TITLE 4
TAX DIVISION

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INTRODUCTION

This Title is an effort to gather into readily accessible form such information as United States Attorneys most frequently require in the handling of civil and criminal tax matters, with particular emphasis on purely procedural questions.

An attempt has been made to outline fully the responsibilty of United States Attorneys in their contacts with the Tax Division, with field employees of the Internal Revenue Service, and in the trial and appeal of tax cases. The functions of the Tax Division are explained in order to acquaint United States Attorneys with the kind and nature of assistance they may obtain upon request and to delineate the circumstances under which the Division assumes direct responsibility for the conduct of tax cases.

Substantive law has been examined only to the extent necessary to resolve jurisdictional questions. Any attempt to discuss the numerous technical and controversial issues which may arise under the internal revenue laws would obviously exceed the intended scope of this Title. Such a discussion is not believed necessary since United States Attorneys are urged and encouraged to call upon the Tax Division for assistance and advice as often as necessary when problems relating to tax matters arise. Only in this manner can we hope to achieve the degree of coordination and control of tax litigation essential to serving the best interests of the Government.

It is an important function in the handling of tax litigation to correlate the problems and urge upon the courts the adoption of uniform principles which can be satisfactorily applied to related cases and to administrative situations within the Treasury. There will be few instances in which a particular tax case may not have a bearing on cases pending in other jurisdictions or upon the administration of the revenue laws. Embarrassing situations will arise in the courts if there is lack of harmony in the approach of those representing the Government. This can be avoided only through a centralized control of tax litigation, in the appellate courts as well as in the trial courts.

The Tax Division in the course of its conduct of tax litigation becomes familiar with the great body of judicial precedents in all courts, including the Supreme Court, and with the administrative interpretations and the trend of administrative rulings. The files of the Internal Revenue Service, including all available data and information, and the Service's suggestions are furnished directly to the Tax Division. Therefore, it is desirable in most instances that the Tax Division prepare, or supervise the preparation of all pleadings, stipu-

lations, etc., prior to trial, that an attorney from the Department be present to try or assist at the trial of tax cases, and that the Department prepare or approve all briefs before they are filed in court.

Experience suggests that the best results in tax litigation are obtained through the cordial cooperation of the United States Attorneys and attorneys of the Department in the preparation of the case for trial and in the trial or other disposition of the case.

The primary sources of federal laws relating to internal revenue are the Internal Revenue Code of 1939 (herein referred to as I. R. C. 1939) and the Internal Revenue Code of 1954 (herein referred to as I. R. C. 1954). I. R. C. 1954 was enacted August 16, 1954. The income tax provisions are generally effective for the taxable year beginning after 1953; the estate tax provisions apply to estates of decedents dying after enactment of the Code; and the gift tax, employment tax, and excise tax provisions take effect January 1, 1955. The procedural and administrative provisions of this Code are generally effective immediately after enactment of the Code. For the effective date of particular provisions of the I. R. C. 1954, see Section 7851. The most convenient source of the new law is the official volume of the Internal Revenue Code of 1954 or the new Code volume of the loose leaf tax services. The 1954 Code is also published in the Statutes at Large (68A Stat.).

Of course much of the current tax litigation is controlled by the Internal Revenue Code of 1939 (53 Stat., Part I). I. R. C. 1939 has been amended numerous times by Revenue Acts and other miscellaneous acts which have repealed, added to, or changed its original provisions, and I. R. C. 1954 has already been amended in various sections. These amendatory acts are to be found in the Statutes at Large which is the primary statute citation to be used. No single official volume containing all the revenue laws in effect at any one certain time is available, but a convenient method of finding the law as it existed at a particular time is by the use of the separate Code volume of the loose leaf tax services. The United States Code, Title 26, may also be used for this purpose but it may not be used as the primary statute citation since it is only *prima facie* the law.

TRIAL OF CIVIL TAX CASES

GENERAL

Since the attorneys from the Tax Division assume the burden in handling the trial of most tax cases, with the cooperation and assistance of the United States Attorneys, it is deemed important that all United States Attorneys be given information through this Title to serve as a useful guide, as to the correlative duties and responsibilities of the trial attorneys from the Tax Division and the United States Attorneys and their assistants in the trial of these cases. Although

the United States Attorneys do not as a rule have the primary responsibility for tax litigation, it is essential that they become familiar with the fundamental jurisdictional as well as procedural rules in that field. For that reason the various types of tax suits, and the circumstances under which they find their way into the trial courts, will be outlined immediately hereinafter, as a preliminary to detailing the procedures involved.

SUITS AGAINST THE UNITED STATES

Suits for Refund

The most common tax suits brought against the United States are for the recovery of taxes allegedly erroneously paid by taxpayer.

Under 28 U. S. C. 1346 (a), the United States District Courts are given original jurisdiction concurrently with the Court of Claims in civil actions against the United States for the recovery of internal revenue taxes (including penalties) alleged to have been erroneously or illegally assessed or collected. The jurisdiction of the District Courts in these suits has been extended by 28 U. S. C. 1346 (a) (1), as amended by Section 2 of the Act of July 30, 1954, c. 648, 68 Stat. 589, to include suits against the United States in any amounts regardless of whether or not the Collector (or Director) who collected the tax is dead or out of office.

