. 4.18.2.6 (Feb. 28, 2017).

(5) **DATL Offer Examinations:** An DATL offer examination is conducted in a manner similar to an audit reconsideration examination (discussed below). I.R.M., pt. 4.18.2.4 (Feb. 28, 2017). Thus, the DATL offer should be examined and additional documents requested from the taxpayer, if necessary. Id.

(6) **Payment in Full Not Required:** If the offer is accepted, then payment will be in accordance with the terms listed on the Form 656. If the taxpayer cannot full pay the amount agreed upon in the accepted DATL offer, consider other payment options such as an installment agreement or advise the taxpayer of his option to file an offer on the basis of doubt as to collectibility.

(7) **Judicial Review:** Neither the IRS Office of Appeals (“Appeals”) nor the Tax Court will review a DATL offer if the Taxpayer has had a prior opportunity to contest the underlying tax.

(a) **Recent Litigation:** For recent litigation concerning the prior opportunity to dispute an underlying liability, see discussion of Keller Tank Servs. II, Inc. v. Commissioner, 854 F.3d 1178 (10th Cir. 2017), James v. Commissioner, 850 F.3d 160 (4th Cir. 2017), and Flume v. Commissioner, T.C. Memo. 2017-21.

(b) **Consequences of Recent Litigation:** Many Appeals officers take the position that any opportunity to contest a liability in Appeals is a prior opportunity for purpose of determining whether a taxpayer may challenge the underlying liability in a CDP hearing. Accordingly, practitioners should determine when and whether to challenge an underlying liability. For example, although past practice may have suggested that filing a penalty and interest abatement request was the opportune time to challenge the imposition of a penalty, in light of the Keller Tank line of cases, it may be more prudent to wait for a final notice before challenging underlying liability, the effect of which is to ensure the taxpayer receives judicial review of Appeals’ decision.

e. **DATC:**

(1) **When Allowed:** The IRS may compromise a tax liability
based on doubt as to collectibility where the taxpayer’s assets and income are less than the full amount of the unpaid tax liability. Treas. Reg. § 301.7122-1(b)(2).

(2) **When Acceptable:** An offer to compromise based on doubt as to collectibility should be considered as acceptable where (1) it is unlikely that the unpaid tax liability can be collected in full, and (2) the offer reflects the taxpayer’s total reasonable collection potential. Rev. Proc. 2003-71, sec. 4.02(2), 2003-2 C.B. 517.

(3) **Application Fee:** There is a $186 application fee for filing an offer on the ground of DATC.

(4) **IRS Policy Objectives:** Consistent with this principle, the I.R.M. provides as follows:

The Service will accept an Offer in Compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential. An OIC is a legitimate alternative to declaring a case as currently not collectible, or to a protracted installment agreement. The goal is to achieve collection of what is potentially collectible at the earliest possible time and at the least cost to the government. The ultimate goal is a compromise, which is in the best interest of the taxpayer and the Service. Acceptance of an adequate offer will also result in creating, for the taxpayer, an expectation of and a fresh start toward compliance with all future filing and payment requirements.

(Policy Statement P-5-100).

(5) **Reasonable Collection Potential:** As noted, to determine whether an offer is adequate, the taxpayer’s reasonable collection potential must be evaluated. In accordance with I.R.M., pt. 5.8.4.3.1 (Apr. 30, 2015), the IRS must ordinarily include the following four components to calculate the reasonable collection potential for offer purposes:

(a) The amount collectible from the taxpayer’s net realizable equity in assets;

(b) The amount collectible from the taxpayer’s expected future income;

(c) The amount collectible from third parties; and

(d) The amount that the taxpayer should reasonably be expected to raise from assets in which the taxpayer has an interest but which is beyond the reach of the government.
f. **Effective Tax Administration:** The IRS may compromise a tax liability for promotion of effective tax administration where: (i) collection in full, while achievable, would cause the taxpayer economic hardship; or (ii) compelling public policy or equity considerations provide a basis for compromising the liability. *Speltz v. Commissioner,* 124 T.C. 165, 172-173 (2005), aff’d, 454 F.3d 782 (8th Cir. 2006).

1. **Jurisdiction:** The IRS’s collection division generally has jurisdiction over offers based on effective tax administration. I.R.M., pt. 4.18.3.3 (Feb. 28, 2017).
2. **Application Fee:** There is a $186 application fee for filing an offer on the ground of effective tax administration.
3. **Factors Considered:** In determining whether or not an offer should be accepted on the ground of effective tax administration, the IRS typically considers whether not granting the offer would result in:
   a. A determination that the taxpayer is incapable of earning a living because of a long-term illness, medical condition, or disability, and it is reasonably foreseeable that taxpayer’s financial resources will be exhausted providing for care and support during the course of the condition. Treas. Reg. § 301.7122-1(c)(3);
   b. A determination that although the taxpayer has certain monthly income, that income is exhausted each month in providing for the care of dependents with no other means of support. Treas. Reg. § 301.7122-1(c)(3);
   c. A determination that although the taxpayer has certain assets, the taxpayer is unable to borrow against the equity in those assets and liquidation of those assets to pay outstanding tax liabilities would render the taxpayer unable to meet basic living expenses. Treas. Reg. § 301.7122-1(c)(3); and
   d. A determination that compromise would not undermine compliance with the tax laws, including (i) the taxpayer does not have a history of noncompliance with the filing and payment requirements of the Code, (ii) the taxpayer has not taken deliberate actions to avoid the payment of taxes, and (iii) the taxpayer has not encouraged others to refuse to comply with the tax laws. Treas. Reg. § 301.7122-1(c)(3); see also I.R.M., pt. 4.18.3.2 (Feb. 28, 2017).

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g. **Types of Offers:**
1. **In General:** When submitting an offer, taxpayers are
expected to pay the entire amount offered in as short a time as reasonably possible. I.R.M., pt. 5.8.1.13.4 (May 5, 2017). There are two types of payment terms offered on the Form 656 to which the IRS and taxpayer may agree:
(a) Lump sum offers; or

(2) **Lump Sum Offers:**
(a) **Defined:** A lump sum offer is defined as one payable in five or fewer installments within five months of the offer acceptance. I.R.M., pt. 5.8.1.13.4 (May 5, 2017)
(b) **Treatment of Lump Sum Offers:** Taxpayers submitting requests for lump sum cash offers must include with the offer a payment equal to 20% of the offer amount. I.R.M., pt. 5.8.1.13.4 (May 5, 2017). The payment is treated as a payment of tax and is nonrefundable, which means that it will not be returned even if the offer is deemed to be not processable, later returned, withdrawn, terminated, or rejected. Id. A lump sum cash offer means any offer of payments made in five or fewer installments within five months of offer acceptance.

(3) **Periodic Payment Offers:**
(a) **Defined:** A period payment offer is defined as one payable in six or more installments. I.R.M., pt. 5.8.1.13.4 (May 5, 2017).
(b) **Treatment of Periodic Payment Offers:** Taxpayers submitting requests for periodic payment offers must include the first proposed installment payment with their offer. I.R.M., pt. 5.8.1.13.4 (May 5, 2017). A periodic payment offer is any offer of payments made in six or more installments. Id. The taxpayer is required to pay additional installments while the offer is being evaluated by the IRS. Id. All installment payments are nonrefundable, even if the offer is deemed not processable, later returned or rejected. Id.

**h. Emphasis on Compliance:** Current compliance in terms of filing all unfiled tax returns and making estimated tax deposit payments is important. “Beginning with Offer applications received on or after March 27, 2017: The IRS will return any newly filed Offer in Compromise application if you have not filed all required tax returns. Any application fee included with the OIC will also be returned. Any initial payment required with the returned application will be applied to reduce your balance due. This policy

3. Installment Agreements:
   a. Overview:
      (1) **In General:** I.R.C. § 6159(a) authorizes the IRS to enter into written agreements which allow taxpayers to pay tax in installment payments if the IRS determines that the “agreement will facilitate full or partial collection of such liability.”

      (2) **Check for Guaranteed, Streamlined, or In-Business Trust Fund Express Agreements:** If the taxpayer is unable to pay in full, then the IRS is to first determine if the taxpayer qualified for a guaranteed, streamlined, or in-business trust fund express agreement (discussed below). I.R.M., pt. 5.14.1.2 (July 16, 2018).

      (3) **Financial Statement Otherwise Required:** If the taxpayer does not qualify for a guaranteed, streamlined, or in-business trust fund express agreement, then the IRS will request a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, or a Form 433-B, Collection Information Statement for Businesses, as appropriate. I.R.M., pt. 5.14.1.2 (July 16, 2018).

      (4) **Methods of Payment:** There are various means of paying installment agreements. The automated methods are usually advisable to avoid an inadvertent default of the installment agreement. The various methods of payment for an installment agreement are set forth as follows in I.R.M., pt. 5.14.1.2(5) (July 16, 2018):

         (a) **Electronic Federal Tax Payment System (EFTPS),** under which taxpayers will select the “payment-due with IRS notice” payment type for posting to Masterfile with a TC 670. EFTPS has the ability to schedule payments up to 12 months in advance for individual taxpayers and up to 4 months in advance for business taxpayers. The taxpayer must initiate payments by sending instructions to EFTPS. See I.R.M., pt. 21.7.1.4.8.1 (Oct. 1, 2017) for instructions.

         (b) **Direct debit installment agreements,** under which, if taxpayers maintain a checking account, they can arrange make direct debit installment agreement payments. See I.R.M., pts. 5.14.10.4 and 5.14.10.5 (Dec. 14, 2017) for instructions.
(c) Payroll Deduction installment agreements, under which, if taxpayers will not agree to a direct debit installment agreement, they can enter into a payroll deduction agreement. See I.R.M., pt. 5.14.10.2 (Dec. 14, 2017) for instructions.

(d) Credit card installment agreement payment, under which taxpayers can pay by credit card. See I.R.M., pt. 21.2.1.48.4 (Oct 1, 2007) for procedures.

(e) Payment by check or money order, under which payments are made by check and should be made payable to: “U.S. Treasury”. Checks made out to “Internal Revenue Service” or “IRS” will also be processed.

(f) Direct pay, which is a free service that allows taxpayers to make electronic payments directly to the IRS from their checking or savings accounts. See I.R.M., pt. 21.2.1.48.1 (Aug. 2, 2018) for further information.

b. Streamlined Installment Agreements:

(1) In General: Under the IRS’s Fresh Start Program, launched in 2008, the IRS made it easier for taxpayers to qualify for installment agreements.

(2) Qualification Under the I.R.M.: Under the I.R.M., streamlined installment agreements may be approved for taxpayers under the following circumstances:

(a) The aggregate unpaid balance of assessments is $50,000 or less (i.e., the “Summary Balance”). The unpaid balance of assessments includes tax, assessed penalties, and interest, and all other assessments on the tax modules. It does not include accrued penalty and interest. I.R.M., pt. 5.14.5.2 (Dec. 23, 2015).

(1) If pre-assessed taxes are included, the pre-assessed liability plus unpaid balance of assessments must be $50,000 or less.

(3) Qualification Under Test Criteria: The IRS is testing expanded criteria for streamlined processing of taxpayer requests for installment agreements. The test is scheduled to run through September 30, 2018 (though at the time of this writing the IRS’s website has not been updated to reflect whether the test criteria will apply post-September 30, 2018. The IRS’s SBSE collection division will test new streamlined processing criteria as follows:

(a) Test Criteria for Smaller Balances: For (a) individual taxpayers who have filed all required returns and have an assessed balance of tax,
penalties and interest of $50,000 or less, (b) out-of-business taxpayers with debts of up to $25,000, (c) out-of-business sole-proprietorships with tax debts of up to $50,000, and (d) in-business taxpayers with tax debts of up to $25,000, the following test criteria may apply:  

<table>
<thead>
<tr>
<th><strong>Current Streamlined Criteria</strong></th>
<th><strong>Test [Expanded] Criteria</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Payment Terms</strong></td>
<td></td>
</tr>
<tr>
<td>Up to 72 months – or – the number of months necessary to satisfy the liability in full by the Collection Statute Expiration date, whichever is less</td>
<td>Payment Terms</td>
</tr>
<tr>
<td></td>
<td>None. This criteria is unchanged.</td>
</tr>
<tr>
<td><strong>Collection Information Statement</strong></td>
<td></td>
</tr>
<tr>
<td>Verification of ability to pay required in event of an earlier default for assessed balances of $25,001 to $50,000</td>
<td>Collection Information Statement</td>
</tr>
<tr>
<td></td>
<td>Not required.</td>
</tr>
<tr>
<td><strong>Payment Method</strong></td>
<td></td>
</tr>
<tr>
<td>Direct debit payments or payroll deduction required for assessed balances of $25,001 to $50,000</td>
<td>Payment Method</td>
</tr>
<tr>
<td></td>
<td>Direct debit payments or payroll deduction is preferred, but not required.</td>
</tr>
<tr>
<td><strong>NFTL</strong></td>
<td></td>
</tr>
<tr>
<td>Determination not required for assessed balances up to $25,000.</td>
<td></td>
</tr>
<tr>
<td>Determination is not required for assessed balances of $25,001 - $50,000 with mandatory use of direct debit or payroll deduction agreement.</td>
<td></td>
</tr>
<tr>
<td>Note: If taxpayer does not agree to direct debit or payroll deduction, then they do not qualify for Streamlined Installment Agreement over $25,000.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>NFTL</td>
</tr>
<tr>
<td>No change in criteria for assessed balances up to $25,000.</td>
<td></td>
</tr>
<tr>
<td>Determination is not required for assessed balances of $25,001 - $50,000 with the use of direct debit or payroll deduction agreement.</td>
<td></td>
</tr>
<tr>
<td>Note: If taxpayer does not agree to direct debit or payroll deduction, then they do qualify for Streamlined Installment Agreement over $25,000, but a NFTL determination will be made.</td>
<td></td>
</tr>
</tbody>
</table>

(b) **Test Criteria for Larger Balances:** For (a) individual taxpayers who have filed all required returns and have an assessed balance of tax, penalties and interest between $50,001 and $100,000, and (b) out of business sole-proprietorship debts between $50,001 and

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$100,000, the following test criteria may apply:\(^7\)

<table>
<thead>
<tr>
<th>Current Criteria</th>
<th>Test [Expanded] Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>None - Streamlined processing criteria currently does not apply to assessed balances of tax between $50,001 and $100,000</td>
<td>Payment Terms</td>
</tr>
<tr>
<td></td>
<td>Up to 84 months – or – the number of months necessary to satisfy the liability in full by the Collection Statute Expiration date, whichever is less</td>
</tr>
<tr>
<td></td>
<td>Collection Information Statement</td>
</tr>
<tr>
<td></td>
<td>Not required if the taxpayer agrees to make payment by direct debit or payroll deduction</td>
</tr>
<tr>
<td></td>
<td>Payment Method</td>
</tr>
<tr>
<td></td>
<td>Direct debit payments or payroll deduction is not required; however, if one of these methods is not used, then a Collection Information Statement is required.</td>
</tr>
<tr>
<td></td>
<td>NFTL</td>
</tr>
<tr>
<td></td>
<td>Determination is required.</td>
</tr>
</tbody>
</table>

(c) Practical Observations Concerning Test Criteria: In practice, IRS employees are not offering the test criteria to taxpayers unless requested (and pressed). Even then, some revenue officers take the position that they are not bound by the test criteria. By contrast, some counsel attorneys have agreed that the Service is bound to offer taxpayers the test criteria.

(4) Computing the Minimum Payment for an Installment Agreement: In the absence of applying the above test criteria, the minimum payment amount is determined by dividing the summary balance by 72. The installment agreement must resolve all balances due prior to the expiration of the collection statute expiration date. I.R.M., pt. 5.14.5.2 (Dec. 23, 2015).


(6) Liens: Historically, the IRS filed a lien when a balance was owed to the IRS. Under the Fresh Start Program, a lien determination is generally not required for a streamlined

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installment agreement but may be made at the discretion of the revenue officer and liens may be filed. I.R.M., pt. 5.14.5.2 (Dec. 23, 2015).

c. Guaranteed Installment Agreements:
(1) Right to Installment Agreement Secured by Statute: I.R.C. § 6159(c) requires the IRS to accept proposals of installment agreements under certain circumstances. In accordance with I.R.C. § 6159(c), the IRS must accept proposals to pay in installments if taxpayers are individuals who:
   (a) Owe income tax only of $10,000 or less (excluding penalties and interest);
   (b) Have not failed to file any income tax returns or to pay any tax shown on such returns during any of the preceding five taxable years;
   (c) Cannot pay the tax immediately (see (2) below);
   (d) Agree to fully pay the tax liability within 3 years;
   (e) Agree to file and pay all tax returns during the term of the agreement; and
   (f) Have not entered into an installment agreement during any of the preceding five taxable years. I.R.M., pt. 5.14.5.3 (Dec. 23, 2015).

(2) Full Payment Inconsequential: As a matter of policy, the IRS grants guaranteed agreements even if taxpayers are able to fully pay their accounts. I.R.M., pt. 5.14.5.3 (Dec. 23, 2015).


d. In-Business Trust Fund Express Agreements:
(1) Qualification: In-business trust fund express installment agreements may be granted if the aggregate unpaid balance of assessments (i.e., the Summary Balance) is $25,000 or less. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).
   (a) The unpaid balance of assessments includes tax, assessed penalty and interest, and all other assessments on the tax modules. It does not include accrued penalty and interest. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).

(2) Limitations: In-business trust fund express installment agreements may not be granted where the first payment on the agreement is a lump sum payment to be made in order to pay down the balance to meet the $25,000 criteria. That is, taxpayers must meet the dollar criteria at the time the in-business trust fund express installment agreement is granted. However, taxpayers with a liability greater than
$25,000, can be considered for an in-business trust fund express installment agreements if they pay down the liability to $25,000 or less prior to the agreement being granted. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).