Under the familiar rule that the United States may be sued only with its consent, the United States is entitled to prescribe the conditions under which it may be sued. Prior to July 30, 1954, jury trials were not permitted in tax suits against the United States. However, 28 U. S. C. 2402 (a), as amended by Section 2 of the Act of July 30, 1954, c. 648, 68 Stat. 589, now permits jury trials in tax suits against the United States upon the timely request of either party. In a suit against the Collector (or Director) of Internal Revenue, either party has always been entitled to a jury trial upon a timely request. The amendment of Section 2402 (a) does not state whether it is applicable so as to permit jury trials in suits against the United States which were pending on the date of its enactment.

No suits to recover internal revenue taxes alleged to have been erroneously assessed or collected shall be maintained unless a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to law and the regulations of the Treasury Department. Section 7422 (a), I. R. C. 1954. See Section 6511 (a), (b), 5705 (a), I. R. C. 1954, for sufficiency and timeliness of claims for refund for various taxes. (See Sections 3772 (a) (1) for similar provisions under I. R. C. 1939. See, also, Sections 322 (b) (1) (5) (6), 910, 1027 (b) (1), 1636 (a) (1) and 3313 for sufficiency and timeliness of claims for refund for various taxes under I. R. C. 1939.) Also note Tables I and II, Appendix A, for limitations upon claims for refund under both the 1939 and 1954 Codes.

No suit or proceeding to recover internal revenue taxes, penalties or other sums shall be commenced before the expiration of six months from the date of filing* of claims for refund unless the Commissioner renders a decision within that time, nor after the expiration of two years from the date of the sending by registered mail by the Commissioner to the taxpayer of notice of the disallowance of the part of the claim to which the suit or proceedings relate. Sec. 6532 (a) (1), I. R. C. 1954. (See also, Section 3772 (a) (2), I. R. C. 1939.)

Section 6532 (a) (2), I. R. C. 1954 (new), provides that the 2-year period of limitations may be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary or his delegate.

Suits on Accounts Stated

Under certain circumstances taxpayers may sue the United States (but not the Director or Collector) on the basis of account stated where certificates of overassessment have been duly scheduled by the Commissioner of Internal Revenue and delivered to the taxpayers, on the theory that by issuing and delivering such certificates the United States has impliedly promised to pay the amounts of such certificates. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. Where such suits may be maintained they are not governed with respect to the statute of limitations by Section 6532, I. R. C. 1954, but are governed by 28 U. S. C. 2401 (a), and may thus be brought within six years from the date the action accrues or from the date the certificate of overassessment is delivered. The District Courts have jurisdiction of such suits if the claim does not exceed $10,000. In cases where the claim exceeds $10,000, the Court of Claims has exclusive jurisdiction. 28 U. S. C. 1346 (a).

Suits to Quiet Title or Foreclose Mortgages or Liens

It is provided in 28 U. S. C. 2410 (a) that under certain conditions the United States may be named a party in any civil action in the United States district courts, or state courts having jurisdiction of the subject matter, to quiet title or to foreclose a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. See also Section 7424, I. R. C. 1954, authorizing petition for permission to bring suit to quiet title

*Section 7502, I. R. C. 1954, provides that a claim for refund is filed when mailed instead of when received by the Collector (or Director).

when the Secretary or his delegate fails to authorize suit to enforce a lien or subject property to payment of a tax under Section 7403, I. R. C. 1954, within 6 months after request.

If an action of this character is filed in a state court, the cause may be removed by the United States to the district court of the United States for the district and division in which the action is pending. 28 U. S. C. 1444, 1446.

Suits Involving Tax Liens

Suits in which the United States may be named as a party defendant by reason of the existence of a tax lien are discussed under a separate heading, *infra*.

SUITS AGAINST COLLECTORS OR DIRECTORS OF INTERNAL REVENUE

Suits for Refund

Most numerous of all tax suits are suits against the Collectors or Directors of Internal Revenue for the recovery of taxes allegedly overpaid by taxpayer.

Prior to the reorganization of the Internal Revenue Service under Reorganization Plan No. 1 (1952), effective March 15, 1952, internal revenue taxes were collected by Collectors of Internal Revenue who served in various collection districts throughout the United States and its territorial possessions. Under the reorganization the offices of Collectors were abolished and the duties of such Collectors were taken over by Directors of Internal Revenue, which offices were created under the reorganization. Hereinafter "the Director" and "the Collector" will be used interchangeably.

For many years the courts have recognized a common law action in the form of assumpsit in favor of taxpayers for the recovery of internal revenue taxes, which action lies against the Collector who collected the tax, when such collection was erroneous or illegal. However, in practically all cases of this character the Collector is not required to pay any judgment rendered against him for the reason that the trial court issues a certificate of probable cause which transmutes the judgment into one against the United States. 28 U. S. C. 2006. Nevertheless, the action is treated for other purposes as being a personal action against the Collector. See *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

Under the Act of July 16, 1952, c. 892, 66 Stat. 735, Sec. 3, actions of this character may be instituted against the Director of Internal Revenue who collected the tax in the same manner and under the same circumstances as such action would lie against a Collector. Suits of this character may be maintained in the district courts against only the Collector or Director who collected the tax, or his personal representative in case of his death. *Patton* v. *Brady*, 184 U. S. 608. They do not lie against a successor in office. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1. There is no statutory limitation as to the amounts for which these suits can be brought. The right to trial by jury may be demanded as provided in Rule 38 (b), Fed. Rules Civ. Proc., by either the plaintiff or the defendant.

Suits to Restrain or Enjoin

Taxpayers often seek to restrain or enjoin Collectors from collecting taxes or levying upon or selling properties of a taxpayer. In these cases the taxpayer usually attempts to allege facts showing that, if threatened actions are taken by the Collector, he will suffer irreparable injury and that he has no adequate remedy at law if the threatened actions are carried out. Section 7421, I. R. C. 1954, specifically provides that no suit to restrain the assessment or collection of any tax may be maintained in any court except as to taxes assessed during the 90-day period of a deficiency notice given taxpayer as to proposed assessments of income, excess profits, gift or estate taxes, or while a petition is pending before the United States Tax Court or until after the decision of the Tax Court on such petition has become final.

Notwithstanding the provisions of Section 7421, the courts have granted injunctions against Collectors restraining the collection of taxes or sales of properties on distraint where exceptional circumstances have been shown, especially where the tax appears to be arbitrary and oppressive and where if it is collected the taxpayer's business would be destroyed and a loss caused for which the taxpayer has no adequate remedy at law. *Dodge* v. *Osborn*, 240 U. S. 118; *Dodge* v. *Brady*, 240 U. S. 122; *Hill* v. *Wallace*, 259 U. S. 44; *Miller* v. *Nut Margarine Co.*, 284 U. S. 498; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Allen* v. *Regents*, 304 U. S. 439.

Although perhaps a few isolated cases can be cited to the contrary, the courts will not grant an injunction simply upon a showing that the tax is not legally due and that if an injunction is not granted an erroneous tax will be collected. *Graham* v. *duPont*, 262 U. S. 234; *Snyder* v. *Marks*, 109 U. S. 189.

No proceedings for a declaratory judgment to determine tax liability may be brought. *Wilson* v. *Wilson*, 141 F. 2d 599 (C. A. 4); 28 U. S. C. 2201.

SUITS BY THE UNITED STATES

General

Generally court proceedings are resorted to for the collection of taxes against delinquent taxpayers when it appears that judicial process will be more effective than summary administrative action. Sometimes it is deemed advisable to reduce tax claims to judgment because of the impending bar to their collection by the statute of limitations. See Appendix A to this Title for tables of the statute of limitations on assessment and collection of taxes.

Section 7401, I. R. C. 1954, provides that no suit for the recovery of taxes shall be commenced without the authorization or sanction of the Commissioner of Internal Revenue and the direction of the Attorney General. In emergencies it may not be possible to obtain the authorization of the Attorney General and the sanction of the Commissioner of Internal Revenue in advance of institution of the suit because of limitations requirements. In such cases, the United States Attorneys should advise the Department promptly and furnish a report setting forth the facts, the reasons for the emergency and at least two copies of the complaint. The sanction of the Commissioner in such cases may be obtained after the suit is filed. Cf. *United States* v. *Tillinghast*, 55 F. 2d 279, affirmed without discussion of this point, 69 F. 2d 718 (C. A. 1).

Enforcement of Liens

Judicial proceedings to enforce tax liens are discussed under a separate heading, *infra*.

Bankruptcy, Receiverships, Etc.

The enforcement of tax claims in bankruptcy, receivership, probate and insolvency proceedings are discussed under a separate heading, *infra*.

Suits Without Assessment

In some instances, suits against the taxpayers may be authorized even though the taxes have not been assessed. Suits of this character may be instituted within three years after the filing of the returns. See Section 6501 (a), I. R. C. 1954, providing the general statute of limitations. See Appendix A for other time limits provided in cases of this character. The right of the United States to maintain suits without assessment has been judicially recognized. *Savings Bank* v.

United States, 19 Wall. 227; *King* v. *United States*, 99 U. S. 229. In actions of this character where no assessment has been made and where the United States does not have a lien, it is necessary for the United States to assume the burden of proof without the benefit of the presumption of correctness which normally attaches to the assessments of the Commissioner of Internal Revenue. *United States* v. *Rindskopf*, 105 U. S. 418; *Paschal* v. *Blieden*, 127 F. 2d 398 (C. A. 8); *Fiori* v. *Rothensies*, 99 F. 2d 922 (C. A. 3); *Weloh* v. *Helvering*, 290 U. S. 111.

Equity Suits to Set Aside Fraudulent Transfers

The district courts clearly have jurisdiction in suits on behalf of the United States to set aside transfers of property by a taxpayer which are fraudulent or which are made without fair and adequate consideration for the purpose of avoiding or evading the payment of federal taxes. See Section 7402 (a), I. R. C. 1954. In addition to the statutory provisions the United States is entitled as an ordinary creditor, to institute suit under applicable provisions of state law to set aside conveyances made in fraud of the rights of any unpaid creditor. The equitable remedy is available to the United States for the reason that until the fraudulent conveyance has been set aside distraint cannot be made upon the property in aid of the lien of the United States. See *Zimmern* v. *United States*, 87 F. 2d 179 (C. A. 5), cert. denied, 300 U. S. 671; *Dooley* v. *Pease*, 180 U. S. 126; *Green* v. *Van Buskirk*, 7 Wall. 139. It is unnecessary to exhaust the remedy against the transferor before proceeding against his property in the hands of the transferee. *Pierce* v. *United States*, 255 U. S. 398; *United States* v. *Fairfield*, 187 F. 2d 328.