(3) **Full Payment Required Within 24 Months:** Taxes must be fully paid in 24 months, or before the collection statute expiration date, whichever is earlier. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).

(4) **Field Visit and Financial Statement Not Required:** If the taxpayer qualifies for an in-business trust fund express installment agreement, then neither a field visit nor a financial statement is required. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).

(5) **Lien Filing:** Per I.R.M., pt. 5.12.2.3.1 (Oct. 14, 2013), a lien notice filing determination decision is not required for in-business trust fund express agreements. If the case cannot be closed as an in-business trust fund express installment agreement on or before the lien notice filing determination requirement date, a lien notice filing determination decision must be made based on the facts of the case. The revenue officer has the latitude to make a non-filing deferral determination decision then finish the negotiation and grant the in-business trust fund express installment agreement. Liens may be filed if they will protect the government’s interests, such as whether the entity has defaulted on an installment agreement in the current year or prior calendar year periods. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).

(6) **TFRP Determinations:** If the taxpayer qualifies for an in-business trust fund express installment agreement, then a TFRP determination is not required if:
   (a) The unpaid balance of assessment is $25,000 or less;
   (b) The outstanding liabilities only include current year or prior calendar year periods; and
   (c) The entire liability will be paid in 24 months. I.R.M., pt. 5.14.5.4 (Dec. 23, 2015).

4. **Currently Not Collectible:**
   a. **Uncollectible Accounts:** Accounts will be reported as currently not collectible when the taxpayer has no assets or income which are, by law, subject to levy. I.R.M., pt. 1.2.14.1.14 (Nov. 19, 1980) (formerly Policy Statement 5-71).
   (1) **Assets Exempt From Levy:** Pursuant to I.R.C. § 6334, the following assets are generally exempt from levy:
      (a) **Wearing apparel and school books:** Such items of wearing apparel and such school books as are
necessary for the taxpayer or for members of his family;

(b) Fuel, provisions, furniture, and personal effects: So much of the fuel, provisions, furniture, and personal effects in the taxpayer’s household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $6,250 in value;

(c) Books and tools of a trade, business, or profession: So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $3,125 in value.

(d) Unemployment benefits: Any amount payable to an individual with respect to his or her unemployment, including any portion thereof payable with respect to dependents, under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico;

(e) Undelivered Mail: Mail, addressed to any person, which has not been delivered to the addressee.

(f) Certain annuity and pension payments: Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. § 1562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(g) Workers’ compensation: Any amount payable to an individual as workers’ compensation, including any portion thereof payable with respect to dependents, under a workers’ compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(h) Judgments for support of minor children: If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(i) Minimum exemption for wages, salary, and other income: Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any
period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(j) Certain service-connected disability payments: Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under (A) subchapter II, III, IV, V, or VI of chapter 11 of such title 38, or (B) chapter 13, 21, 23, 31, 32, 34, 35, 37, or 39 of such title 38.

(k) Certain public assistance payments: Any amount payable to an individual as a recipient of public assistance under (A) title IV or title XVI (relating to supplemental security income for the aged, blind, and disabled) of the Social Security Act, or (B) State or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

(l) Assistance under Job Training Partnership Act: Any amount payable to a participant under the Job Training Partnership Act (29 U.S.C. § 1501, et seq.) from funds appropriated pursuant to such Act.

(m) Certain Residences in Certain Cases: Any real property of the taxpayer used as a residence is exempt from levy if the levy amount does not exceed $5,000.

(1) Court Approval Required: To the extent the IRS seeks to administratively seize a residence, the IRS needs to obtain a court order with respect to the principal residence of:

(i) The taxpayer;
(ii) The taxpayer’s spouse;
(iii) The taxpayer’s former spouse; or
(iv) The taxpayer’s minor child.

b. Economic Hardship: An account should be declared as currently not collectible if collecting the tax will cause an economic hardship to the taxpayer (i.e., cause him or her to be unable to meet his or her basic living expenses). See I.R.M., pt. 5.16.1.2.9 (Sept. 18, 2018).

(1) Economic Hardship for Corporations: In Lindsay Manor Nursing Home, Inc. v. Commissioner, 148 T.C. No. 9 (2017), appeal dismissed as moot, No. 17-9002 (10th Cir. Mar. 27, 2018), the Tax Court rejected a corporate taxpayer’s challenge to an economic hardship regulation
and held that non-individual taxpayers (e.g., corporations) could not use economic hardship as a ground to challenge a proposed levy under I.R.C. § 6343(a)(1)(D) in a collection due process hearing. Some practitioners continue to challenge the correctness of the Tax Court’s opinion in Lindsay Manor.

c. **Defunct Businesses:** Accounts may be reported as currently not collectible when an operating business entity cannot pay its back taxes and enforcement cannot be taken because the business has no distrainable accounts receivable of other receipts or equity in assets. I.R.M., pt. 5.16.1.2.7 (Aug. 25, 2014).

5. **Bankruptcy:** The IRS reports taxes properly discharged in bankruptcy as currently not collectible.

6. **Audit Reconsideration:**
   a. **Defined:** Audit reconsideration is the process the IRS uses to reevaluate the results of a prior audit if the taxpayer disagrees with the original determination and there is new information that was not considered during the original examination. It is also the process the IRS uses when the taxpayer contests a substitute return determination by filing an original delinquent return or when there is an IRS computational or processing error in assessing the tax. I.R.M., pt. 4.13.1.2 (Dec. 16, 2015).
   b. **When Granted:** The IRS will grant an audit reconsideration request when:
      (1) The taxpayer did not appear for the audit;
      (2) The taxpayer moved and did not receive IRS correspondence; or
      (3) The taxpayer has new documentation that is pertinent to audit the issues presented. I.R.M., pt. 4.13.1.3 (Dec. 16, 2015).
   c. **When Denied:** The IRS will deny an audit reconsideration request when:
      (1) The taxpayer has already been afforded an audit reconsideration request and did not provide any additional information with his/her current request that would change the audit results;
      (2) The assessment was made as a result of a closing agreement entered into under I.R.C. § 7121 using Form 906, *Closing Agreements on Final Determination Covering Specific Matters*, or Form 866, *Agreement as to Final Determination of Tax Liability*, or some combination of the two forms;
      (3) The assessment was made as a result of a compromise under I.R.C. § 7122 because such agreements are final and conclusive;
      (4) The assessment was made as the result of final TEFRA
administrative proceedings;
(5) The assessment was made as a result of the taxpayer entering into an agreement on Form 870-AD, *Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment*;
(6) The Tax Court has entered a decision that has become final, or a U.S. district court or the United States Court of Federal Claims has rendered a judgment on the merits that has become final; or
(7) The Tax Court dismissed a case for lack of prosecution.


d. Criteria for Reconsideration: To request the audit reconsideration, the following items must be present:
(1) The taxpayer filed the tax return for the disputed item;
(2) The assessment remains unpaid or the IRS reserved credits that the taxpayer is disputing;
(3) The taxpayer must identify the adjustments that are in dispute;
(4) The taxpayer must provide new information that was not considered during the original audit; and
(5) There was a computational or processing error in assessing the tax.

D. Passport Revocation

1. Background: As noted, on December 4, 2015, Congress granted to the Service authority to deny, revoke, or limit the passport of any person who the Service certifies has a seriously delinquent tax debt (*i.e.*, an assessed tax greater than $50,000 with respect to which formal collection action has been taken). See Fixing America’s Surface Transportation Act (sometimes, “FAST Act”), Pub. L. No. 114-94, § 32101. Included in the FAST Act is a provision which allows for judicial review of the Service’s certification that a person’s passport should be denied, revoked, or limited.

2. Statute: This provision, which is now codified in I.R.C. § 7345(e) provides as follows:

(e) JUDICIAL REVIEW OF CERTIFICATION.—

(1) IN GENERAL.—After the Commissioner notifies an individual under subsection (d), the taxpayer may bring a civil action against the United States in a district court of the United States or the Tax Court to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification.

(2) DETERMINATION.—If the court determines that such certification was erroneous, then the court may order the Secretary to notify the Secretary of State that such


   a. Time Within Which to File Unclear: Neither I.R.C. § 7345(e) nor the Tax Court’s recently proposed rules set forth the time within which a certification action must be commenced. Treasury Regulations have not yet been issued on the topic, but when such regulations are issued, they will hopefully address this issue (among others).

E. Private Debt Collection


   2. The Statute: I.R.C. § 6306, entitled “Qualified tax collection contracts, now provides, in pertinent part, as follows:

      (a) In general

      Nothing in any provision of law shall be construed to prevent the Secretary from entering into a qualified tax collection contract.

      (b) Qualified tax collection contract. For purposes of this section, the term “qualified tax collection contract” means any contract which—

      (1) is for the services of any person (other than an officer or employee of the Treasury Department)—

      (A) to locate and contact any taxpayer specified by the Secretary,
(B) to request full payment from such taxpayer of an amount of Federal tax specified by the Secretary and, if such request cannot be met by the taxpayer, to offer the taxpayer an installment agreement providing for full payment of such amount during a period not to exceed 5 years, and

(C) to obtain financial information specified by the Secretary with respect to such taxpayer,

(2) prohibits each person providing such services under such contract from committing any act or omission which employees of the Internal Revenue Service are prohibited from committing in the performance of similar services,

(3) prohibits subcontractors from—

(A) having contacts with taxpayers,

(B) providing quality assurance services, and

(C) composing debt collection notices, and

(4) permits subcontractors to perform other services only with the approval of the Secretary.

(c) Collection of inactive tax receivables

(1) In general

Notwithstanding any other provision of law, the Secretary shall enter into one or more qualified tax collection contracts for the collection of all outstanding inactive tax receivables.

(2) Inactive tax receivables. For purposes of this section—

(A) In general. The term “inactive tax receivable” means any tax receivable if—

(i) at any time after assessment, the Internal Revenue Service removes such receivable from the active inventory for lack of resources or inability to locate the taxpayer,

(ii) more than ⅓ of the period of the applicable statute of limitation has lapsed and such receivable has not been assigned for collection to any employee of the
Internal Revenue Service, or

(iii) in the case of a receivable which has been assigned for collection, more than 365 days have passed without interaction with the taxpayer or a third party for purposes of furthering the collection of such receivable.

(B) Tax receivable

The term “tax receivable” means any outstanding assessment which the Internal Revenue Service includes in potentially collectible inventory.

(d) Certain tax receivables not eligible for collection under qualified tax collections contracts. A tax receivable shall not be eligible for collection pursuant to a qualified tax collection contract if such receivable—

(1) is subject to a pending or active offer-in-compromise or installment agreement,

(2) is classified as an innocent spouse case,

(3) involves a taxpayer identified by the Secretary as being—

(A) deceased,

(B) under the age of 18,

(C) in a designated combat zone, or

(D) a victim of tax-related identity theft,

(4) is currently under examination, litigation, criminal investigation, or levy, or

(5) is currently subject to a proper exercise of a right of appeal under this title.


4. **Contractors Selected:** The IRS will assign these cases to the following private collection agencies:
   a. Conserve, Fairport, New York;
b. Pioneer, Horseheads, New York;
c. Performant, Livermore, California; and
d. CBE Group, Cedar Falls, Iowa. Id.

5. Taxpayer Rights Protected? As a condition of receiving a contract, these agencies must respect taxpayer rights including, among other things, abiding by the consumer protection provisions of the Fair Debt Collection Practices Act. Id.

6. What to Expect:
   a. Stale Liabilities: The private collection agencies will work on accounts where taxpayers owe money to the government, but the IRS is no longer actively working the case. Several factors contribute to the IRS assigning these so-called stale liabilities to private collection agencies, including older, overdue tax accounts or lack of resources preventing the IRS from working the cases. Id.
   b. Cases That Will Not Be Transferred to the Collection Agency: The following accounts will not be transferred to the collection agency:
      (1) Deceased taxpayers;
      (2) Taxpayers under 18 years of age;
      (3) Taxpayers in designated combat zones;
      (4) Victims of tax-related identity theft;
      (5) Taxpayers currently under civil examination, litigation, criminal investigation, or levy;
      (6) Taxpayers with pending or active offers in compromise;
      (7) Taxpayers with installment agreements;
      (8) Taxpayers who have a right to appeal their tax cases;
      (9) Taxpayers whose cases are classified as innocent spouse cases; and
      (10) Taxpayers in presidentially declared disaster areas who are requesting relief from collection. I.R.C. § 6306(d).
   c. Notices: The IRS will give taxpayers and their representative written notice that the accounts are being transferred to the private collection agency. The agency will send a second, separate letter to the taxpayer and their representative confirming this transfer. IRS, Private Debt Collection, https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection (last visited Oct. 19, 2016).
   d. Challenging Liabilities and Submitting Collection Alternatives: The details of what happens when a taxpayer wants to challenge a liability or submit a collection alternative have not yet been detailed, but details should be coming soon.

7. The Teachings of New Jersey Private Tax Debt Collection: The New Jersey Division of Taxation has long-used Pioneer to collect underpaid and unfiled State taxes. In New Jersey, the process works as follows:
   a. Process: The collection process with Pioneer currently works as
follows:

(1) The collection agency will review the liability and assign the account to a caseworker;

(2) The caseworker then mails an initial contact letter along with an updated Schedule of Liabilities (the New Jersey-equivalent of an account transcript) detailing the current balance due;

(3) The collection agency attempts to contact the taxpayer in an effort to resolve the matter;

(a) Note: Although the Division of Taxation states that the collection agency observes powers of attorney on file with the tax authority, this is rarely the case, and instead, the collection agency usually contacts the taxpayer direct.

(4) If the liability remains unresolved after 30 days, the collection agency will issue a “Notice of Demand for Payment” via certified mail. This official notification allows taxpayers either 30 days (for deficient items) or 90 days (for delinquent items) to resolve the issue. It is important that taxpayers with delinquent returns be aware that penalty and fees are assessed on delinquencies that are higher than if a return was filed timely.

(5) If the liability is still outstanding, a Certificate of Debt (“COD”, which is the New Jersey-equivalent of a NFTL filing) is entered with the Clerk of the New Jersey Superior Court. In New Jersey, a COD has the same force and effect as a docketed judgment adjudicated in any court of law.

(a) If a COD is issued for the outstanding liability, a cost of collection fee is added to the docketed judgment and becomes part of the outstanding liability. Not surprisingly, this causes the collection agency to move towards issuance of the COD more quickly than the IRS moves to issue the NFTL.

(6) Once the COD is in place, the case is returned to the tax authority for further collection action.

(7) All cases with CODs are assessed a cost of collection, which is in addition to the recovery fee. State of New Jersey, Who is Pioneer Credit Recovery, http://www.state.nj.us/treasury/taxation/PioneerCreditRecoveryWebNotice.shtml (last visited Oct. 19, 2016).

b. Referral Cost Recovery Fee: In New Jersey, the collection agency is entitled to a recovery fee rate of 10.7%. Id. The recovery fee to which the collection agency would be entitled under federal law has not yet been fixed.

c. Observations: Pioneer is effective at its job. Deadlines are short, cases are closed fast, and there is not much flexibility in approach.
Practitioners will need to get used to a less kind, less gentle, and less informed tax collection agency.

(1) **Private Causes of Action:** The Fair Debt Collection Practices Act applies to private collectors, which means that taxpayers can within one year of the violation bring suit against the collection agency in an appropriate U.S. district court. *See* 15 U.S.C. § 1692k(d) (“An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.”)

(2) **Complaints to TIGTA:** The IRS advises that, to make a complaint about a private collection agency or report misconduct by its employee, call the TIGTA hotline at (800) 366-4484, visit www.tigta.gov, or write to:

 Treasury Inspector General for Tax Administration
 Hotline
 Post Office Box 589
 Ben Franklin Station
 Washington, DC 20044-0589
II. Administrative & Judicial Review – Appeals & the Tax Court

A. Administrative Review in Collection Cases

1. **CDP Rights Generally:** In addition to issuing the notice and demand for payment (discussed above), the Commissioner must also notify the affected taxpayer in writing of his or her right to a hearing with an impartial officer of the IRS Office of Appeals (“Appeals”) either:
   a. Before the Commissioner may pursue collection by levy, or
   b. Within five business days after the date of the filing of a NFTL filing. See I.R.C. §§ 6320(a) and (b) (relating to liens) and 6330(a), (b) (relating to levies).

2. **Final CDP Notices & Administrative Appeal Rights:** The Commissioner typically advises taxpayers of the IRS’s intended collection efforts by sending to the affected taxpayer, with respect to a lien filing, the Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320, or with respect to a proposed levy, a Final Notice of Intent to Levy and Notice of Your Right to a Hearing.
   a. **Notices Which Trigger CDP Rights:** A CDP hearing may be requested in response to any of the following notices:
      (1) “Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC § 6320”;
      (2) “Notice of Intent to Levy and Notice of Your Right to a Hearing”;
      (3) “Notice of Jeopardy Levy and Right of Appeal”;
      (4) “Notice of Levy on Your State Tax Refund - Notice of Your Right to a Hearing”; and
   b. **One Hearing Per Period:** I.R.C. §§ 6320 and 6330 provide for one hearing per type of tax and tax period for the tax liability listed on the Final Notices.
      (1) **Multiple NFTLs or Proposed Levy Notices:** The right to request a CDP hearing applies to the first NFTL filed or the first proposed levy notice issued for a particular tax liability.
   c. **Coordination of Collection Review:** To the extent practical, a CDP lien hearing will be held in conjunction with a CDP levy hearing whenever a NFTL and proposed levy notice are issued.

3. **The Form 12153:**
   a. **Exercising CDP Rights:** A taxpayer invokes his or her rights to receive a CDP hearing by filing with the IRS no later than 30 days after the date of the final notice a Form 12153, Request for a Collection Due Process or Equivalent Hearing, with the IRS office and address as directed on the CDP notice.
      (1) When does 30 day period begin to run? The 30-day period in which to request CDP hearing runs from the date of mailing rather than the date that is on the notice. Weiss v.