Equity Suits to Recover Taxes from Transferees Under the Trust Fund Theory

Rule 2, Fed. Rules Civ. Proc., provides that only one form of action, to be known as a "civil action," may be brought in the district courts. This modified 28 U. S. C., 1940 ed., 384, since repealed, which provided that suits in equity shall not be sustained in any court of the United States where a plain, adequate and complete remedy may be had at law. See Advisory Notes to Rule 2, Fed. Rules Civ. Proc. Under Rule 2, and under Section 7402 (a), I. R. C. 1954, the district courts have jurisdiction to grant complete equitable relief in suits brought in behalf of the United States under the trust fund theory to recover taxes from transferees of the property of insolvent or defunct taxpayers.

The trust fund doctrine applies irrespective of whether the transfers were made without notice of the tax or without any fraudulent intent in fact. *Updike* v. *United States*, 8 F. 2d 913 (C. A. 8), cert. denied, 271 U. S. 661. It is unnecessary for the United States to exhaust its remedy against the transferor before proceeding under the trust fund theory against the transferee when it appears that the transferor has insufficient assets to satisfy the tax. *Cleveland* v. *Commissioner*, 28 B. T. A. 578, affirmed *sub nom. Flynn* v. *Commissioner*, 77 F. 2d 180 (C. A. 5); *Coffee Pot Holding Corp.* v. *Commissioner*, 118 F. 2d 415 (C. A. 5).

The liability of the transferee is joint as well as several to the extent of the amount or value of the assets of the taxpayer which such transferee has received. *Phillips* v. *Commissioner*, 283 U. S. 589. This equitable remedy against the transferee is not exclusive. *Leighton* v. *United States*, 289 U. S. 506. Additional administrative remedies are provided for the assessment and enforcement of transferee liabilities. See Section 6901, I. R. C. 1954.

Suits to Enforce Liability of Fiduciaries

Section 3466, R. S. (31 U. S. C. 191) provides that whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased person in the hands of administrators or executors is insufficient to pay all the debts due from the decedent, the debts (which include taxes) due the United States shall be first satisfied; and the priority established also extends to cases (1) in which a debtor without sufficient assets to pay all his debts (including taxes) makes a voluntary assignment of his property, or (2) in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or (3) in which an act of bankruptcy is committed. *United States* v. *Oklahoma*, 261 U. S. 253.

Section 3467, R. S., as amended by Section 518 (a) Revenue Act of 1934, provides that every executor, administrator, assignee or other person who pays, in whole or in part, any debt due by the estate or person for whom or which he acts before satisfying and paying debts (including taxes) due to the United States from such person or estate, becomes personally liable, to the extent of such payments, for the debts (including taxes) so due to the United States or so much thereof as may remain due and unpaid. See *United States* v. *Weisburn*, 48 F. Supp. 393; *United States* v. *Kaplan*, 74 F. 2d 664 (C. A. 2); *United States* v. *First Huntington Nat. Bank*, 34 F. Supp. 578, aff'd *per curiam*, 117 F. 2d 376 (C. A. 4).

The remedy by suit in the United States district court to enforce the personal liability of the fiduciary is alternative and not exclusive

of the administrative remedy for enforcing the liability of fiduciaries and transferees under Section 6901, I. R. C. 1954. See *Leighton* v. *United States*, 289 U. S. 506; *United States* v. *First Huntington Nat. Bank*, *supra*.

Suits for Erroneous Refunds

Section 7405 (a), I. R. C. 1954, provides that any internal revenue taxes which have been erroneously refunded may be recovered in suits brought by the United States within two years after the making of such refunds. The 2-year period of the statute of limitations runs from the date the refund is actually made to the taxpayer rather than from the date of its allowance by the Commissioner. *United States* v. *Wurts*, 303 U. S. 414. See Table D, Appendix A. The remedy afforded the United States is cumulative and in addition to the right of the Commissioner to reopen the case and determine the amount of the tax by administrative processes. *United States* v. *Tuttle Spring Co.*, 55 F. 2d 415.

Penalty Suits for Refusal to Surrender Property Subject to Warrants of Distraint

Section 6332, I. R. C. 1954, provides that any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the Director making the levy, surrender such property or rights to the Director or his deputy, unless the property or rights so levied upon are at the time of surrender subject to an attachment or execution under any judicial process. This section further provides that any person who violates these provisions shall become individually liable to the United States in a sum equal to the value of the property or rights not so surrendered to the Director or his deputy, but not exceeding the amount of the taxes, including penalties and interest, for the collection of which the levy was made, together with costs and interest from the date of the levy. Jurisdiction over this form of action is in the district courts. 28 U. S. C. 1345.

The defendant in such actions is not permitted to raise defenses ordinarily available in actions directly instituted against the taxpayer for collection of the tax, such as constitutionality, amount, or validity of the assessment, or the statute of limitations. *United States* v. *Marine Midland Trust Co. of New York*, 46 F. Supp. 38; *United States* v. *Bank of Shelby*, 68 F. 2d 538 (C. A. 5); *United States* v. *First Capital National Bank*, 89 F. 2d 116 (C. A. 8); *United States* v. *Penn Mut. Life Ins. Co.*, 130 F. 2d 495 (C. A. 3).

Suits on Bonds to Stay Collection of Taxes

Where extensions of the time for payment of taxes have been granted by the Bureau of Internal Revenue upon the taxpayer's giving bond with surety covering the taxes, and default occurs with respect to such extended payments, suits may be instituted in the district courts by the United States and sometimes by the Collectors to enforce the conditions of the bonds.

In suits for breach of conditions of such bonds, it is generally held that the defendants cannot question the amount or validity of the tax. *Gray Motor Co.* v. *United States*, 16 F. 2d 367 (C. A. 5); *Bowers* v. *American Surety Co.*, 30 F. 2d 244 (C. A. 2), cert. denied, 279 U. S. 865.

When the bond runs to a certain Collector, and the suit is brought in the name of such Collector, the action does not abate upon the Collector's death but may be brought in the name of the succeeding Collector. *Fiw* v. *Phila. Barge Co.*, 290 U. S. 530. Suits on bonds running to a Collector should be brought in the name of the incumbent Collector regardless of the name set forth as obligee in the bond. *McCaughn* v. *Union Paving Co.*, 63 F. 2d 258 (C. A. 3).

Suits to Establish Taxes and Lien Rights

On some occasions it has been deemed advisable to institute suits in the district courts to establish tax liabilities and lien rights where the assets of the debtor are *in custodia legis*. It is held that where there are assets in the custody of the court, as in probate and certain types of insolvency proceedings, a suit may be instituted in the federal court for a determination and establishment of the Government's rights, although the district court has no jurisdiction to enter judgments or orders interfering with the custody of the assets in the probate or other state court. See *Morris* v. *Jones*, 329 U. S. 545; *Markham* v. *Allen*, 326 U. S. 490; *Propper* v. *Clark*, 337 U. S. 472; *Waterman* v. *Canal Louisiana Bank Co.*, 215 U. S. 33. When such suits are authorized or sanctioned by the Commissioner and are directed by the Attorney General, the United States Attorneys will be given special instructions concerning the type of order which may be entered by the district court, when judgment is secured.

CLAIMS OF UNITED STATES IN BANKRUPTCY, RECEIVERSHIP, PROBATE, AND INSOLVENCY PROCEEDINGS

General

The Department has arranged with the Internal Revenue Service to deal directly with the United States Attorneys in cases which in-

volve bankruptcy, receivership, and decedents' estate matters where the Director's efforts have proved or may prove inadequate. In most cases no serious technical questions arise, and satisfactory adjustments are worked out; however, occasionally an important question will arise in such a case.

The United States Attorney should notify the Department of the prospect of serious controversy involving technical tax questions, furnishing copies of relevant papers, and arrangements will then be made with the office of the Chief Counsel, Internal Revenue Service, so that the general supervision of the matter may be taken over by the Tax Division.

Bankruptcy Proceedings

Notice of adjudication.—Section 6036, I. R. C. 1954, places a duty upon every trustee in bankruptcy to give notice in writing to the Secretary of the Treasury, or his delegate, of his qualification as such, in such manner and in such time as provided by the regulations, so that an immediate determination may be made by the Commissioner as to whether all taxes have been properly returned. Prompt assessment may be thereafter made.

When a person or corporation is adjudicated a bankrupt under Chapters I to VII, Bankruptcy Act, or files a petition for relief under Chapters X, XI, XII, XIII, XIV, or XV, Bankruptcy Act, it is the practice of the Commissioner promptly to determine and assess against the bankrupt or debtor all taxes which may be due and owing. See Section 6871 (a), I. R. C. 1954.

Proof of claim filed by Director.—It is the practice in bankruptcy cases for the Directors to file claims for taxes, including those assessed pursuant to the notice mentioned above. These claims must be filed within six months after the first date set for the first meeting of creditors unless the time is extended before the expiration of such period for good cause shown. See Section 57n, Bankruptcy Act, as amended.

It is the practice of the Director to supply the United States Attorney with copies of claims filed together with a report on Treasury Form 166A. In many cases this ends the matter so far as the United States Attorney is concerned because the claim will be allowed and paid by the trustee in bankruptcy as a matter of course from the bankrupt's estate to the extent that funds are available.

Contested cases.—In some bankruptcy cases questions as to the merits or priority of the Government's claim will be raised by objections or other appropriate pleadings which may involve considerable litigation. In the event objections are made to the allowance of

claims by the United States for taxes, or if questions of priority or other issues are raised, the United States Attorney is requested promptly to forward to the Department copies of papers relating to the questions involved, together with a statement concerning the matters presented so that the Department will be in a position to give appropriate assistance.

Sec. 64a, Bankruptcy Act, as amended, gives the bankruptcy court power to determine all questions as to the correctness of the tax assessment as well as the priority of the claim of the United States. No petition for redetermination may be filed in the Tax Court after adjudication of bankruptcy. Section 6871 (b), I. R. C. 1954. (See also 274 (a) I. R. C. 1939.)

If the United States is aggrieved by an order of a referee in bankruptcy, it may within ten days after the entry thereof, or such time as extended, file with the referee a petition for review and serve copies on all adverse parties. See Sec. 39c, Bankruptcy Act, as amended. Because of this short time limit, it is usually advisable for the United States Attorney to obtain an extension of time before referring the matter to the Department. As to the time limit (30 days) and procedure for appeals from orders of the district court, see Title 6, Appeals.