(2) **Importance of the Form 12153:** It is important to fully develop the Form 12153 vis-à-vis an attachment and supporting documents. Even if the issues raised in the Form 12153 are not discussed during the CDP hearing (as sometimes occurs), if the matters are in the Form 12153, Appeals should consider those items when issuing its determination as to whether the IRS’s collection action is sustained.

(3) **Where to send the Form 12153 Package:** Package must be sent to IRS office indicated on notice. If it is timely sent to incorrect IRS office, which then forwards it to the correct IRS office, it runs the risk of being considered untimely as a jurisdictional requirement. Treas. Reg. §§ 301.6320-1(c)(2)(A-C6) & 301.6330-1(c)(2)(A-C6); I.R.M. § 5.19.8.4.2(8) (Aug. 5, 2016); see also T. Keith Fogg, *The Jurisdictional Ramifications of Where You Send a CDP Request*, Tax Notes (Nov. 12, 2018)

(a) Recent unpublished tax court opinions have been inconsistent as to whether the Tax Court would have jurisdiction to review CDP denials in this scenario and whether equitable tolling would apply to this 30 day period. See Taylor v. Commissioner, Docket No. 3043-17L (order dated Nov. 8, 2017); Nunez v. Commissioner, Docket No. 2946-17L (order dated May 18, 2018), and Nunez v. Commissioner, Docket No. 2925-17L (order dated May 21, 2018).

Items to Include With Form 12153 Package: The Form 12153 package should be sent by certified mail or fax and include the following items:

(a) Cover letter;
(b) Complete Form 12153 (may be signed by an authorized representative pursuant to a Form 2848);
(c) A copy of the Form 2848; and
(d) An attachment to the Form 12153 that should include, but is not limited to, the following items:

1. A request for a face-to-face transcribed conference request at the local IRS Appeals Office pursuant to I.R.C. §§ 6330 and 7521 (more on I.R.C. § 7521 below);
2. A request for de novo review of the tax, penalty and interest, if applicable;
3. A request that Appeals verify that the applicable requirements of law have been met, including but not limited to:
   (i) Record of assessment (I.R.C. § 6203);
   (ii) Issuance of a notice of deficiency if the assessment is for more than the tax shown on the return (I.R.C. § 6212);
   (iii) Notice and demand of payment (I.R.C. §§ 6303, 6321, 6331(a));
   (iv) SOL on assessment has not expired (I.R.C. § 6501);
   (v) SOL on collection has not expired (I.R.C. § 6502);
   (vi) Document demonstrating compliance with I.R.C. § 6751(b)(1) if a non-automatic penalty is to be collected; and
   (vii) Verification of contacts required by I.R.C. § 6404(g) for non-suspension of interest.
4. A request for penalty abatement request, if applicable;
5. A statement of relevant background facts;
6. A statement of all pertinent and potential issues;
7. A request for the right to amend the request;
8. A request for the right to supplement the CDP request;
9. A request for no ex-parte communication.
between IRS employees working on the same or related cases unless it is beneficial for resolution of the case to allow such ex parte communications; and

(10) If applicable, the taxpayer’s proposed collection alternative(s).

Attached as **Appendix A** is a sample attachment to a Form 12153.

(5) **Equivalent Hearings Allowed:** A taxpayer who fails to make a timely request for a CDP hearing may request an equivalent hearing with Appeals. But, the determination by Appeals in connection with the equivalent hearing is NOT subject to Tax Court review.

b. **Supplementing the Form 12153:** As the window in which to file a Form 12153 is a relatively short 30-day window, practitioners may want to supplement the Form 12153 as new facts are discovered. It is okay to supplement the Form 12153, and as noted above, it is generally advisable to reserve the right to supplement the Form 12153 when it is first submitted to Appeals. The Supplement may include:

(1) Additional facts and arguments Appeals should consider;
(2) Proof of compliance with payment and filing obligations;
(3) Requests for penalty abatements or audit reconsideration, as appropriate;
(4) The collection information statement (i.e., the Form 433-A or Form 433-B, as appropriate); and
(5) Forms required to obtain collection alternatives (e.g., Form 9465, *Installment Agreement Request* (for installment agreement requests), Form 656 (for OIC requests), and Form 8857, *Request for Innocent Spouse Relief* (for innocent spouse requests)).

4. **Securing Face-to-Face Hearings in a Resource-Challenged Environment:**

a. **Elimination of Face-to-Face Conferences?** The extent to which a taxpayer is entitled to a face-to-face conference in connection with a CDP hearing has long been the subject of debate. On October 1, 2016, the IRS amended the I.R.M. to instruct AOs and SOs: “[e]xcept as set forth below, hold conferences by telephone.” I.R.M., pt. 8.6.1.4.1 (Oct. 1, 2016).

(1) **The Issue With Eliminating Face-to-Face Conferences:** Face-to-face conferences contribute to amicable resolution of many tax cases, especially CDP cases. The elimination of face-to-face conferences is troubling for many reasons which are outside the scope of this Outline. That said, we reject the premise that Appeals can unilaterally eliminate
face-to-face conferences, provided that the request is made under I.R.C. § 7521.

b. Using I.R.C. § 7521 to Force Face-to-Face Conferences:

(1) **Taxpayers’ Right to Record:** Under the plain language of I.R.C. § 7521, first enacted with the original Taxpayer Bill or Rights as part of the Technical and Miscellaneous Revenue Act of 1988, any IRS officer or employee “in connection with any in-person interview with any taxpayer relating to the determination or collection of any tax” must allow the taxpayer to audio record an interview if the taxpayer requests it in advance, pays for it, and supplies the equipment. I.R.C. § 7521(a)(1).

(2) **IRS’s Right to Record:** IRS officers or employees may also record any such interview with advanced notice to the taxpayer, and if they provide the taxpayer a transcript or copy of the recording upon the taxpayer’s request. (The taxpayer would pay for his or her personal copy of the IRS’s recording or transcript.) I.R.C. § 7521(a)(2).

(3) **When Granted:** Requests to record an in-person interview will be granted by the IRS under the following conditions:
   (a) The taxpayer or representative supplies the equipment;
   (b) The IRS may produce its own recording;
   (c) The recording takes place in a “suitable location, ordinarily in an Internal Revenue Service office where equipment is available to produce the Service’s recording”; and
   (d) All non-IRS participants consent to the recording, and they identify themselves and their roles in the proceeding. Notice 89-51, 1989-1 CB 691.

(4) **How to Request:** A taxpayer or tax representative must request a recording in writing addressed to the IRS employee conducting the interview, who must receive it at least ten days prior to the interview date. If such notice is not given, the IRS may use its discretion to conduct the interview or schedule a new date. Id.

(5) **In-Person Interviews Include CDP Hearings:** I.R.C. § 7521 applies to not only in-person interviews with the examination division, but also to face-to-face Appeals hearings. Keene v. Commissioner, 121 T.C. 8 (2003); I.R.M., pt. 8.6.1.5.2 (Oct. 1, 2016).
   (a) **Keene v. Commissioner:** In the landmark case of Keene v. Commissioner, 121 T.C. 8 (2003), the Tax Court held that a taxpayer who declined to participate in a CDP hearing because the Appeals Officer refused to let him record the hearing was
denied due process rights. The majority of the Tax Court decided on several grounds that Appeals conferences could be recorded or transcribed. First, the Court determined that language in Notice 89-51, 1989-1 C.B. 691, and internal memorandum which deliberately excluded Appeals hearings as “interviews” was invalid; “hearing” and an “interview” were basically synonymous, and any other interpretation would lead to an anomalous result. Keene, 121 T.C. at 16-18.

(1) Benefits of Transcribed Hearings in CDP Cases: In his concurring opinion in Keene, Judge Vasquez aptly described the benefits of a transcribed CDP hearing as follows:

Having a transcript of the section 6330 hearing will allow us to perform better the review provided to taxpayer by section 6330(d). Until now, in order to determine what issues taxpayers raised at the Section 6330 hearing, the Court was faced with “he said-she said” situations—needless “credibility contests” between the taxpayer and the Appeals Officer. [Keene, 121 T.C. at 23 (J. Vasquez, concurring).]

(b) What Must Be Done to Obtain the Face-to-Face Conference: Pursuant to the I.R.M., a taxpayer who

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8 Note that the taxpayer in Keene raised all frivolous arguments in his request for a CDP hearing. The general consensus in case law, the Treasury Regulations, and I.R.M. directives post-Keene is that AOs need not grant face-to-face conferences for “taxpayers who only raise frivolous issues and/or arguments, or other issues such as those concerning moral, constitutional, religious, conscientious, political, or similar grounds.” I.R.M., pt. 8.6.1.5(2) (Oct. 1, 2016). Because the taxpayer must raise all issues before the hearing, the I.R.M. implies that Appeals will determine whether it deems an issue frivolous before a face-to-face hearing can be scheduled. I.R.M., pt. 8.6.1.5(2), (3), Note (Oct. 1, 2016); see also Treas. Reg. § 301.6330-1(d)(2), Q&A-D8 (“A face-to-face CDP conference concerning a taxpayer’s underlying liability will not be granted if the request for a hearing or other taxpayer communication indicates that the taxpayer wishes only to raise irrelevant or frivolous issues concerning that liability.”). According to the I.R.M., taxpayers who are denied a face-to-face hearing because their issues are deemed frivolous “are allowed an opportunity to raise specific relevant issues in response to the Appeals letter advising them they do not qualify for a face-to-face conference.” I.R.M., pt. 8.6.1.5(3) (Oct. 1, 2016). If the taxpayer succeeds to raise such specific relevant issues before the Appeals conference, but discusses only frivolous issues during a face-to-face conference, the Appeals officer may terminate the conference. I.R.M., pt. 8.6.1.5.1(2) (Oct. 1, 2016). Indeed, the IRS’s policy is now that frivolous arguments may not be audio recorded. I.R.M., pt. 8.6.1.5.2(3) (Oct. 1, 2016). See also Le Doux v. United States, 375 F. Supp.2d 1242 (D.N.M. 2005) (ruling that the IRS’s refusal to let a taxpayer raising frivolous arguments record a CDP hearing constituted “harmless error”).

9 For full text of the 2002 memorandum, see Keene, 121 T.C. at 12-13.
wishes for a stenographic record of a CDP hearing, in addition to notifying the IRS ten days in advance, must also otherwise qualify for a face-to-face conference, and must work with a court reporter who is either qualified to take depositions for a U.S. district court or who is licensed or certified by any State to be a court reporter or to take depositions. I.R.M., pt. 8.6.1.5.2 (Oct. 1, 2016).

5. Collection Forms With Which Practitioners Should Be Familiar:
   a. **In General:** A number of forms arise with regularity in collection cases. A summary of the forms practitioners are most likely to encounter, and their relevance to the collection process, are discussed below.
   b. **Form 433-A:** The IRS uses Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*, to obtain current financial information to determine how a wage earner or self-employed individual can satisfy an outstanding tax liability. Income from a Schedule C, *Profit or Loss From Business*, should be reported on Form 433-A.
   c. **Form 433-B:** The IRS uses Form 433-B, *Collection Information Statement for Businesses*, to obtain current financial information with respect to income derived from an active trade or business or with respect to income received from an entity (e.g., from a corporation, partnership, or limited liability company (“LLC”), regardless of whether the LLC has a single member or multiple members).
   d. **Form 433-F:** The IRS uses Form 433-F, *Collection Information Statement*, to obtain current financial information to determine how a wage earner or self-employed individual can satisfy an outstanding TFRP liability. Form 433-F may be used in lieu of Form 433-A if the individual is a wage earner and the potential TFRP liability is less than $100,000.
   e. **Form 656:** Offers in compromise requests are submitted on Form 656, *Offer in Compromise*, using the most current version.
      (1) **The Form 656 Booklet:** The Form 656-B (Booklet), *Offer in Compromise*, provides detailed instructions for completing an offer and includes all of the necessary financial forms. When submitting Form 656, unless the taxpayer qualified for the low-income certification or is filing a DATL offer, the taxpayer must include an application fee and the required TIPRA payment (i.e., the payments established in accordance with the Tax Increase and Reconciliation Act of 2005). I.R.M., pt. 5.8.1.13 (Nov. 8, 2018).
      (2) **When Are Financial Statements Required for an Offer:** Offers submitted on the basis of DATC or ETA should
include a current version of the collection information statement \textit{(i.e., Form 433-A (OIC))}. For offers based solely on DATL, no collection information statement is required. However, the taxpayer must include a written statement explaining why the liability is incorrect and must include a statement addressing the validity of the actual assessment(s) or a portion of the assessment(s). I.R.M., pt. 5.8.1.13 (Nov. 8, 2018).

f. Form 656-L: To apply for an offer on the basis of doubt as to liability, a taxpayer should submit Form 656-L, \textit{Doubt as to Liability}.

g. Form 433-A (OIC): The IRS uses Form 433-A (OIC), \textit{Collection Information Statement for Wage Earners and Self-Employed Individuals}, to obtain current financial information for wage earners and self-employed individuals to determine a taxpayer’s reasonable collection potential and to compute the minimum offer amount that the IRS would accept in connection with an OIC. Income from a Schedule C should be reported on Form 433-A.

h. Form 433-B (OIC): The IRS uses Form 433-B (OIC), \textit{Collection Information Statement for Businesses}, to obtain current financial information with respect to businesses or entities \textit{(e.g., from a corporation, partnership, or LLC of any type)}. The IRS uses the Form 433-B (OIC) to determine a taxpayer’s reasonable collection potential and to compute the minimum offer amount that the IRS would accept in connection with an OIC.

i. Form 8857: The Form 8857, \textit{Request for Innocent Spouse}, is filed to request relief from joint and several liability with respect to a joint tax return.

j. Form 9465: The Form 9465, \textit{Installment Agreement Request}, is used to request an installment agreement where the taxpayer cannot pay the amount due in one payment, but can pay it over time.

k. Form 911: The Form 911, \textit{Request for Taxpayer Advocate Service Assistance}, is used to request assistance from the Taxpayer Advocate Service \textit{\textquoteleft\textquoteleft TAS\textquoteright\textquoteright} if the taxpayer is facing difficulty with the IRS. The Form 911 is appropriate if:

1. The taxpayer’s problem with the IRS is causing financial difficulties for the taxpayer, his or her family, or his or her business;

2. The Taxpayer (or his or her business) is facing an immediate threat of adverse action;

3. The Taxpayer has tried repeatedly to contact the IRS, but no one has responded, or the IRS has not responded by the date promised; or

4. If an IRS office will not give the taxpayer the help you’ve requested.
Note: TAS is an incredible resource for taxpayers where the IRS is not doing what it should be doing. TAS is overloaded, and as a practical matter, will sometimes seek to reject cases where there is no economic hardship. However, to the extent there is a violation of the Taxpayer Bill of Rights, explaining that to the case advocate, will often result in TAS interceding on the taxpayer’s behalf.

1. Form 12153: Form 12153, Request for a Collection Due Process or Equivalent Hearing, is the form by which a CDP hearing is requested. CDP hearings are discussed in passim throughout this outline.

m. Form 9423: Form 9423, Collection Appeal Request, is the form by which a CAP hearing is requested. CAP hearings are discussed in passim throughout this outline.

6. Appeals’ Function in CDP Cases:
a. Appeals Handles CDP Cases: Collection cases are reviewed by the Appeals. This is to say that the Commissioner takes a collection action (as is the case in issuing the NFTL) or proposes to levy property. Then, that collection action is subject to administrative review by Appeals and, if an agreement is not able to be reached and a petition is timely filed, judicial review by the Tax Court. Within Appeals, readers must understand a distinction between to whom their clients cases may be assigned:
   (1) AOs v. SOs: Within Appeals, there are Appeals Officers (“AOs”) and Settlement Officers (“SOs”).
   (2) AOs: AOs have the ability to determine underlying tax liability; SOs generally do not.
   (3) SOs: SOs usually handle CDP cases where the underlying liability is not at issue.

b. The Welcome to Appeals Letter: Once the case is assigned to an officer in Appeals, the assigned officer will send a letter introducing himself or herself, scheduling a CDP conference, and requesting certain documents to support the collection alternative requested.
   (1) Documents Typically Requested: The documents typically requested include: (1) an amended tax return (if the underlying liability is challenged in connection with a filed tax return for which a notice of deficiency has not been issued); (2) Form 8857, Request for Innocent Spouse (if relief from joint and several liability is requested); (3) Forms 433-A and 433-B (Collection Information Statements); and (4) proof of current compliance (e.g., proof that tax filings are current and that current tax deposits have been made).
   (a) Exception to Current Compliance: If a proposed
levy will cause an undue hardship and must be immediately released, the taxpayer is not required to prove compliance as a pre-requisite for a hearing. See Vinatieri v. Commissioner, 133 T.C. 392 (2009).

(2) What to Do When the Case is Not Assigned to a Local Office: More frequently, despite the request for a face-to-face conference, the IRS is assigning CDP requests to Service Centers for CDP conferences by telephone. The assigned office will be learned in the Welcome to Appeals Letter. In response to the Welcome to Appeals Letters to a Service Center, assuming the practitioner still desires a face-to-face conference, submit a request to have the case transferred to a local Appeals office and renew the request that the CDP conference be recorded. Traditionally, Appeals will transfer the case to a local Appeals office, provided that the Taxpayer is in compliance and has submitted all required documents (e.g., the Form 433-A, Form 433-B, and proof of current compliance). Practitioners should expect resistance from Appeals with respect to these requests in light of the recent changes to the I.R.M. providing the default rule that conferences with Appeals should be held by telephone.

7. The CDP Hearing:
   a. Generally: As noted, I.R.C. §§ 6320(b) (relating to liens) and 6330(b) relating to levies allows a taxpayer to request a hearing with Appeals to review the propriety of the collection action. This hearing is known as a “CDP hearing”.
   b. Preparing the CDP Hearing: It is important to prepare for the CDP hearing by taking the following steps:
      (1) Explore and Be Prepared to Discuss All Potential Arguments: Any issue not raised during the CDP hearing is waived, so it is important to raise all arguments. Giamelli v. Commissioner, 129 T.C. 107, 111 (2007).
      (2) Review All Information About the Taxpayer’s Case:
         (a) Request updated IRS account transcripts;
         (b) Review the IRS’ administrative file pursuant to the FOIA Request; and
         (c) Conduct searches for taxpayer’s assets, liabilities, and background via Google, credit reports, public record searches, lawsuits, liens, etc.
      (3) Determine and Discuss Which Collection Alternatives Are Being Requested and Which Apply: It is important to fully think through (and discuss during the CDP hearing) possible collection alternatives:
         (a) Challenges to the underlying liability;
(b) Offers in compromise;
(c) Audit reconsideration;
(d) Innocent spouse;
(e) Currently not collectible; and
(f) Installment agreements and full-pay offers.

c. Issues Which May Be Raised During Hearing: CDP hearings allow taxpayers to raise issues relating to the collection of the tax liability, including:

1. Appropriateness of the collection action;
2. Collection alternatives (e.g., installment agreement, OIC, request for “currently not collectible” status, relief from joint and several liability, and any other item the taxpayer wishes to propose);
3. Spouse defenses under I.R.C. § 6015;
4. The existence or amount of the underlying liability, but only if the taxpayer did not receive a notice of deficiency or otherwise have an opportunity to dispute the tax (I.R.C. § 6330(c)(2)(B)); and

(a) Refusal of Delivery of Notice of Deficiency: A taxpayer who receives notification from the U.S. Post Office that a notice of deficiency is ready to be picked up, but refuses to collect the notice, had a meaningful opportunity to challenge the underlying tax liability and is not entitled to challenge the notice at the CDP hearing. See Onyango v. Commissioner, 142 T.C. 425 (2014), aff’d, 638 Fed. Appx. 5 (D. C. Cir. 2016).

(b) Proving the Notice of Deficiency Was Not Received: Self serving testimony alone is generally insufficient to demonstrate that a notice of deficiency was not received. See Klingenberg v. Commissioner, T.C. Memo. 2012-292, aff’d 551 Fed. Appx. 354 (9th Cir. 2014). But, some of the authors have recently had success on this front with credible taxpayers. When challenging receipt of a notice of deficiency, to the extent possible, it is advisable to buttress the witness’ testimony with a lack of records by the IRS (e.g., no proof of certified mailing, notice not issued to the taxpayer’s last known address, or the IRS is unable to produce a copy of the notice of deficiency).

(c) Recent Litigation: For recent litigation concerning the prior opportunity to dispute an underlying liability, see discussion of Keller Tank Servs. II, Inc. v. Commissioner, 854 F.3d 1178 (10th Cir. 2017), James v. Commissioner, 850 F.3d 160 (4th
Practical Consideration of Rulings: As noted, many Appeals officers now take the position that any opportunity to contest a liability in Appeals is a prior opportunity for purpose of determining whether a taxpayer may challenge the underlying liability in a CDP hearing. Accordingly, practitioners should determine when and whether to challenge an underlying liability. For example, although past practice may have suggested that filing a penalty and interest abatement request was the opportune time to challenge the imposition of a penalty, in light of the Keller Tank line of cases, it may be more prudent to wait for a final notice before challenging underlying liability, the effect of which is to ensure the taxpayer receives judicial review of Appeals’ decision.

(5) Any other relevant issue relating to the unpaid tax, the lien, or the proposed levy.

d. Issues Which May Not Be Raised at the Hearing: Pursuant to I.R.C. § 6330(c)(4), an issue may not be raised at the CDP hearing if:

(1) The issue was raised and considered at a previous hearing under I.R.C. § 6320 (notice and opportunity for hearing upon filing of notice of lien) or in any other previous administrative or judicial proceeding and the person seeking to raise the issue participated meaningfully in such hearing or proceeding; or

(2) The issue meets the requirements of a “specified frivolous submission” (i.e. based on a position which the IRS has identified as frivolous, or a position which reflects a desire to delay or impede the administration of federal tax laws). See I.R.C. § 6702(b)(2)(A).

e. Items to be Raised and Considered at Hearing: Where a hearing is requested, either in response to a lien filing or a proposed levy, the Appeals officer must comply with the requirements set forth in I.R.C. § 6330(c). That is, the Appeals officer must:

(1) Obtain verification from the IRS that the requirements of applicable law or administration procedure were met;

(a) Thus, to the extent the IRS did not comply with the applicable law or administrative procedures, then this should be discussed and documented during the CDP hearing.

(2) Consider any relevant issue relating to the unpaid tax, the filing of the NFTL or the proposed levy, including but not
limited to appropriate spousal defenses, challenges to the appropriateness of the collection actions, and collection alternatives; and
(a) As noted, the taxpayer should raise during the hearing all challenges to the underlying liability and all collection alternatives, as well as any other relevant issue the taxpayer wants considered.

(3) Consider whether the action taken or proposed balances the government’s need for the efficiency collection of taxes with the taxpayer’s legitimate concern that any collection action be no more intrusive than necessary. See I.R.C. § 6330(c); see also I.R.M., pt. 8.22.9.6.7 (Nov. 13, 2013).
(a) As discussed more fully infra at Section II.B.3.2, some Appeals officers fail to properly balance these two competing interests. Practitioners should detail the reasons that the taxpayer’s concern that the collection action be no more intrusive than necessary outweighs the government’s need to efficiently collected taxes.

8. The Notice of Determination:
a. In General: Following the CDP hearing, Appeals issues its determination by mailing to the taxpayer a notice of determination that sets forth its findings and decision, resolves the tax liability, sustains or rejects the IRS’s proposed (or actual) collection action, or accepts or rejects the taxpayer’s proposed collection alternative. I.R.C. § 6330(c)(3); Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E8 (relating to liens); 301.6330-1(e)(3), Q&A-E8 (relating to levies). As explained below, the taxpayer is entitled to judicial review of the notice of determination.

b. Items to Be Considered in Issuing the Notice of Determination: I.R.C. § 6330(c)(3) requires an Appeals officer to take into account the following items in making a determination in connection with a CDP case:
(1) Verification from the Secretary that the requirements of applicable law or administration procedure were met;
(a) Requirements of Applicable Law: The requirements of applicable law may include any of the following:
(1) Record of assessment (I.R.C. § 6203);
(2) Issuance of a notice of deficiency if the assessment is for more than the tax shown on the return (I.R.C. § 6212);
(3) Notice and demand of payment (I.R.C. §§ 6303, 6321, 6331(a));
(4) SOL on assessment has not expired (I.R.C. § 6501);
(5) SOL on collection has not expired (I.R.C. § 6502);  
(6) Document demonstrating compliance with I.R.C. § 6751(b)(1) if a non-automatic penalty is to be collected; and 
(7) Verification of contacts required by I.R.C. § 6404(g) for non-suspension of interest.

(2) Any relevant issue relating to the unpaid tax, the filing of the NFTL or the proposed levy, including but not limited to appropriate spousal defenses, challenges to the appropriateness of the collection actions, and collection alternatives; and 
(3) Whether the action taken or proposed balances the government’s need for the efficiency collection of taxes with the taxpayer’s legitimate concern that any collection action be no more intrusive than necessary. See I.R.C. § 6330(c)(3).

c. Beware of misleading language regarding time to petition tax court: Taxpayer has 30 days to petition Tax Court for review but language on Notice of Determination is misleading some taxpayers to believe that this is incorrectly a 31 day period, causing untimely petitions. See T. Keith Fogg, Collection Due Process Determination Letter Continues to Mislead Taxpayers Into Filing Their Tax Court Petition Too Late, Posting to Procedurally Taxing Blog, http://procedurallytaxing.com/collection-due-process-determination-letter-continues-to-mislead-taxpayers-into-filing-their-tax-court-petition-too-late/ (Oct. 4, 2017)

9. CAP & Equivalent Hearings: A taxpayer who fails to make a timely request for a CDP hearing may request an equivalent hearing with Appeals. But, the determination by Appeals in connection with the equivalent hearing is NOT subject to Tax Court review.

B. Judicial Review in CDP Cases
1. Jurisdiction and Filing the Petition:
   a. Jurisdiction: I.R.C. §§ 6320(c) (relating to liens) and 6330(d)(1) (relating to levies, and by incorporation, to liens) grants the Tax Court jurisdiction to review lien and levy collection actions undertaken by the IRS. 
      (1) Purpose of Judicial Review: A lien and levy action seeks judicial review of the Service’s determination to proceed with respect to certain collection actions; namely, liens and levies. 
      (2) Ability to Restrain: The Tax Court may restrain collection actions where the IRS did not comply with certain procedural due process requirements. I.R.C. § 6330. 
   b. Prerequisites to Jurisdiction – The Notice of Determination and the Petition: Following the issuance of the notice of determination, the
taxpayers has the right to judicial review of Appeal’s determinations provided that the taxpayer timely:

(1) Filed the CDP request;
   (a) What if a taxpayer fails to request a CDP hearing within 30 days because the notice was not sent to the most recent address or was not sent at all?
      (1) The Tax Court has no jurisdiction without a Notice of Determination which comes after a CDP hearing.
      (2) Many Tax Court decisions invalidated levies in such situations before dismissing the case for lack of jurisdiction.
      (3) One recent appellate decision stated that, without jurisdiction, the Tax Court cannot invalidate levies in such cases. See Adolphson v. Comm’r, 842 F.3d 478, 486 (7th Cir. 2016) (citing Boyd v. Commissioner, 451 F.3d 8, 10 (1st Cir. 2006)).
      (4) The Court stated such wronged taxpayers can still sue for a refund in the U.S. Court of Federal Claims and in U.S. District Courts.

and

(2) Petitions the Tax Court.
   (a) Time for Filing Petition: A taxpayer has 30 days from the date the notice of determination is placed in the mail to file a petition.
      (1) Note: The operative date is not the date of the notice of determination, but the date the notice is placed into the mail. Recently, in Weiss v. Commissioner, 147 T.C. 179 (2016), the Tax Court held that when the date appearing on a levy notice is earlier than the date of mailing, the 30-day period to file a Tax Court petition is calculated by reference to the date of mailing, not the date of the notice. This logic easily extends to the 90-day period to file a Tax Court petition in response to a notice of deficiency (though in practice it is less of an issue because of the longer period).

   (b) Lien Action Petitions: A petition initiating a lien action shall be entitled “Petition for Lien Action Under Section 6320(c)”.

   (c) Levy Action Petitions: A petition initiating a levy action is to be entitled “Petition for Levy Action
Under Section 6330(d). The contents are discussed below.

(d) Petition Requirements: The requirements of the respective petitions are set forth in Tax Court Rule 331(b). The contents are discussed below.

c. Tax Court’s Two-Fold Function in a CDP Case: In Dalton v. Commissioner, 682 F.3d 149 (1st Cir. 2012), the Court of Appeals for the First Circuit reversed the Tax Court and held that the Tax Court’s job is two-fold:

(1) To decide whether the IRS’s subsidiary factual and legal determinations are reasonable; and

(2) Whether the ultimate outcome of the CDP proceeding constitutes an abuse of the IRS’s wide discretion. In other words, subsidiary legal determination, even if incorrect, will not be an abuse of discretion, if the determination was reasonably reached.

d. Record Rule: Under the administrative record rule, judicial review of nonliability issues under I.R.C. § 6330 is limited to the administrative record (i.e., the administrative record developed during the agency proceeding). See, e.g., Boulware v. Commissioner, T.C. Memo. 2014-80.

(1) Query whether the record rule should necessarily include a transcription of the hearing, which is allowed under I.R.C. § 7521, but not required.

2. Pleadings & Requested Relief:

a. The Petition: As noted, a petition initiating a lien action shall be entitled “Petition for Lien Action Under Section 6320(c)”. A petition initiating a levy action is to be entitled “Petition for Levy Action Under Section 6330(d).” The requirements of the respective petitions are set forth in Tax Court Rule 331(b) and are as follows:

(1) In the case of a petitioner who is an individual, the petitioner’s name and State of legal residence on the date the petition is filed. In the case of a petitioner that is other than an individual, the petitioner’s name and principal place of business or principal office or agency as of the date the petition is filed;

(2) The petitioner’s mailing address as of the date of the petition;

(3) The date of the notice of determination;

(4) The city and State of the office of the Service which made the determination;

(5) The amount or amounts and type of underlying tax liability and the year or years or other periods to which the notice of determination relates;

(6) Clear and concise assignments of each and every error
which the petitioner alleges to have been committed by the Service in the notice of determination;

(7) Clear and concise lettered statements of the facts on which the petitioner bases the assignments of error;

(8) A prayer setting forth the relief sought by the petitioner;

(9) The signature, mailing address, and telephone number of each petitioner or each petitioner’s counsel, as well as the counsel’s Tax Court bar number; and

(10) A COPY OF THE NOTICE OF DETERMINATION.

b. The Answer:

(1) In General: The Answer is the Service’s responsive pleading, and is required pursuant to Tax Court Rule 36.

(2) Time to Answer or Move: The Service has 60 days from the date the petition is served within which to file an answer or 45 days from that date within which to move with respect to the petition (e.g., to file a motion to dismiss for lack of jurisdiction). Tax Ct. R. 36(a).

(3) Form and Content: The answer must be drawn so that it will advise the petitioner and the Court fully of the nature of the Service’s defenses. Tax Ct. R. 36(b). Paragraphs within the answer must be designated to correspond to those of the petition to which they relate. The following general rules apply as to the admission or denial of any matter contained in the answer:

(a) Admissions and Denials: The answer must contain a specific admission or denial of each material allegation in the petition; but if the Service lacks knowledge or information sufficient to form a belief as to the truth of an allegation, then the Service shall so state, and such statement shall have the effect of a denial.

(b) Clear and Concise Statements: The answer must contain a clear and concise statement of every ground, together with the facts in support thereof on which the Commissioner relies and has the burden of proof (e.g., fraud).

(4) Effect of Answer: Every material allegation of the petition, not expressly admitted or denied in the answer, is deemed admitted. Tax Ct. R. 36(c).

c. Reply: Taxpayers can file a Reply in response to affirmative allegations in the Answer. Affirmative allegations are rarely (if ever) made in a collection case, and as such, we do not discuss the Reply here.

3. Standard of Review:

a. Standard of Review:

(1) Underlying Liability at Issue: Where the validity of an
underlying tax liability is properly raised in the taxpayers’ CDP hearing, the Court reviews the issue de novo. Montgomery v. Commissioner, 122 T.C. 1, 7-10 (2004).

(2) Underlying Liability Not at Issue: Where the underlying tax liability is not at issue, and the Court reviews only the appropriateness of the collection action, the standard of review is abuse of discretion.

(a) Abuse of Discretion: An abuse of discretion occurs if the Appeals Office exercises its discretion arbitrarily, capriciously, or without sound basis in fact or law. Woodral v. Commissioner, 112 T.C. 19, 23 (1999).

(b) Creative Uses of I.R.C. § 7803(a)(3) to Establish an Abuse of Discretion: As noted supra at II,G.1., the recent codification of TBOR II through I.R.C. § 7803(a)(3) permits practitioners to argue that Appeals’ failure to follow the TBOR II is a violation of the internal revenue laws and a per se abuse of discretion. Taxpayers may be able to craft arguments that Appeals abused its discretion in failing to adhere to these rights (e.g., the right to pay no more than the correct of tax and the right to a fair and just tax system).

(c) Creative Uses of I.R.C. § 6330(c) to Establish an Abuse of Discretion: Recall that I.R.C. § 6330(c) requires the Appeals officer to balance the government’s need for the efficiency collection of taxes with the taxpayer’s legitimate concern that any collection action be no more intrusive than necessary. Many Appeals officers are failing to properly balance, if they balance at all, these two factors. Instead, some Appeals officers simply say they have balanced the government’s and the taxpayer’s respective interests, but do not cite any specific factors explaining the balancing test performed. Practitioners should evaluate whether the Appeals officer properly balanced the two competing interests, and to the extent the Appeals officer did not, to argue that the improper balancing was an abuse of discretion.