Priority of tax claim.—Where the United States acquires no tax liens prior to bankruptcy, the priority of the United States with respect to its tax claims in bankruptcy is generally governed by Section 64a (4), Bankruptcy Act, as amended, which gives the United States a preferred position with respect to its taxes, on an equality with the tax claims of states or subdivisions thereof, but inferior to administration expenses and certain wage claims given priority under Section 64a (2). Where federal tax liens do arise before bankruptcy they must be recognized to the full extent they attach to the bankrupt's property (see Sec. 67b) subject to the provisions of Section 67c, which makes them inferior to administration expenses and certain wage claims given priority under Section 64a, with respect to *personal* property, unless such property has been seized or sold by the Director prior to bankruptcy.

In the event an objection is made to the allowance of the claim of the United States for taxes, or some question is raised in respect thereto, the United States Attorney should promptly forward to the Department copies of papers relating to the question, together with pertinent information, so that assistance may be supplied, if requested. In the event of an adverse ruling by the Referee, see discussion of contested cases, above.

Reorganization proceedings.—In reorganization proceedings under Chapter X, Bankruptcy Act, as amended, the Secretary of the Treasury is given the power under Section 199, Bankruptcy Act, as amended, to accept plans of reorganization dealing with the taxes of the United States. Where such a plan has been accepted by the Secretary of the Treasury, the Department will give appropriate instructions to the United States Attorney with respect to filing notice of acceptance.

Receivership Proceedings

Where receivers are appointed in a state or federal court it is the practice of the Internal Revenue Service to make determinations and file proofs of claim pursuant to the provisions of Section 6871 (a), I. R. C. 1954. In such cases the receivership court has jurisdiction to hear and determine objections to the merits of the tax claim. The priorities of the United States in receivership proceedings are asserted under Section 3466, R. S. (31 U. S. C. 191).

Where receivership proceedings are pending in a state court and the United States has filed its claims and thereby submitted to the jurisdiction of that court, the United States is generally required to follow the procedure and abide by the procedural rules of the state tribunal. In referring such a matter to the Department, the United States Attorney should inform the Department of the applicable time limits and obtain necessary extensions of time pending consideration by the Department. In respect of appeals, the United States Attorney must assume responsibility for timely protection of the right, perfecting the appeal, if necessary, pending authorization of appeal by the Solicitor General. (See discussion of appellate matters, Title 6.)

Probate Proceedings

The Internal Revenue Service will give appropriate instructions to the Directors with respect to the treatment of tax claims in probate proceedings. Where assessments have been made against the decedent in his lifetime, or are made under Sections 6501, 6861 or 6863, I. R. C. 1954, notice of the assessment in the form of a proof of claim is brought to the attention of the personal representative of the decedent and to the United States Attorney who is furnished a copy of the claim and report on Treasury Form 166A. Generally such a claim is allowed and paid in due course of administration and no further questions arise.

When a tax claim against a decedent's estate is disallowed in whole or in part, the Director reports the fact to the office of the Chief Counsel, Internal Revenue Service. In case further action to collect the claim is desired, the Commissioner of Internal Revenue will

authorize and request the Attorney General to take such action. If the request is approved, the Department will send appropriate instructions, and usually furnish to the United States Attorney a draft of any pleadings to be filed and a discussion of the facts and the law involved.

Occasionally it will be necessary for the United States Attorney to seek to control action of the personal representative through the processes of the probate court. Sometimes, if there is insolvency, the threatened action of the personal representative (as failure to recognize the Government's priority) can be discouraged by calling his attention to the provisions of Sections 3466 and 3467, R. S. (31 U. S. C. 191 and 192). In other cases, the supervisory authority of the probate court, provided by most State codes or statutes, will ordinarily be adequate. Suits for refund by decedents' estates take the regular course of refund suits, described *supra*.

The United States Attorneys are requested to notify the Department, and to forward any papers that may be germane to the question raised, whenever a contest develops, or whenever it becomes necessary to compel the personal representative to act on a claim of the United States. Because of the differences in probate law in the several states, it is the general policy of the Department to rely heavily in probate court proceedings on the experience of the United States Attorney concerning the laws of his jurisdiction. In respect of appeals, he must assume responsibility for timely protection of the right, perfecting the appeal, if necessary, pending authorization of appeal by the Solicitor General.

Insolvency Proceedings

Sometimes it will be necessary to handle tax claims of the United States in insolvency proceedings in the state courts, such as assignment proceedings for the benefit of creditors. Where claims are filed and litigation arises, the comments relative to probate claims are generally applicable. Sections 3466 and 3467, R. S. (31 U. S. C. 191 and 192) relating to priorities, are applicable in such proceedings.

LIEN CASES

General

Statutes relating to taxes have traditionally provided for liens on property as an aid to collection. The Federal tax lien provision of longest standing and most general application has been carried into the 1954 Internal Revenue Code as Section 6321 *et seq.* (It previously was incorporated as 3670 *et seq.*; I. R. C. 1939). It gives a lien upon all property and rights to property, both real and personal,

owned by the delinquent taxpayer at any time during the life of the lien. It covers property acquired after the lien arises as well as property owned when the lien arises. *Glass City Bank* v. *United States*, 326 U. S. 265.