(1) National Taxpayer Advocate’s Concerns: The National Taxpayer Advocate (“NTA”) reported that that “[t]hese issues contribute to the appearance that Appeals is simply “rubber stamping” prior determinations by the Collection function.” 2 NAT’L
In particular, the NTA determined that Appeals often uses *pro forma* or boilerplate statements that the balancing test has been performed yet does not cite any specific factors balanced. *Id.*

(2) Proposals for Balancing Test: The NTA proposed the following solution in order to address errors with the balancing test:

To provide the protections that Congress intended, the National Taxpayer Advocate recommends that the Office of Appeals, in collaboration with TAS, formulate a policy statement on the CDP balancing test that reflects congressional intent; develop specific factors for the application of the CDP balancing test based on an analysis of case law and legislative history for use by both Appeals and Collection; revise the IRM to specifically prohibit *pro forma* statements that the balancing test has been performed and instead require a description of which factors were considered and how they apply in the particular taxpayer’s case; integrate any newly developed factors for the application of the CDP balancing test into the Appeals IRM and train all Appeals Officers, Settlement Officers, and Appeals Account Resolution Specialists on applying the balancing test consistently; incorporate the balancing test analysis into the Collection IRM; and provide necessary training to Collection employees (because if the balancing test were applied at the point of first contact, there would be less rework for TAS and Appeals). *[Id.]*

4. **Scope of Review & the Chenery Doctrine:**
   a. **Underlying Liability at Issue:** As noted, where the validity of the tax liability is properly at issue, the standard of review is *de novo*. *Montgomery v. Commissioner*, 122 T.C. 1 (2004). This means that the Court will consider all relevant evidence introduced at trial. *See Hoyle v. Commissioner*, 131 T.C. 197 (2008).
   b. **Underlying Liability Not at Issue:** As noted, where the validity of an underlying tax liability is properly raised in the taxpayers’ CDP hearing, the Court reviews the issue *de novo*. *Montgomery v. Commissioner*, 122 T.C. 1, 7-10 (2004). However, the scope of that review is limited by at least three doctrines.
      (1) **Administrative Record at the Time of the CDP Hearing:** The scope of review is limited to the administrative record at the time of the CDP hearing. *Giamelli v. Commissioner*,

(a) **Exception for Changed Circumstances:** There is an exception if there are changed circumstances, in which the Court may remand the case to Appeals to consider the changed circumstances if doing so would be “necessary or productive”. See [Lunsford v. Commissioner, 117 T.C. 183, 189 (2001); Magana v. Commissioner, 118 T.C. 488 (2002); Churchill v. Commissioner, T.C. Memo. 2011-182](http://www.irs.gov)

(2) **Issues Not Raised During the CDP Hearing Cannot Be Raised:** Issues not raised during the CDP hearing cannot be raised by the taxpayer at trial. See [Giamelli, 129 T.C. at 107](http://www.irs.gov).

(3) **The Chenery Doctrine:** Under the Chenery doctrine, the IRS should not argue that a determination should be sustained on issues that were not identified in the Notice of Determination. See [Antioco v. Commissioner, T.C. Memo. 2013-35](http://www.irs.gov). The Chenery doctrine provides as follows:

A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. [SEC v. Chenery, 332 U.S. 194, 196 (1947)]


c. **How It Arises in Practice:** Sometimes, an Appeals officer will fail to consider an issue in a CDP case, and IRS counsel will seek to supplement the administrative record with evidence showing the correctness of the Appeals officer’s decision, for example, to sustain a proposed levy or the filing of a NFTL. IRS counsel is generally precluded from doing so under the Chenery rule. See, e.g., [La. Ass’n of Indep. Producers & Royalty Owners v. F.E.R.C., 958 F.2d 1101, 1123 n.12 (D.C. Cir. 1992) (noting that Chenery](http://www.irs.gov)
precludes a court from giving an agency, such as the Service, the benefit of a “post hoc rationale of counsel”); see also Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169 (1962) (“The courts may not accept ... counsel’s post hoc rationalizations for agency action; ... an agency’s discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself”).

5. **Motion Practice:**
a. **The Motion for Summary Judgment:**
   
   (1) **Overview:** A motion for summary judgment attempts to bring to a head the legal merits of the case (or a part of the case) on the basis of the pleadings, affidavits, and exhibits, without the need for a trial.
   
   (a) **Common in CDP Cases:** Especially in CDP cases, where the record rule applies, a motion for summary judgment is an appropriate way to dispose of a collection case.
   
   (2) **Purpose:** Summary judgment is a procedure designed to serve judicial economy by avoiding unnecessary and expensive trials of phantom factual questions. Shiosaki v. Commissioner, 61 T.C. 861, 862 (1974).
   
   (3) **Who May File (Tax Court Rule 121(a)):** Either party may move, with or without supporting affidavits or declarations, for a summary adjudication in the moving party’s favor upon all or any part of the legal issues in controversy.
   
   (4) **Time for Filing (Tax Court Rule 121(a)):** A motion for summary judgment may be filed at any time commencing 30 days after the pleadings are closed and no later than 60 days before the date the case is calendared for trial. The Court has discretion to allow the filing of a motion for summary judgment after the 60-day deadline.
   
   (5) **Response Will be Required (Tax Court Rule 121(b)):** The Court will order a written response.
   
   (6) **When Decision Will be Entered (Tax Court Rule 121(b)):** After the motion and response are filed, the Court will render a decision “if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits and declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law.”
   
   (7) **Partial Summary Judgment Allowed (Tax Court Rule 121(b)):** The motion for summary judgment may be filed with respect to one, more than one, or all issues presented in the case.
   
   (8) **Factual Inferences:** The facts and inferences drawn
therefrom are viewed in the light most favorable to the nonmoving party. See Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

(9) **Opposing Party May Not Rest on Allegations in Pleadings Alone** (Tax Court Rule 121(d): The non-moving party may not simply rest upon the allegations and denials in that party’s pleadings. Instead, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Tax Ct. R. 121(d); Dahlstrom v. Commissioner, 85 T.C. 812, 820-821 (1985).

b. **The Motion to Remand:**

(1) **General:** In collection cases, Appeals retains jurisdiction of a case even though judicial review of the collection action is sought in the Tax Court. See I.R.C. § 6330(d)(2).

(2) **Applicability:** In collection cases in which the underlying tax liability is not at issue, the Tax Court may make a determination on the basis of the administrative record that the Appeals officer or Settlement officer (collectively, “Appeals officer”) assigned to the taxpayer’s case abused his or her discretion in sustaining a proposed (or actual) collection action. When Appeals has abused its discretion or the taxpayer was not given a proper hearing, the Tax Court will remand the case to Appeals to hold a new hearing if a new hearing is necessary or will be productive. I.R.M., pt. 35.3.23.7 (Mar. 26, 2015). This type of relief is requested in a Motion to Remand.

(3) **Procedure for the Moving Party:** In practice, a Motion to Remand is made much the same way as a Motion for Summary Judgment. The moving party relies upon the administrative record and applicable law to prove that the assigned Appeals officer abused his or her discretion (i.e., acted without a sound basis in fact or law). The Motion to Remand should be supported with a motion, a memorandum of law, and one or more declarations that include all or relevant portions of the administrative record.

(4) **Procedure for the Government Attorney:** I.R.M., pt. 35.3.23.7 (Mar. 26, 2015) instructs Government attorneys to proceed as follows on a Motion to Remand:

(a) Instead of trying to defend an erroneous or insufficient notice of determination at trial, the trial attorney should consider asking the court to remand the case to Appeals for a supplemental determination if:

1. The Appeals officer failed to address a relevant issue;
2. The Appeals officer failed to make
necessary findings of fact;

(3) The Appeals officer failed to perform an analysis that is necessary in making the determination;

(4) The administrative record contains no indication of the documents or evidence the Appeals officer considered in making the determination or the reasons for the determination;

(5) The Appeals officer’s conduct of the hearing deprived the taxpayer of a procedural right granted by statute or regulation, such as the right to an impartial Appeals officer under I.R.C. §§ 6320(b)(3) or 6330(b)(3); or

(6) The Appeals officer did not give the petitioner an adequate opportunity to present evidence or arguments in support of relevant issues raised during the CDP hearing process.

(5) Time: The Motion to Remand can be made at any time 30 days after the joinder of issues (i.e., the filing of the last responsive pleading) and before trial. Although there is no rule on point, it is generally advisable to file a Motion to Remand at least 60 days before trial, and ideally as early as possible. Keep in mind that the Service will move for summary judgment in the majority of collection cases.

(6) Time: The Motion to Remand can be made at any time 30 days after the joinder of issues (i.e., the filing of the last responsive pleading) and before trial. Although there is no rule on point, it is generally advisable to file a Motion to Remand at least 60 days before trial, and ideally as early as possible. Keep in mind that the Service will move for summary judgment in the majority of collection cases.

(7) Relief Requested: The relief requested in the Motion to Remand is typically as follows: (1) grant the Motion to Remand; (2) strike the case from the calendar (if applicable); (3) continue the case; and (4) remand the case to Appeals to conduct a new (or supplemental) hearing under I.R.C. §§ 6320 and/or 6330 (as the case may be). The Court will provide further instructions to Appeals if you are successful on the Motion to Remand and those deadlines should obviously be adhered to by both the taxpayer and the Service.

6. The Effect of Bankruptcy:
   a. Historical Rule for Cases:
      (1) When a bankruptcy petition is filed, an automatic stay is in
effect. See 11 U.S.C. 362(a)(8). The stay halts ongoing collection procedures against the debtor, including an ongoing Tax Court case. A case cannot be commenced in the Tax Court while the stay is in effect.

(2) While the stay is in effect, no Tax Court petition can be filed, whether the deficiency is for a pre-petition or post-petition liability. Halpern v. Commissioner, 96 TC 895 (1991).

b. Recent Developments Concerning Innocent Spouse and Collection Cases:

(1) Recent Developments: Congress recently amended I.R.C. §§ 6015(e) and 6330(d) to provide that the period for filing a petition for review of a claim for spousal relief or a petition for review of a lien or levy action is suspended during the period that a bankruptcy filing under title 11 of the United States Code prevents a taxpayer from petitioning the Court and for 60 days thereafter. See also Protecting Americans From Tax Hikes Act of 2015, Pub. L. 114-113, § 425, 129 Stat. 2242.

(2) Effective Date: The effective date for such changes is December 18, 2015.


7. Concurrent Jurisdiction With Appeals: Pursuant to I.R.C. § 6330(d)(3), Appeals retains jurisdiction with respect to any determination made under I.R.C. § 6330, including subsequent hearings requested by the taxpayer or directed by the Tax Court. This means that, even with a docketed Tax Court case, the Tax Court can still remand a case to Appeals for a new or supplemental hearing under I.R.C. § 6330.

8. Changed Circumstance Remands: The Tax Court has the authority to remand CDP cases to Appeals pursuant to I.R.C. § 6330(d). Thus, where an argument can be made that remanding the case to Appeals will be “necessary or productive”, a collection case may be remanded to Appeals.

a. The Goal is Orderly and Efficient Disposition of Cases: “Absent limiting statutes, courts generally have the inherent authority to issue such orders as they deem necessary and prudent to achieve the orderly and expeditious disposition of cases.” Churchill v. Commissioner, T.C. Memo. 2011-182 (quoting Williams v.

b. **Necessary or Productive:** The Tax Court has the authority to remand this case to Appeals if it believes doing so is “necessary or productive”. Lunsford v. Commissioner, 117 T.C. 183 (2001).

C. **Tax Court’s Ability to Restrain Collection in Deficiency Cases**

1. **Background:** Under I.R.C. § 6213(a), the Tax Court may enjoin assessment and collection or may order a refund with respect to taxes for which a timely petition is filed.

2. **Motions to Restrain Assessment or Collection:** A motion to restrain assessment or collection or to order refund of any amount collected may be filed with the Court where a timely petition has been filed with the Court. Tax Ct. R. 55.

3. **Example:** Once a petition is filed, premature assessment and/or collection as to that taxable year is prohibited. If the Service seeks to prematurely assess or collect taxes with respect to a year properly before the Court, the taxpayer may move the Court to restrain assessment or collection pursuant to Tax Court Rule 55.

4. **Strategy:** It is generally advisable, even where a favorable result has been reached in Appeals but a notice of determination is issued, for the taxpayer to file a protective petition so that the Tax Court acquires jurisdiction over the period for which the tax is sought to be collected. This ensures that the taxpayer has an opportunity for judicial review if the Service continues the collection action despite the agreement reached in Appeals.

D. **Tax Court Review of Jeopardy Assessments and Levies:**

1. **Background:** I.R.C. § 7429(b) authorizes the Tax Court to review a jeopardy assessment or jeopardy levy (e.g., an extreme action to prematurely assess or collect taxes if the Service determines that property in question is in jeopardy).

2. **Commencement of Review (Tax Court Rule 56(a)):** Review of jeopardy assessment or jeopardy levy is commenced by filing a motion with the Court. The petitioner-moving party shall:
   a. Entitle the document “Motion for Review of Jeopardy Assessment” or “Review of Jeopardy Levy”, as the case may be;
   and
   b. Place on the motion the same docket number as that of a then-pending action under I.R.C. § 6213 (deficiency petition).

3. **Time for Filing (I.R.C. § 7429(b)(1)):** The motion must be filed within 90 days of the earlier of (i) the administrative review determination, or (ii) the 16th day after the request for administrative review.

4. **Service of Motion (Tax Court Rule 56(b)):** A motion for review of jeopardy assessment or jeopardy levy shall be served by the taxpayer on counsel for the Commissioner.

5. **Contents of Motion (Tax Court Rule 56(c)):** The motion contains very specific requirements that are set forth in Tax Court Rule 56(c).
6. **Response by Commissioner (Tax Court Rule 56(d))**: The Commissioner must file a written response to the motion no later than 10 days after the date on which the Court receives the petitioner’s motion.

7. **Hearing (Tax Court Rule 56(e))**: A hearing will usually be held.

E. **Appeals of Tax Court Decisions**

1. **Appropriate Venue**: Recently, Congress changed I.R.C. § 7482(b) to provide that appellate venue for CDP cases is to the United States court of appeals for the circuit in which the taxpayer is, in the case of an individual, a legal resident or, if the petitioner is an individual other than an individual, the principal place of business or principal office or agency. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 423, 129 Stat. 2242.

   a. **Historical Change**: Until December 2015, the United States Court of Appeals for the District of Columbia Circuit had exclusive jurisdiction to hear appeals from Tax Court decisions based on CDP hearing final determinations where the underlying liability was not at issue. See Byers v. Commissioner, 740 F.3d 668 (D.C. Cir. 2014).

F. **Most Litigated Issue**:


2. **Statistics**:

   a. **In General**: According to the National Taxpayer Advocate’s 2016 Annual Report, there were 99 reported opinions involving appeals from CDP hearings. 1 NAT’L TAXPAYER ADVOCATE, 2016 Annual Report to Congress, 438 (2016).

   b. **Success Rate**: The Service prevailed in full in 83 of these cases (around 84%), taxpayers prevailed in full in 10 of these cases (around 10%), and split decisions were entered in 6 cases (around 6%). Id.

   c. **Statistics Misleading as to the Number of Cases Being Brought**: According to the National Taxpayer Advocate’s 2016 Annual Report, the average number of published opinions concerning CDP appeals was approximately 200 from 2003 through 2007. Despite the decrease in the number of CDP opinions from around 200 in 2007 to 99 in 2016, the total number of CDP petitions filed with the Tax Court has not declined (and has actually increased).

   (1) **Trends Per the National Taxpayer Advocate**: The National Taxpayer Advocate notes as follows regarding this decline in published opinions (as compared to the increase of the overall number of CDP petitions filed):

   [T]his decline may seem to be attributed, in part, to a series of operational changes in fiscal years (FYs) 2011 and 2012, collectively known as the “Fresh Start” initiative, which led
to fewer NFTL filings and more accepted OICs. However, it is not clear that the reduction in CDP published opinions is attributable to the reduced number of lien filings. Furthermore, the annual number of CDP cases petitioned fluctuated inconsistently over this time.

The increase in CDP cases received suggests that the reduced number of CDP opinions identified may not be the result of fewer taxpayers requesting a CDP hearing and then contesting the CDP determination by filing a Tax Court petition. Instead, it could be the result of more taxpayers deciding not to pursue litigation after filing a petition, more settlements, or more non-precedential CDP orders or bench opinions that do not result in a published opinion. Moreover, the decline in litigated cases may be due to taxpayers litigating many issues of first impression in the years immediately following the enactment of IRC §§ 6320 and 6330, which now have been resolved by the courts. [1 Nat’l Taxpayer Advocate, 2016 Annual Report to Congress, 445-446 (2016) [Footnotes omitted].]

(2) Other Explanations: One private practitioner, Carlton M. Smith, offers a different explanation for the reduced number of CDP opinion. Specifically, Mr. has observed as follows:

I did an order search for orders issued from 1/1/14 to 12/31/14 using the following words: “(summary judgment or remand) and (6330 or 6320).” This search turned up about 300 orders (12 pages of 25 cases per page).

Most of these orders are grants of IRS motions for summary judgment — but with multipage descriptions of (1) the facts, (2) the legal standards for summary judgment (e.g., Florida Peach Corp. v. Commissioner, 90 T.C. 678 (1988)) and CDP review (e.g., Sego v. Commissioner, 114 T.C. 604, 608 (2000)), and (3) application of the law to the stated facts to reach a ruling.…

In the vast bulk of the orders, the taxpayer is told that he or she can’t challenge the underlying liability (if the taxpayer tried to), and he or she loses on collection alternatives either because the taxpayer (1) is not current on paying and filing, (2) never provided a requested Form 433-A, or (3) never requested a specific collection alternative (i.e., a particular installment agreement or offer in compromise).
Still, in [some of these] rulings, the IRS loses the motion, and, sometimes a remand is ordered…. My hunch is that some of these ordered remands result in settlements so the cases never again return to the judges for a regular ruling. For those of you who are tired of reading CDP T.C. Memo. and T.C. Summary Opinions where the taxpayer loses and so conclude that Tax Court CDP review is a waste of time, I suggest you examine some of these orders where the court directs a remand. [Carlton Smith, Unpublished CDP Orders Dwarf Post-trial Bench Opinions in Uncounted Tax Court Rulings, Procedurally Taxing (Jan. 29, 2015), available at http://www.procedurallytaxing.com/unpublished-cdp-orders-dwarf-post-trial-bench-opinions-in-uncounted-tax-court-rulings/.

(3) Are CDP Cases Really On the Decline? On the one hand, the number of published opinions suggests that CDP cases are on the decline, but the number of Orders released on the Tax Court’s website suggests that CDP cases are actually on the rise. So what do we make of this? The Service has increasingly been moving for summary judgment in CDP cases, and it is possible that the reduced number of CDP opinions is a function not of the number of cases being brought, but through published opinions of the Tax Court.