Section 6322, I. R. C. 1954, provides that the lien shall arise at the time the assessment is made. Section 6321, I. R. C. 1954, provides that the lien shall arise if the tax debtor neglects or refuses to pay after demand. (Under the Internal Revenue Code of 1939 the lien arose at the time the assessment list was received by the Collector or Director where the tax debtor neglected or refused to pay after demand. Compare Sections 3670 and 3671, I. R. C. 1939.) The lien, therefore, may not arise until demand has been made, but once demand is made and payment refused or neglected, the lien relates back to the date the assessment was made. In a suit under I. R. C. 1939, to enforce its lien, the Government must, therefore, allege and prove the date on which the assessment list was received by the Collector. Under I. R. C. 1954, the Government must allege and prove the date the assessment was made. The suit must be brought in the name of the United States, not in the name of the Collector.

The lien continues until payment of the tax and, if not paid, for six years after the date of assessment unless extinguished by distraint proceedings or court action. If the tax liability is reduced to judgment the lien remains alive as long as the judgment remains enforceable. *Investment & Securities Co.* v. *United States*, 140 F. 2d 894 (C. A. 9). In such cases the judgment should be pleaded and proved together with the other matters already mentioned.

The federal tax lien is a specific and perfected lien which creates a right in the United States against all of the taxpayer's property and rights to property and which is superior to other liens (with the exceptions specified in Section 6323, I. R. C. 1954, relating to mortgagees, pledgees, purchasers and judgment creditors) unless prior to the date on which the federal lien arose, the competing lienor has made his lien specific and has perfected such lien by actually divesting the debtor of either title or possession. *New York* v. *Maclay*, 288 U. S. 290; *Illinois* v. *Campbell*, 329 U. S. 362; *United States* v. *Gilbert Associates*, 345 U. S. 361; *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47.

In *Security Tr. & Sav. Bk.*, *supra*, it was held that in determining priority of liens arising under Sections 6321 and 6322, I. R. C. 1954, (See also Sections 3670 and 3671, I. R. C. 1939), similar criteria are applied as in cases involving insolvency where the United States asserts its claims for priority under Section 3466, Revised Statutes. See *Illinois* v. *Campbell*, *supra*; *United States* v. *Gilbert Associates*, *supra*.

In determining whether an adverse lien is specific and perfected resort is always made to federal law since a federal question is presented. See *Illinois* v. *Campbell*, *supra; United States* v. *Gilbert Associates*, *supra.*

Requirement of Notice of Lien

By a provision of the law dating back to 1913 (now Sec. 6323, I. R. C. 1954), the lien upon all property and rights to property of a delinquent tax debtor created by Section 6321 is not "valid" as against any mortgagee, pledgee, purchaser, or judgment creditor (though valid as to all others) until notice of the lien has been filed by the Collector. It has been held that the words "judgment creditor" as used in Section 6323, I. R. C. 1954, are used in the conventional sense. (See also Section 3672, I. R. C. 1939.) *United States* v. *Gilbert Associates*, *supra.* This notice, in states which have provided for an office of filing, is filed in the designated office; otherwise it is filed in the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated. All States except New Hampshire have designated an office for the filing of tax liens. Prior to I. R. C. 1954 it had been held that the form and content of the notice had to comply with the requirements of state law. *Youngblood* v. *United States*, 141 F. 2d 912 (C. A. 6). However, Section 6323 (b), I. R. C. 1954, makes it clear that the notice is valid if it is in such form as would be valid if filed with the clerk of the United States District Court.

The filing of the liens in the appropriate place and manner is a function of the Director. In the event foreclosure becomes necessary all of the pertinent facts surrounding the filing of notice of lien should be alleged and proved as a matter of precaution in case any of the other claimants fall within the class of exceptions.

Gift and Estate Tax Liens

Special liens are provided for unpaid gift and estate taxes which attach for a period of 10 years "to the property comprised in the gift" and the "property included in the gross estate." If the property to which the lien attaches is transferred to a bona fide purchaser, mortgagee or pledgee for adequate and full consideration, the lien is divested and a like lien attaches to other property of the transferor. Section 6324, I. R. C. 1954. (See also Sections 827 and 1009, I. R. C. 1939.)

Enforcement of Tax Liens

Methods available to the United States to enforce a lien on property are by distraint and by judicial proceedings. Distraint involves direct seizure and sale of the taxpayer's property, first personal and then real, subject to the provisions of Section 6331 *et seq.*, I. R. C. 1954.

Judicial proceedings to enforce a tax lien are governed by Section 7403, I. R. C. 1954. The section is available in the enforcement of estate and gift tax liens arising under Section 6324, I. R. C. 1954, as well as the older and more general tax lien provided by Section 6321, I. R. C. 1954.

Complaint.—A suit for the enforcement of a tax lien against property under Section 7403 is a suit of a civil nature directed by the Attorney General to be filed under sanction of the Commissioner of Internal Revenue and the complaint should so allege. The complaint should include a careful reference to all the taxes which the lien may be said to secure, showing them to have been assessed by the Commissioner. This will make available the presumption of correctness resulting from performance of official duty. *Niles Cement Pond Co.* v. *United States*, 281 U. S. 357. An accurate description of the property sought to be applied to the payment of the taxes should be set forth in detail. Particular care should be taken that the complaint set forth the legal description of all real estate upon which the Federal lien is asserted together with the best available description of personal property upon which the lien is claimed. If the lien sought to be enforced is one created by Section 6321, I. R. C. 1954, it is essential that the date the assessment list was received by the Collector be alleged as exactly as possible for the reasons already mentioned elsewhere herein. It is also necessary in such cases to allege demand because, although the lien arises at the date the assessment is made or the list is received by the Collector (dependent upon whether Section 6321, I. R. C. 1954 or Section 3670, I. R. C. 1939 is applicable), it was early held that demand is required as an essential element to the creation of a lien under the statute. *United States* v. *Pacific Railroad*, 1 Fed., 97, 100; *United States* v. *Allen*, 14 Fed. 263, 266.