G. Other Developments
1. Codification of TBOR II & Creative Arguments:

   ***In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including—

   (A) the right to be informed,

   (B) the right to quality service,

   (C) the right to pay no more than the correct amount of tax,

   (D) the right to challenge the position of the Internal Revenue Service
and be heard,

(E) the right to appeal a decision of the Internal Revenue Service in an independent forum,

(F) the right to finality,

(G) the right to privacy,

(H) the right to confidentiality,

(I) the right to retain representation, and

(J) the right to a fair and just tax system.

b. Creative Uses of I.R.C. § 7803(a)(3): Practitioners should keep in mind these rights when arguing collection cases administratively and before the Tax Court. To the extent that TBOR II is now part of the internal revenue laws, a violation of TBOR II is a violation of the internal revenue laws (and a per se abuse of discretion). Taxpayers may be able to craft arguments that Appeals abused its discretion in failing to adhere to these rights (e.g., the right to pay no more than the correct of tax and the right to a fair and just tax system).

2. Fast Track Mediation Collection: On November 18, 2016, the IRS released Rev. Proc. 2016-57, which created a new fast track mediation program for collection cases, Fast Track Mediation – Collection (“FTMC”).

a. Applicability: FTMC allows taxpayers with issues concerning OICs and TFRP cases an opportunity to mediate their case with a mediator.

b. Governing Authority: Appeals and Collection will jointly administer the FTMC program.

c. OIC Cases Covered: The revenue procedure contemplates that the following OIC issues will be eligible for FTMC:

(1) The value of the taxpayer’s assets, including those held by a third party;

(2) The amount of dissipated assets that the IRS should include in the reasonable collection potential calculation;\(^{10}\)

\(^{10}\) In March 2018, the IRS updated the I.R.M. provisions related to dissipation of assets. Prior to March 2018, dissipated assets were included in computing a taxpayer’s reasonable collection potential. However, under I.R.M., pt. 5.8.5.18 (Mar. 23, 2018):

Inclusion of dissipated assets in the calculation of the reasonable collection potential (RCP) is no longer applicable, except in situations where it can be shown the taxpayer has sold, transferred, encumbered or otherwise disposed of assets in an attempt to avoid the payment of the tax liability or used the assets or proceeds (other than wages, salary, or other income) for other than the
(3) Whether the facts warrant a deviation from the national or local expense standards;
(4) Determination of a taxpayer’s proportionate interest in jointly held assets;
(5) Projections of future income based on calculations other than current income;
(6) The calculation of a taxpayer’s future ability to pay when the taxpayer lives with and shares expenses with a nonliable person;
(7) Doubt as to liability cases worked by Collection; and
(8) A catch-all provision that uses as an example whether a taxpayer’s contributions to a retirement savings account are discretionary or mandatory.

d. **TFRP Cases Covered:** The revenue procedure contemplates that the following TFRP issues will be eligible for FTMC:
   (1) Whether the person is a responsible person of the business that failed to pay over the trust fund taxes;
   (2) Whether the person willfully failed to collect, truthfully account for, and pay over trust fund taxes, or willfully attempted in any manner to evade or defeat the payment of such tax; and
   (3) Whether the taxpayer properly designated a payment.

e. **Cases Ineligible for FTMC:** The revenue procedure states that the following cases are ineligible for FTMC:
   (1) Issues requiring assessment of the hazards of litigation or use of the Appeals mediator’s delegated settlement authority;
   (2) Cases referred to the Department of Justice;
   (3) Cases worked at an SB/SE Campus site;
   (4) Collection Appeals Program (CAP) cases;
   (5) Collection Due Process (CDP) cases;
   (6) Frivolous issues, such as, but not limited to, those identified in Rev. Proc. 2016-2 § 4.04, 2016-1 I.R.B. 102, or any succeeding revenue procedure;
   (7) Collection cases in which the taxpayer has failed to respond to IRS communications or failed to submit documentation to Collection for consideration;
   (8) The following OIC cases:
      (a) Cases in which the unadjusted financial information submitted by the taxpayer demonstrates the taxpayer has the ability to pay in full, except where an Effective Tax Administration OIC is based on economic hardship and the assessed liability is less

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payment of items necessary for the production of income or the health and welfare of the taxpayer or their family, after the tax has been assessed or during a period of up to six months prior to or after the tax assessment.
than $250,000.

(b) Cases in which the taxpayer declines to amend or increase the offer despite having no specific disagreement with the valuations, figures, or methodology used by Collection in determining the reasonable collection potential;

(c) Cases in which the disputed issue is explicitly addressed by IRS guidance or authority, including but not limited to regulations, published guidance, the Internal Revenue Manual, forms or instructions.

(d) Cases in which Delegation Order 5-1 requires a level of approval higher than that of the Collection Group Manager;

(9) Issues for which mediation would be inconsistent with sound tax administration; and

(10) Issues that have otherwise been identified in subsequent published guidance issued by the IRS as excluded from FTMC.

f. How to Request:

(1) Full Development of Facts Required: Either the taxpayer or the revenue officer can request FTMC after full development of an issue and before Collection makes its final determination. Participation in the program is optional.

(2) Form 13369: To request FTMC, a Form 13369 must be signed by both the Collection Group Manager and the taxpayer, or the taxpayer’s authorized representative, if applicable (Form 2848 required).

(3) Written Summaries Required: In addition to the form the taxpayer submits a written summary of their position with respect to the disputed issues and the IRS will submit a written summary as well.

(4) Case Forwarded to Appeals and Appeals Vested With Discretion as to Whether to Accept the Case: Once the parties have prepared the form and the statements, Collection sends the package to the appropriate Appeals office. The Appeals office decides whether to accept the case for FTMC. The taxpayer must consent to disclosure of their tax information to participants in the mediation and does this in signing the Form 13369. For additional information, see Posting of Fast Track Mediation for Collection to Procedurally Taxing blog, http://procedurallytaxing.com/fast-track-mediation-for-collection/ (Nov. 30, 2016).

3. Significant Cases:

a. Keller Tank Servs. II, Inc. v. Commissioner, 854 F.3d 1178 (10th
Cir. 2017). The Taxpayer argued that the “did not otherwise have an opportunity” language of I.R.C. § 6330(c)(2)(B) applies only to another judicial opportunity, not an administrative opportunity. The Court of Appeals for the Tenth Circuit upheld the Tax Court’s decision denying a taxpayer the opportunity to raise the merits of underlying liability in a CDP case where the taxpayer had the administrative, but not judicial, opportunity to raise the issue prior to the CDP case.

b. Jones v. Commissioner, 850 F.3d 160 (4th Cir. 2017). The Taxpayer similarly argued that the “did not otherwise have an opportunity” language of I.R.C. § 6330(c)(2)(B) applies only to another judicial opportunity, not an administrative opportunity. The Court of Appeals for the Fourth Circuit similarly upheld the Tax Court’s decision denying a taxpayer the opportunity to raise the merits of underlying liability in a CDP case where the taxpayer had the administrative, but not judicial, opportunity to raise the issue prior to the CDP case. The Fourth Circuit found the Treasury Regulations as a reasonable interpretation of I.R.C. § 6330(c)(2).

c. Graev v. Commissioner, 147 T.C. No. 16 (2016). The Tax Court held that I.R.C. § 6751(b)(1), which prohibits the assessment of a penalty not calculated through automatic means, does not apply as a defense to penalties in a deficiency proceeding. The Tax Court stated, however, that its ruling does not “foreclose the possibility that a taxpayer who believes that a penalty has been assessed in violation of sec. 6751(b)(1) might raise this issue in a postassessment collection due process (CDP) proceeding. See secs. 6320(c), 6330(c)(1) (requiring the Appeals officer in a CDP hearing to obtain verification that the requirements of any applicable law or administrative procedure have been met).” 147 T.C. No. 16 n.22 (2016).

(1) But see Chai v. Commissioner, 851 F.3d 190, 222 (2d Cir. 2017), where the Court of Appeals for the Second Circuit held: “Because § 6751(b)(1) provides that ‘[n]o penalty…shall be assessed’ (emphasis added) unless the written-approval requirement is satisfied, it would be inappropriate to impose a penalty where § 6751(b)(1) was not satisfied. Read in conjunction with § 7491(c), the written-approval requirement of § 6751(b)(1) is appropriately viewed as an element of a penalty claim, and therefore part of the IRS's prima facie penalty case.” [Emphasis supplied.] The Second Circuit ultimately held that the Tax Court in Graev was wrong that I.R.C. § 6751 was a premature defense in a deficiency proceeding (i.e., that such an argument could be raised in a deficiency proceeding as a defense to a penalty).

d. Weiss v. Commissioner, 147 T.C. 179 (2016). The Tax Court held
that when the date appearing on a levy notice is earlier than the date of mailing, the 30-day period to file a Tax Court petition is calculated by reference to the date of mailing, not the date of the notice. This logic easily extends to the 90-day period to file a Tax Court petition in response to a notice of deficiency (though in practice it is less of an issue because of the longer period).

e. **Buczek v. Commissioner**, 143 T.C. 301 (2014). Taxpayer raised frivolous arguments in request for CDP hearing, but did not request a collection alternative, or assert inability to pay or raise any other issue. IRS disregarded the hearing. Tax Court upheld and distinguished **Thornberry v. Commissioner**, 136 T.C. 356 (2011), which stated that the Court could not review portions of CDP hearing requests identified as frivolous under I.R.C. § 6702(b)(2)(A), but could review an Appeals determination that the hearing request was frivolous in its entirety and collection action could proceed. Here, unlike Thornberry, because no legitimate issues were raised, it was as if the hearing never took place (see I.R.C. § 6330(g)), so the Court dismissed the case for lack of jurisdiction.

f. **Budish v. Commissioner**, T.C. Memo. 2014-239. IRS issued notice of intent to levy on taxpayer, an artist who sells through a wholly owned S Corporation. In the CDP hearing, the taxpayer agreed on a full-pay installment agreement, but the Appeals Officer insisted on filing a NFTL due to the amount of the liability, and because the installment agreement request did not meet the Streamlined, Guaranteed, or In-Business trust fund express criteria. Taxpayer disagreed with the decision to file the NFTL, saying it would damage his business relationships and credit and petitioned the Tax Court when an agreement could not be reached. The Court determined the Appeals Officer misinterpreted and overstated the directives set forth in the I.R.M. regarding filing a lien, that they were directive, not required, and that the I.R.M. also says that revenue officers can defer filing a NFTL if it would impede tax collection. The Court also said that the Appeals Officer failed to discuss the balancing factors between efficient tax collection and taxpayer’s legitimate concern that any collection be no more intrusive than required. The Appeals Officer therefore abused discretion. The case was remanded to Appeals for a supplemental CDP hearing with directions to perform balancing factors.

g. **Gurule v. Commissioner**, T.C. Memo. 2015-61. Husband took distributions from 401(k) retirement plan, which he intended to use for a down payment on a house after he was relocated for his job, which he subsequently lost and could not buy a house. Husband and Wife moved back to prior house, which was foreclosed on. Husband took out three loans from his 401(k) plan for expenses and for the Wife’s severe and their son’s terminal medical
conditions. IRS sent Husband and Wife notice proposing adjustments based on the 401(k) distributions. Taxpayers requested a CDP hearing for hardship, submitting an OIC, which was rejected on the grounds that the taxpayers could pay based upon their net realizable equity and future income. Taxpayers appealed to Tax Court, and the case was remanded because the record was insufficient, because (1) there was no record the IRS properly mailed a statutory notice of deficiency; (2) the Court could not determine whether the settlement officer abused her discretion (i.e., the IRS had completely ignored Vinatieri, in that a CDP hearing cannot proceed with a proposed levy action when a taxpayer establishes it would create economic hardship, and the IRS did not cite the I.R.M. section only allowing levying of retirement accounts for flagrant conduct when the taxpayer does not depend on the funds to live); (3) it was unclear whether the settlement officer properly calculated the reasonable collection potential (there may have been material errors—there was evidence that the loans may have been used for necessary living expenses); and (4) it was unclear whether the settlement officer properly considered the taxpayers’ special circumstances before rejecting the OIC (Wife’s and son’s medical conditions).

h. Ligman v. Commissioner, T.C. Memo. 2015-79. Taxpayer timely requested CDP hearing after receiving notice of intent to levy. Taxpayer’s only source of income was his Railroad Retirement Board benefits and offered a PPIA; the Appeals Officer countered, then closed the case when Taxpayer did not immediately respond. Taxpayer appealed for abuse of discretion, saying the benefits were partially levy proof under I.R.C. §§ 6334(a)(6) and 6331(h). The IRS said it could consider the benefits for purpose of determining availability of a collection alternative. The Court agreed with the IRS, stating that Railroad Retirement benefits are similar to Social Security benefits, which are specifically included in the I.R.M.’s calculation of income, despite being partially levy proof, so the Appeals Officer did not abuse discretion in using them to calculate ability to pay.

i. Sanfilippo v. Commissioner, T.C. Memo. 2015-15. Decedent taxpayer left Beneficiary interest in a shopping center, of which he already owned part, and forgave a debt he owed to the Estate. For the next five years, the Estate filed extensions to pay the estate tax due to liquidity problems, and eventually the Estate, the Beneficiary and the IRS entered into a three-way security agreement, giving the IRS first priority in a Property owned by the Estate so long as the tax was unpaid. IRS sent a notice of intent to levy the property, and the Estate requested a CDP hearing and submit an OIC. The Property had interest from a potential buyer and the sale funds could satisfy the tax liability in an OIC, and the

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settlement officer granted CNC status until the Property was sold. When the sale was delayed, the Settlement Officer transferred the case to Appeals, but before he did, a Second Settlement Officer, not well-versed in estate cases, changed the focus of collection to Beneficiary’s interest in the shopping center, including the amount which he already owned in the calculation. When the Second Settlement Officer closed the case, the Estate appealed to the Tax Court. The IRS argued the Second Settlement Officer committed “harmless error,” but the Court disagreed, because the miscalculation of Beneficiary’s interest in the shopping center was instrumental to sustain the levy. The Court also found that the Second Settlement Officer did not even consider the Estate’s proposed OIC, or previous discussions between the Beneficiary and the first Settlement Officer. Therefore, the Second Settlement Officer abused his discretion, and the case was remanded to Appeals to consider any collection alternatives the Estate proposed.

j. Gyorgy v. Commissioner, 779 F.3d 466 (7th Cir. 2015), aff’g T.C. Docket No. 19240-11 (Mar. 25, 2013). Taxpayer did not file returns for seven years, so IRS prepared substitute returns for the first three years and sent notices of deficiency to the address on Taxpayer’s most recently filed return over the next four years, as well as a Form 2797 “R-U-There” letter to one of Taxpayer’s other possible addresses. The mail was returned as undeliverable, and the IRS took no further steps to locate taxpayer. Two years later, the IRS filed a NFTL and sent a notice of Taxpayer’s right to request a CDP hearing to Taxpayer’s current address. Taxpayer challenged whether the IRS followed proper procedures, but the Appeals Officer sustained the NFTL. Taxpayer petitioned the Tax Court, which sustained the lien because the Taxpayer did not notify the IRS of his address change. Taxpayer appealed to the Seventh Circuit, which said (1) the Tax Court looked beyond the administrative record when it considered trial testimony, but declined to rule on whether judicial review of the CDP decision was limited to the record because neither party raised it; (2) the proper standard of review when considering whether the IRS followed proper procedures in assessing the liability was abuse of discretion (the challenge was not to the underlying tax liability—which is de novo—or Appeals’ decision—abuse of discretion—but the IRS mailing procedure, which was an administrative decision unrelated to the amount of underlying liability, and Taxpayer did not challenge the liability); (3) the IRS had used reasonable diligence in finding Taxpayer’s correct address—since the Taxpayer had not filed returns for seven years and did not alert the IRS of his whereabouts, the IRS properly relied on the address on Taxpayer’s most recent return. Therefore Appeals properly
sustained the NFTL.
III. Nominee, Alter Ego, Successor Determinations and Liens, and Quiet Title Actions

A. Overview of Authorized Collection

1. **Lien Created:** As noted, I.R.C. § 6321 creates a federal tax lien on all property and rights to property of any taxpayer who neglects or refuses to pay the tax for which the taxpayer is liable. This lien continues against the taxpayer’s property until the liability either has been fully paid or is legally unenforceable. I.R.C. § 6322.

2. **Notice to Third Parties:** To put third parties on notice and establish the priority of the government’s interest in a taxpayer’s property against subsequent purchasers, secured creditors, and junior lien holders, the IRS must file an NFTL in the appropriate location, such as a county registry of deeds. I.R.C. § 6223(f); Treas. Reg. § 301.6323(f).

3. **Authority to File NFTLs Against Alter Egos, Nominees, and Transferees:** The IRS can file NFTLs and issue levies against the property of third parties, known as nominees, alter egos, or transferees that hold property belonging to taxpayers subject to collection.

   a. **Limited Nature of Nominee and Transferee Liens:** As a general rule, in transferee or nominee situations, the IRS can pursue only specific property to which the NFTL has attached. *Oxford Capital Corp. v. United States*, 211 F.3d 280, 284 (5th Cir. 2000).

   b. **Alter Egos Compared:** As a general rule, the IRS can pursue all of an alter ego’s property to collect the taxpayer’s liability. *Oxford Capital Corp.*, 211 F.3d at 284.

B. Nominees, Alter Egos, and Transferees

I. **Nominees:**

   a. **Defined:** “A nominee is someone designated to act for another. As used in the federal tax lien context, a nominee is generally a third-party individual who holds legal title to property of a taxpayer while the taxpayer enjoys full use and benefit of that property. In other words, the federal tax lien extends to property ‘actually’ owned by the taxpayer even though a third party holds ‘legal’ title to the property as nominee. Generally speaking, the third party in a nominee situation will be either another individual or a trust.” I.R.M., pt. 5.17.2.5.7.2 (Mar. 19, 2018).

   b. **Fraudulent Conveyances Common:** A nominee situation usually involves a fraudulent conveyance or transfer of a taxpayer’s property to avoid legal obligations or creditors. I.R.M., pt. 5.17.2.5.7.2 (Mar. 19, 2018).

   c. **The IRS’s Proof to Establish a Nominee Lien:** To establish a nominee lien, “it must be shown that while a third party may have legal title to the property, it is really the taxpayer that owns the property and who enjoys its full use and benefit.” I.R.M., pt. 5.17.2.5.7.2 (Mar. 19, 2018).

   d. **Factors to Consider for a Nominee:** Whether a third-party is a taxpayer’s nominee is determined on the basis of the surrounding facts and circumstances in the light of the following factors:
(1) The taxpayer previously owned the property;
(2) The nominee paid little or no consideration for the property;
(3) The taxpayer retains possession or control of the property;
(4) The taxpayer continues to use and enjoy the property conveyed just as the taxpayer had before such conveyance;
(5) The taxpayer pays all or most of the expenses of the property; and
(6) The conveyance was for tax avoidance purposes.

**Note:** No single factor is dispositive, but a number of factors may support a finding of an alter ego.

e. **Nominees Distinguished From Alter Egos:** Unlike alter ego situations, nominee situations usually involve specific pieces of a taxpayer’s property that were conveyed to the nominee. Since the federal tax lien only attaches to property actually “owned” by the taxpayer, it may not reach all property that is, in fact, actually owned by the nominee. Therefore, the NFTL in a nominee situation will usually contain a notation on its face that the lien is filed to attach specifically to certain identified property. This property must be specifically identified and described in the NFTL. I.R.M., pt. 5.17.2.5.7.2 (Mar. 19, 2018).

2. **Alter Egos:** Alter egos connote legally distinct entities that are so intermixed that their affairs (and assets) are not readily separable. I.R.M., pt. 5.17.2.5.7.1 (Jan. 8, 2016).

a. **Sham Corporations Commons:** “An alter ego generally involves a sham corporation used to avoid legal obligations.” I.R.M., pt. 5.17.2.5.7.1(2) (Jan. 8, 2016).

b. **The IRS’s Proof to Establish an Alter Ego Lien:** To establish an alter ego lien, “it must be shown that the shareholders disregarded the corporate entity and made it an instrumentality for the transactions of their own affairs.” I.R.M., pt. 5.17.2.5.7.1(2) (Jan. 8, 2016).

c. **Factors to Consider for an Alter Ego:** Whether a taxpayer is a third-party’s alter ego is determined on the basis of the surrounding facts and circumstances in the light of the following factors:

(1) The functioning and likeness of the officers, directors, and shareholders;
(2) Whether the corporate form was the same between the third-party and the putative alter ego;
(3) Whether the third-party-corporation was grossly undercapitalized;
(4) Whether the third-party-corporation observed corporate formalities (e.g., issuance of stock, payment of dividends, or the existence of director or shareholder meetings) were
observed;
(5) Whether the third-party-corporation was insolvent at the time of the putative transfer;
(6) Whether funds were siphoned from the third-party-corporation to the alleged alter ego;
(7) Whether the third-party-corporation maintained corporate records;
(8) Commingling of corporate and personal finances and use of corporate funds to pay personal expenses;
(9) Unsecured interest-free loans between the corporation and the shareholder;
(10) The taxpayer is a shareholder, director, or officer of the corporation or otherwise exerts substantial control over the corporation; and

**Note:** No single factor is dispositive, but a number of factors may support a finding of an alter ego.

d. **Element of Injustice Required:** In addition, the situation “must present an element of injustice or fundamental unfairness.” DeWitt Truck Brokers, 540 F.2d at 686-687.
e. **Beware of the IRS Asserting Alter Ego Theories to Circumvent Transferee Liability Statutes of Limitation:**

(1) **In General:** The IRS will sometimes assert alter ego claims in what is in essence a transferee case (e.g., where the taxpayer transfers assets to another corporation and establishes that corporation as essentially a parallel entity). This may be done because the period of limitations on assessment of the taxpayer as a transferee has expired. This is also an improper attempt at an end run around the periods of limitations on transferee liability imposed by I.R.C. § 6901(c).

(2) **Statute of Limitations on Transferee Liability Cases:** The statute of limitations for transferee cases is as follows:

(a) With respect to the initial transferee, one year after the expiration of the period of limitation for assessment against the transferor. I.R.C. § 6901(c)(1); see also I.R.M., pt. 4.11.52.4 (Nov. 1, 2004).

(b) With respect to a transferee of a transferee, one year
after the expiration of the period of limitation for assessment against the preceding transferee or 3 years after the expiration of the period of limitation for assessment against the transferor, whichever expires first; except that if, before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the initial transferor or the last preceding transferee, respectively, then the period of limitation for assessment of the liability of the transferee shall expire 1 year after the return of execution in the court proceeding. I.R.C. § 6901(c)(2); see also I.R.M., pt. 4.11.52.4 (Nov. 1, 2004).

(c) With respect to a fiduciary, not later than one year after the liability arises or not later than the expiration of the period for collection of such tax, whichever is later. I.R.C. § 6901(c)(3); see also I.R.M., pt. 4.11.52.4 (Nov. 1, 2004).

3. Transferees:
   a. Defined: If the taxpayer transfers assets for inadequate consideration, the transferee is not considered a purchaser pursuant to I.R.C. § 6323, and the federal tax lien maintains priority over the transferee’s interest in the property. I.R.C. § 6323(a), (h)(6).
   b. Lien Authorized: The IRS can file NFTLs against or levy upon property subject to a federal tax lien that has been transferred by the taxpayer, which is in the hands of the transferee or any subsequent transferee. A complete discussion of transferee liability is outside the scope of this Outline.

C. Notices and Responses to Alter Ego and Nominee:
   1. Overview: Generally speaking, the IRS reflects its determination that a third party is an alter ego or nominee of the taxpayer by filing a federal tax lien. The mechanics of the federal tax lien filing vary depending upon the type of claim asserted.
   2. Alter Ego Liens: In an alter ego case, a special condition NFTL is used, identifying, in the name line of the NFTL before the taxpayer’s name, the third party as the alter ego. “For example, if the taxpayer is TP, and ABC Inc. is TP’s alter ego, then the NFTL name line would read ‘ABC, Inc., as Alter Ego of TP.’” I.R.M., pt. 5.17.2.5.7.1 (Mar. 19, 2018).
      a. Counsel Approval Required: Area Counsel approval is required prior to filing a NFTL naming an alter ego.
   3. Nominee Liens: The NFTL in a nominee situation is identical to the standard NFTL, except that the nominee is identified as the name of the taxpayer. “For example, if the taxpayer is TP, and My Brother-In-Law or My Trust is TP’s nominee, then the name of the taxpayer on the nominee
NFTL would be "My Brother-In-Law or My Trust, Nominee of TP."
I.R.M., pt. 5.17.2.5.7.2 (Mar. 19, 2018).

4. **FOIA Requests:** Any time an alter ego or nominee determination is made, it is important to understand the basis for the IRS’s determination. In order to obtain this information, taxpayers should make a FOIA request that asks the IRS to produce the following items (among others):
   a. All notices, letters, memorandum, contact history sheets, audit reports, correspondence, IRS forms, liens and levies prepared by or received by the IRS that refer or relate to the year(s) and/or period(s) referenced above, and specifically, with respect to the IRS’s determination that the taxpayer is the alter ego of another;
   b. All transcripts of account, records of assessments and abatements and any other documents reflecting all account activity and transactions that refer or relate to the year(s) and/or period(s) referenced above, and specifically, with respect to the IRS’s determination that the Taxpayer is alter ego of another;
   c. A record of persons contacted by the IRS with respect to the determination that the taxpayer is the alter ego of another;
   d. All third-party information received by the IRS that refers or relates to the years and/or period(s) referenced above, and specifically, any and all information that the IRS received in connection with its determination that the taxpayer is the alter ego of another.
   e. All third-party information in the IRS’s possession relevant to the determination that the taxpayer is the alter ego of another.

Attached as **Exhibit B** is a sample FOIA request to submit to the IRS in connection with an alter ego determination.

5. **CAP Hearing Requests:** Third parties who are affected by alter ego and nominee liens are not considered taxpayers for purposes of the CDP rights under I.R.C. §§ 6320 and 6330. Thus, these third parties are currently not entitled to CDP rights in response to the filing of an alter ego or nominee lien. Thus, an administrative review with Appeals of the IRS’s alter ego or nominee determination is made by submitting to the IRS Form 9423, *Collection Appeal Request*. It is advisable to include with the Form 9423 an attachment similar to that for the Form 12153 that explains the basis for the challenge that the taxpayer is the alter ego of another. Suggested items to be included as an attachment to the Form 9423 is set forth in Section II.A.3. Attached as **Appendix A** is a sample attachment for a Form 12153 (which is relevant to the CAP hearing, except that the review is not requested pursuant to I.R.C. § 6330) (*i.e.*, delete references to I.R.C. § 6330).

D. **Challenges to Nominee, Alter Ego, and Transferee Determinations:**
1. Overview:
   a. Procedure to Challenge: In practice, third parties who are affected by alter ego and nominee liens are not considered taxpayers for purposes of the CDP rights under I.R.C. §§ 6320 and 6330. Thus, these third parties are currently not entitled to CDP rights in response to the filing of an alter ego or nominee lien.

   b. Defenses Generally: As detailed below, there are at least two primary arguments to consider in response to the filing of an alter ego lien. First, that the alter ego has no right in the principal’s property because the period of limitations for asserting fraud has expired. Second, that the alter ego determination is wrong as a matter of law because there is no alter ego.

2. State Law Important: State law plays a crucial role in determining whether a federal tax lien may attach to a nominee’s property or rights to property. An important case on this issue is Drye v. United States, 528 U.S. 49 (1999).
   a. Drye v. United States:
      (1) Issue Presented: In Drye, the Supreme Court decided whether a federal tax lien can attach to an inheritance that a taxpayer disclaimed under State law (i.e., “whether Drye’s interest as heir to his mother’s estate constituted ‘property’ or a ‘right[ ] to property to which the Federal tax lien attaches under I.R.C. § 6321, despite Drye’s exercise of the prerogative state law accorded to him to disclaim the interest retroactively.”). Id. at 52.
      (2) Lien Broadly Attaches: The Supreme Court, citing I.R.C. § 6321, noted that “the Government may impose a lien on any ‘property’ or ‘rights to property’ belonging to the taxpayer.” Id. at 55.
      (3) The Two-Prong Test for Whether a Lien Can Attach: In determining whether a lien can attach to a nominee’s property, the Supreme Court adopted the following two-prong analysis:
         (a) First, in deciding whether a lien may attach courts and the IRS must first look to “state law to determine what rights the taxpayer has in the property the Government seeks to reach.” Id. at 58.
         (b) Second, if State law supports that the taxpayer has the right in property sought to be liened, courts and
the IRS must then look to federal law to determine “whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”  Id.

b.  Drye Reasoning Extended to Alter Ego Determinations: The two-prong analysis in Drye was developed under nominees theories, but has also been extended to alter ego determinations by the IRS. In this regard, courts have uniformly held that State law determines the appropriateness of using alter ego theories to file a NFTL.  See e.g., United States v. Scherping, 187 F.3d 796, 801-802 (8th Cir. 1999) (“Generally, federal courts will look to state law to determine whether an entity is an alter ego of a taxpayer.”); Towe Antique Ford Foundation v. I.R.S., 999 F.2d 1387, 1391 (9th Cir. 1993) (“We apply the law of the forum state in determining whether a corporation is an alter ego of the taxpayer.”); Zahra Spiritual Trust v. United States, 910 F.2d 240, 242 (5th Cir. 1990) (“In determining whether the appellants are the alter egos of the taxpayers, and whether the taxpayer has an interest in property to which the government’s tax lien attached, we look to state law.”); see also Old West Annuity and Life Ins. Co. v. the Apollo Group, 605 F.3d 856, 861-862 (11th Cir. 2010) (trial court properly applied State law to determine applicability of alter ego theories); Floyd v. I.R.S., 151 F.3d 1295, 1297-1300 (10th Cir. 1998) (applying State law to decide the applicability of alter ego theories).

(1)  Analysis of Drye Factor 1: Under Drye’s first prong, the IRS and a reviewing court must look to “state law to determine what rights a taxpayer has in the property the government seeks to reach.”  Drye, 528 U.S. at 58.  Where the alter ego is a corporate or other limited liability entity, this usually requires the IRS to pierce the corporate veil (i.e., to ignore the existence of the separate corporate form).

(a)  Veil Piercing in an Alter Ego Situation: Under many States’ laws, veil-piercing under an alter ego theory is properly invoked only where the putative alter ego abused the privilege of incorporation to perpetrate a fraud or injustice, or otherwise to circumvent the law.  See, e.g., New Jersey Dep’t of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500-501 (N.J. 1983); Lyon v. Barrett, 89 N.J. 294, 300 (N.J. 1982).  In many States, the corporate veil should not be pierced unless the putative alter ego has been so dominated by the original corporation that the successor had no separate existence and was merely an instrumentality of the putative alter ego.  See, e.g., New Jersey Dept. Of Envtl. Prot., 94 N.J. at
Alter Ego Allegations Substantives Grounded in Fraud: The IRS typically grounds its alter ego determinations in fraud. See, e.g., Culbreth v. Amosa (Pty) Ltd., 898 F.2d 13 (3d Cir. 1990) (noting that the law in New Jersey is that injustice, without fraud, is insufficient to pierce the corporate veil under an alter ego theory); Nat’l Elevator Indus. Pension, Health, Benefit & Educ. Funds v. Lutyk, 332 F.3d 188, 192 (3d Cir. 2003) (alter ego theory “has elements of fraud theory [and] must be shown by clear and convincing evidence.”).

Statute of Limitations Issues and Defenses:

(1) In General: The IRS and the Tax Division sometimes make alter ego determinations after the State statute of limitations for fraud has expired. The IRS generally cannot perfect its interest in a federal tax lien where the underlying fraud cause of action giving rise to the alter ego liability is time-barred.

(2) State Law Causes of Action for Fraud: A cause of action for fraud is usually based on common law principles or the State’s Uniform Fraudulent Transfers Act. See, e.g., N.J.S.A. 25:2-20, et seq.

(3) Statute of Limitations for Fraud Actions: The statute of limitations for common law fraud is typically six years. See, e.g., N.J.S.A. 2A:14-1. The statute of limitations for statutory fraud under Uniform Fraudulent Transfers Acts is four years. See, e.g., N.J.S.A. 25:2-31. These statutes of limitations may be equitably tolled to the extent the taxpayer (or the alter ego) made affirmative representations that were untrue.

Analysis of Drye Factor 2: Under Drye’s second prong, if State law supports that the taxpayer has the right in property sought to be liened, courts and the IRS must then look to federal law to determine “whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.” Drye, 528 U.S. at 58.

(a) Interplay of Statutes of Limitations: As detailed above, State law sometimes does not support that the putative alter ego had a property right that may properly be liened because the cause of action for
that property right, fraud under an alter ego theory, is time-barred.

(b) Effect of Failing Drye Prong 2: Where the second prong under Drye is not met because the filing of the federal tax lien was time-barred, then the lien is outside the scope of the federal tax lien.

E. Quiet Title Suits

1. Introduction:
   a. Purpose of Quiet Title Suits: The purpose of a quiet title suit is “to determine which named party has superior claim to a certain piece of property.” United States v. Nolasco, 354 Fed. Appx. 676, 680 (3d Cir. 2009) (quoting United States v. McHan, 345 F.3d 262, 275 (4th Cir. 2003)).

   b. Equitable Remedy and All Defenses Available: A quiet title suit is essentially an equitable remedy, and subject to equitable defenses (as well as all other defenses). Defenses routinely raised in a quiet title suit are:

      (1) That the periods of limitations on assessment and collection under I.R.C. §§ 6501 and 6502 have expired;

      (2) That the United States improperly computed the taxes, penalties and interest alleged to be due from the defendant-taxpayer;

      (3) That the liabilities have been paid, in full or in part; and

      (4) That State law precluded the lien action.

   Note: Because all defenses are available, taxpayers who relied upon the erroneous advice of an IRS official may assert the doctrine of laches or the doctrine of equitable estoppel. Accord Reitmeier v. Kalinoski, 631 F. Supp. 565, 570 (D.N.J. 1986) (noting that a quiet title suit is “essentially equitable in nature and, therefore, subject to equitable defenses.”).

   c. Typically Handled by AUSA: The United States Attorney’s Office typically handles most suits under 24 U.S.C. § 2410. The Tax Division, however, handles suits under § 2410 for interpleader or in the nature of interpleader, actions that tax protesters file, and actions that raise substantive tax issues. USAM, § 6-5.300.

2. Jurisdiction of the District Courts: I.R.C. § 7402(e) provides as follows: “The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.”


   (a) Under the conditions prescribed in this section and section
1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,
(2) to foreclose a mortgage or other lien upon,
(3) to partition,
(4) to condemn, or
(5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

4. Pleadings:
   a. The Complaint or the Counterclaim: The Taxpayer brings a quiet title suit in federal district court by filing a complaint with the appropriate U.S. district court or filing a counterclaim in answering the United States’ Complaint (typically filed in connection with an action to reduce an assessment to judgment or a tax lien foreclosure action, in which case the taxpayer counterclaims the United States to quiet title).11

11 An action may also be commenced in State court. As this Outline is focused on federal tax law, we do not discuss State causes of action.
Items to Be Included in the Complaint or Counterclaim: 28 U.S.C. § 2410 provides that a complaint or counterclaim to quiet title with respect to a tax lien must include the following items:

(a) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States (e.g., “a continuing lien” on the taxpayer’s property should be a sufficient allegation);

(1) See Coplin v. United States, 952 F.2d 403 (Table), 1991 WL 270831, at *2 (6th Cir. 1991) (holding that the trial court properly determined that it had jurisdiction to hear the taxpayers’ quiet title action under 28 U.S.C. § 2410 and observing that it “is somewhat disingenuous and illogical for the government to assert that it can place a lien on everything the taxpayers own, even when the government is unclear what ‘everything’ entails, while at the same time demanding that the taxpayers can bring a quiet title action only if their defense is more specific than the lien itself.”).

(b) The name and address of the taxpayer whose liability created the lien; and

(c) If a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice and the date and place that the notice of lien was filed.\(^{12}\)

Facial Plausibility Pleading:

(a) The Rule: The general rule of pleadings requires a short and plain statement of the claim showing that the pleader is entitled to relief and generally need not contain detailed factual allegations. See Fed. R. Civ. P. 8(a)(2); Phillips v. Cnty. of Allegheny, 515 F.3d 224, 232-234 (3d Cir. 2008). To state a claim upon which relief can be granted requires that the complainant plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp.  

\(^{12}\) In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.
A claim is facially plausible if the pleading party alleges facts that allow the Court to draw a reasonable inference that the opposing party is liable for the misconduct alleged. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The Court must accept all factual allegations in the complaint as true, view them in the light most favorable to the complainant, and determine whether, under any reasonable reading of the pleadings, the complainant may be entitled to relief. Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006); Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002).

b. **The Answer:** The United States typically moves to dismiss the quiet title suit before answering the complaint or counterclaim. Assuming that the motion to dismiss is denied, then the United States must answer the complaint or counterclaim.

5. **The Motion to Dismiss:**

   a. **Sovereign Immunity:** The United States routinely cites sovereign immunity as grounds to dismiss a quiet title suit. This argument is unfounded.

      (1) **28 U.S.C. § 2410 Waives Sovereign Immunity:** 28 U.S.C. § 2410 is the United States’ waiver of sovereign immunity on which taxpayers should rely in support of its claims.

      (2) **Recognition by Courts:** Courts routinely recognize that 28 U.S.C. § 2410 “waives sovereign immunity” in cases seeking to quiet title to real or personal property on which the United States has or claims a mortgage or other lien. Burge v. I.R.S., 39 F.3d 1191 (Table), 1994 WL 596586 (10th Cir. 1994); see also United States v. Coson, 286 F.2d 453, 457 (9th Cir. 1961) (ruling that waiver of immunity exists for a suit to remove a cloud on title).

   b. **Anti-Injunction Act and Declaratory Judgment Act Arguments:** The United States routinely claims that quiet title suits are barred by the Anti-Injunction Act and the Declaratory Judgment Act.

      (1) **Rejection of Argument by Courts:** Courts have generally rejected that a quiet title suit runs afoul of the Anti-Injunction Act. For example, in United States v. McFarland, No. 3:14cv29-DPJ-FKB, 2014 WL 7149769 (S.D. Miss. Dec. 15, 2014), the United States claimed an interest in real property the defendant had purchased in 1997 and transferred to his son in 2003.

         (a) **United States’ Argument:** The United States argued that the son held title as the defendant’s nominee, and as such, that the government’s tax liens arising after the transfer attached to the property.
(b) **Taxpayer’s Counterclaim:** The defendant-taxpayer counterclaimed the United States to quiet title under 28 U.S.C. § 2410.

(c) **The Motion to Dismiss:** The United States moved to dismiss the counterclaim on the grounds that the Court lacked subject-matter jurisdiction and did not waive its sovereign immunity, or alternatively, on the grounds that the counterclaim violated the Anti-Injunction Act and the Declaratory Judgment Act.

(d) **Court’s Ruling Re: Sovereign Immunity:** The Court denied the United States’ motion to dismiss. Specifically, the Court found that “the United States waived its sovereign immunity for claims under 28 U.S.C. § 2410, and the Court has subject-matter jurisdiction over the counterclaim.”

(e) **Court’s Ruling on Anti-Injunction and Declaratory Judgment Acts:** Also, the Court held that the counterclaim did not violate the Declaratory Judgment Act because that Act “poses no barrier to a suit by a third party to clear his property of a federal tax lien since the quiet title action specifically mandated by [28 U.S.C.] § 2410 is in substance a suit for a declaratory judgment.” The Court went on to similarly note that “the Anti-Injunction Act has been interpreted so as to not prohibit such third party results.”
Appendix A: Sample Attachment to Form 12153:

Request for a Transcribed Face-to-Face Collection Due Process Hearing Pursuant to I.R.C. §§ 6330 and 7521

November 2, 2018

Via Certified Mail, R.R.R.
Attention: Revenue Officer Jones
Internal Revenue Service
1234 Main Street
Anywhere, NJ 07054-4507

Re: Taxpayer: Investment Company, Inc.
EIN: XX-XXXXXXX
Type of Tax: 941
Tax Periods: 12/31/2014, 03/31/2015, 06/30/2015
Date of IRS Notice: 10/15/2015
Our File No.: 1234

Dear Ladies & Gentlemen,

We represent Investment Company, Inc. (hereinafter, sometimes, “Taxpayer”). A copy of our filed Form 2848, Power of Attorney and Declaration of Representative, is attached as Exhibit A.

Request for a Collection Due Process or Equivalent Hearing IRS Form 12153

Enclosed for filing please find a Form 12153, Request for a Collection Due Process or Equivalent Hearing, for the Taxpayer. The Form 12153 relates to the Taxpayer’s request for a collection due process or equivalent hearing to review the Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing (hereinafter “Notice”) issued to the Taxpayer on or about October 15, 2015. The Notice, a copy of which is attached as Exhibit B, relates to the following liabilities:

<table>
<thead>
<tr>
<th>Type of Tax</th>
<th>Tax Form Number</th>
<th>Tax Period(s)</th>
<th>Total Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment</td>
<td>941</td>
<td>12/31/2014</td>
<td>$16,000.00</td>
</tr>
<tr>
<td>Employment</td>
<td>941</td>
<td>03/31/2015</td>
<td>$21,000.00</td>
</tr>
<tr>
<td>Employment</td>
<td>941</td>
<td>06/30/2015</td>
<td>$20,000.00</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>$57,000.00</td>
</tr>
</tbody>
</table>
Pursuant to I.R.C. §§ 6330 and 7521, the Taxpayer hereby requests a face-to-face, transcribed hearing at the Internal Revenue Service’s (“IRS”) Office of Appeals (“Appeals”) located in Newark, New Jersey.

Request That the Appeals Officer Obtain Verification From the IRS That the Requirements of Any Applicable Law or Administrative Procedure Have Been Met

The Taxpayer requests that the Appeals officer obtain and provide to the Taxpayer at or before the hearing the documents verifying that the requirements of any applicable law or administrative procedure have been met. The documents requested include, but are not limited to:

<table>
<thead>
<tr>
<th>Verification Requests</th>
<th>Internal Revenue Service Code Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The Record of Assessment</td>
<td>I.R.C. § 6203 provides: “Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.”</td>
</tr>
<tr>
<td>(2) The Notice and Demand Referred to in I.R.C. §§ 6303(a) and 6601(e)</td>
<td>Collectively, I.R.C. §§ 6303(a), 6321, and 6331(a) provides that: Notice and demand must be provided to a taxpayer before the IRS can collect through the tax lien or by levy.</td>
</tr>
<tr>
<td>(3) Proof That the Statute of Limitations on Assessment Has Not Expired</td>
<td>I.R.C. § 6501</td>
</tr>
<tr>
<td>(4) Proof That the Statute of Limitation on Collection of the Assessment Has Not Expired</td>
<td>I.R.C. § 6502</td>
</tr>
<tr>
<td>(5) The Documents Demonstrating Compliance With I.R.C. § 6751(b)</td>
<td>I.R.C. § 6751(b) provides that: “No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.”</td>
</tr>
</tbody>
</table>

Pursuant to I.R.C. § 6404, the Taxpayer requests that the Appeals Officer direct the IRS to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which (1) is excessive in amount, (2) was assessed after the expiration of the period of limitations properly applicable thereto, or (3) was erroneously or illegally assessed.
Request for a De Novo Review of the Taxes, Penalties, and Interest

The Taxpayer requests a de novo review of the taxes, penalties, and interest reportedly due from the Taxpayer and to which the Notice relates. See Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). If Appeals contends that the Taxpayer had a prior opportunity to dispute the tax liability at issue, the Taxpayer requests copies of any documents demonstrating that the Taxpayer had an opportunity to dispute such tax liability.

Challenges to the Appropriateness of the Proposed Collection Action and Summary of Taxpayer’s Disagreement With the IRS’s Decision to Levy

The IRS’s proposed levy does not balance the need for the efficient collection of tax with the legitimate concern of the Taxpayer’s members that the collection action be no more intrusive than necessary. Stated simply, levying the Taxpayer’s assets is inappropriate because such levy will not facilitate the collection of tax, will create far-reaching economic hardships, and must be restrained during the pendency of the Taxpayer’s requested installment agreement (discussed more fully below).

1. Facilitate Collection

I.R.C. § 6159 authorizes the IRS to enter into written agreements which allow taxpayers to pay tax in installment payments if the IRS determines that the “agreement will facilitate full or partial collection of such liability.” As detailed below, the Taxpayer requests that Appeals consider an installment agreement as a collection alternative to the proposed levy. The Internal Revenue Manual (“I.R.M.”) provides that an installment agreement should be considered when taxpayers are unable to pay a tax liability in full. I.R.M., pt. 5.14.1.1.1 (July 16, 2018). Not filing the levy and instead entering into an installment agreement will facilitate the collection of tax by allowing the Taxpayer the means to generate revenues to pay existing unpaid tax liabilities and future tax liabilities. The I.R.M. provides that a levy should not be made when the IRS determines that not levying will facilitate the collection of tax. Accord I.R.M., pt. 5.11.2.3.1.3(1) (Apr. 15, 2014).

2. Economic Hardship:

The I.R.M. provides that a levy should not be pursued when the IRS determines that the levy would cause economic hardship to the Taxpayer (i.e., the levy will cause the taxpayer to be unable to pay its basic operating expenses). Accord I.R.M., pt. 5.11.2.1.4 (Aug. 24, 2010). The Taxpayer, a limited liability company, relies on positive cash-flow to meet its financial obligations, including the payment of Federal and state taxes. A levy would deprive the Taxpayer of positive cash-flow, which is necessary for the Taxpayer to pay salaries to its employees, pay creditors, and keep the Taxpayer a going concern. As detailed below, the Taxpayer proposes to enter into an installment agreement to fully satisfy its unpaid tax liabilities. Permitting the Taxpayer to enter into an installment agreement will ensure that the Taxpayer has continuing positive cash-flow to remain a going concern and an employer of New Jersey residents.
3. Levy May Not Be Pursued While Installment Agreement Request is Pending

The I.R.M. provided that a levy may not be made on taxpayer’s accounts while, in addition to other events, requests for installment agreements are pending, while an installment agreement is in effect. I.R.M., pt. 5.14.1.5 (Mar. 4, 2011). As detailed below, the Taxpayer is requesting an installment agreement as a collection alternative to the proposed levy. Accordingly, the levy may not be made while this request is pending, while it is in effect, or for 30 days after any installment agreement request is rejected. Id.

Proposed Collection Alternatives

The Taxpayer requests that Appeals consider an installment agreement as a collection alternative to the proposed levy. I.R.C. § 6330(c)(2)(A)(iii) provides: “a person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including ... offers of collection alternatives, which may include ... an installment agreement, or an offer-in-compromise.” The proposed levy is premature because collection alternatives, such as an installment agreement, have not been considered or explored. Restraining the levy and entering into an installment agreement which will fully pay the taxes, penalties, and interest specified in the Notice will facilitate the collection of tax, avoid unnecessary economic hardship to the Taxpayer, and is required under the I.R.M.

Upon the written request of Appeals, the Taxpayer will provide (1) any information required by the Appeals officer to analyze the Taxpayers income and expenses, and (2) more concrete collection alternatives to resolve the liabilities without a levy. The financial information the Taxpayer will submit in advance of the hearing will establish that the Taxpayer is unable to fully satisfy its balance due with a single payment, but that the Taxpayer can and will satisfy its balances due in installments determined on the basis of the Taxpayer’s ability to pay. Such an installment agreement should be accepted because it will facilitate the efficient collection of tax, address the Taxpayer’s legitimate concern that the collection action be no more intrusive than necessary, and allow the Taxpayer to remain a viable employer in the State of New Jersey. Accord I.R.M., pt. 5.14.1.4(1) (Sept. 19, 2014) (noting that an installment agreement should be considered when a taxpayer is unable to currently fully satisfy the balance due accounts, but an installment agreement will fully satisfy the balance due accounts). As such, the IRS should exercise restraint in levying the Taxpayer’s assets.

The Taxpayer’s Request for a Transcribed Face-to-Face Hearing Pursuant to I.R.C. §§ 6330 and 7521

Pursuant to I.R.C. §§ 6330 and 7521, the Taxpayer hereby requests that the case be transferred to the Newark, New Jersey IRS Appeals Office for a transcribed, face-to-face collection due process or equivalent hearing. As mentioned above, the Taxpayer will submit in advance of the face-to-face hearing such financial information as is necessary to establish that an installment agreement is appropriate, including but not limited to a complete Form 433-B, Collection Information Statement for Businesses, and supporting documentation. The Taxpayer believes that a face-to-face hearing will allow Appeals and the Taxpayer’s representative to more quickly and efficiently reach a resolution with respect to the issues presented in this case. The
Taxpayer also believes that the expedience of a face-to-face hearing will help conserve the limited financial resources of the Taxpayer and the IRS.

**I.R.C. § 6330(b)(3) and Revenue Procedure 2012-18 Request**

Pursuant to I.R.C. § 6330(b)(3) and Revenue Procedure 2012-18, 2012-10 I.R.B. 455, the Taxpayer requests that the IRS implement such procedures as are necessary to prohibit *ex parte* communications between the Appeals officer assigned to the Taxpayer’s collection due process or equivalent hearing and all other IRS personnel assigned to the Taxpayer’s case.

**Reservation of Right to Amend**

The undersigned hereby reserves the right to amend and supplement this Request for a Collection Due Process or Equivalent Hearing at or before the face-to-face hearing.

**Request for Receipt**

Kindly acknowledge receipt of this request by countersigning the enclosed copy of this letter and returning the same in the enclosed self-addressed stamped envelope. Please keep me apprised as to the status of this request.

Very truly yours,

John Q. Attorney

Cc: Investment Company, Inc. (via email with enclosures)

RECEIPT ACKNOWLEDGED:
INTERNAL REVENUE SERVICE
BY:
TITLE:
DATED:
Appendix B:  FOIA Letter for Alter Ego Determination

TRANSCRIPT REQUEST
PRIVACY ACT, FOIA & IRC § 6103 REQUEST

Sent Via Facsimile to (877) 891-6035

Internal Revenue Service
IRS FOIA Request
Stop 93A
Post Office Box 621506
Atlanta, GA 30362-3006

ATTENTION:  FOIA REQUESTS

Re:  ABC Construction Corp.
Tax Period(s) Ending: 12/31/2003 through 12/31/2014
EIN: XX-XXXXXXX
Our File:  1234

Dear Ladies and Gentlemen,

We represent ABC Construction Corp. ("Taxpayer"). Enclosed is a copy of our filed Form 2848, Power of Attorney and Declaration of Representative, for the Taxpayer. Pursuant to the provisions of sections 6103 and 7602(c) of the Internal Revenue Code ("I.R.C.") and the Freedom of Information Act (the "Act" or "FOIA"), 5 U.S.C. § 552, as amended, we request access to and copies of the following records maintained by the Internal Revenue Service ("IRS"):

1. All notices, letters, memorandum, contact history sheets, audit reports, correspondence, IRS forms, liens and levies prepared by or received by the IRS that refer or relate to the year(s) and/or period(s) referenced above, and specifically, with respect to the IRS’s determination that the Taxpayer is the alter ego of XYZ Construction, Inc. (EIN: XX-XXXXXXX) ("XYZ Corporation").

2. All transcripts of account, records of assessments and abatements and any other documents reflecting all account activity and transactions that refer or relate to the year(s) and/or period(s) referenced above, and specifically, with respect to the IRS’s determination that the Taxpayer is alter ego of XYZ Corporation.

3. A record of persons contacted by the IRS with respect to the determination that the Taxpayer is the alter ego of XYZ Corporation.
4. All third-party information received by the IRS that refers or relates to the years and/or period(s) referenced above, and specifically, any and all information that the IRS received in connection with its determination that the Taxpayer is the alter ego of XYZ Corporation.

5. All third-party information in the IRS’s possession relevant to the determination that the Taxpayer is the alter ego of XYZ Corporation.

In accordance with IRS Statement of Procedural Rules, Reg. § 601.702(c)(4)(ii), we agree to pay reasonable charges incurred in locating and copying the requested documents, to an upper limit not to exceed $200.

If you decide that any portion of a requested record is exempt from disclosure under the Act, I request that you send me the remaining nonexempt portion of that record. In addition, to the extent that access is denied to inspect any part of the requested administrative files and documents, please send me an index and a detailed description of the deleted material and a statement of the statutory basis for withholding each such document.

As stated above, we have attached a copy of the IRS Form 2848 that authorizes us to make this request for the Taxpayer. In accordance with the provisions of the Act, we expect to receive a reply within 20 working days.

Kindly acknowledge receipt of this letter by countersigning the enclosed copy of this letter and returning the in the enclosed self-addressed, stamped envelope.

Very truly yours,

Jane A. Attorney

JAA/jaa

Enclosures as stated

cc: ABC Construction Corp., Mr. John Q. Taxpayer, President (via email)

RECEIPT ACKNOWLEDGED:
INTERNAL REVENUE SERVICE
BY:____________________
TITLE:__________________
DATE:__________________