Adjudication and sale.—In an action to enforce a lien under Section 7403, I. R. C. 1954, the suit must (the law says "shall") make parties of all persons having liens upon or claiming any interest in the property or rights to property sought to be subjected to payment of the tax. The court is authorized to adjudicate all matters involved in the proceeding, make final determination of the merits of all claims to or liens upon the property and rights to property in question, and, if a claim or interest of the United States is established, may order sale of the

property and distribution of the proceeds in accordance with the findings of the court in respect of the interest of the parties and of the United States.

Receivers.—In addition to the powers of the court under Section 7403 which have just been discussed the court may, at the instance of the United States, appoint a receiver to enforce the lien; or during the pendency of the proceedings, upon certification of the Commissioner that it is in the public interest, a receiver may be appointed with all the powers of a receiver in equity. Section 7403 (d), I. R. C. 1954. These powers are in addition to the general powers granted to the district courts to issue orders, process and judgments, including appointment of receivers under Section 7402 (a), I. R. C. 1954. (Compare Section 3800, I. R. C. 1939). The appointment of such a receiver should be sought only upon authorization of the Attorney General.

Section 7403, I. R. C. 1954, is used where it appears that its use would be more effective than the use of the ordinary administrative processes of distraint. It is the position of the Department that under the statute it is entitled to the appointment of a receiver upon a showing that the taxes cannot be readily collected through administrative processes without establishing the usual equities such as a showing of waste, insolvency or fraud. *United States* v. *Lass*, 103 F. Supp. 341, aff'd 196 F. 2d 90 (C. A. 4); *United States v. Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9 (C. A. 3). When invoking Section 3678 (d), however, every effort should be made to establish waste, insolvency, fraud or other grounds for equitable relief as well as the difficulty of using customary administrative and judicial processes in the liquidation of the Government's claim.

Where the Commissioner of Internal Revenue furnishes a certificate as provided for in Section 7403 (d), I. R. C. 1954, the receiver will be given all the powers of a receiver in equity. In such cases the receiver will proceed under the order of the court to marshal and liquidate the assets of the delinquent. The court will determine the merits of all claims and priorities of liens, as well as the rights to property in question.

Receivers appointed to aid in enforcing the lien of the United States will be confronted with problems, both legal and factual, and, it may be expected, will request the United States Attorney for assistance in these matters. The Tax Division is prepared to furnish advice and assistance to the United States Attorney, the receiver or the court, touching upon the administration of the receivership. All important matters in this kind of a proceeding should be submitted to the Department, if possible, before orders are entered by the court. This includes the question of fees for the receivers and their attorneys.

If the delinquent's property is located, in part, outside of the district in which the proceeding is commenced and the receiver appointed, the latter has the capacity to take possession of all property or to sue in any district where the property is located. 28 U. S. C. 754. These powers of the receiver, however, are divested unless within *ten days after his appointment* he files copies of the complaint and order of appointment in the district court for each district in which property is located over which he should exercise control or in which he should sue. 28 U. S. C. 957 and 958 touch upon eligibility of certain persons to be appointed receivers, while 28 U. S. C. 959 relates to the responsibilities of receivers in the conduct of their office.

In some cases it will be found that persons cannot be reached by the customary personal service within the district wherein the suit is brought to enforce a lien under Section 7403, I. R. C. 1954. Provision is made to meet such situations in 28 U. S. C. 1655.

Section 6325, I. R. C. 1954, provides that if the Secretary or his delegate finds that the interest of the United States in a particular piece of property subject to a lien is valueless, he may issue a certificate discharging such property from the lien. Compare Section 3674, I. R. C. 1939. Section 6323 (d), I. R. C. 1954, provides that the Secretary or his delegate may disclose the outstanding liability secured by the lien.

SUITS AGAINST THE UNITED STATES INVOLVING TAX LIENS

As pointed out above, the claim for taxes and resulting lien are those of the United States. Since the United States is not suable as a matter of common right, the plaintiff in an action involving the rights of the United States must bring himself clearly within the provisions of a Federal statute authorizing the suit. So far as tax liens are concerned, there are two statutes under which a claimant to property or rights to property may proceed to secure an adjudication and clear the title to property.

The first consent statute is now set forth in Section 7424, I. R. C. 1954. The statute applies to both real and personal property. The procedure is slow and is seldom used. The statute applies to real estate only. The person bringing the suit must have a prior recorded lien or interest relating to the real estate involved, or be the person who purchased the property upon foreclosure of the prior lien. He must request the Commissioner of Internal Revenue to authorize the filing of a civil action on behalf of the United States to enforce its lien and then must wait 6 months unless the Commissioner expressly refuses the request. Then he must file a petition

in the district court where the real estate is located asking leave to file a civil action for final determination of all claims to or liens upon the property. If, at the term of court next following its filing, the petition is granted after a full hearing in open court has shown that jurisdictional facts stated in the petition are true, the complaint is filed and the United States must be served.

The other consent statute is 28 U. S. C. 2410 and the remainder of this discussion relates only to it. Under this statute the consent of the United States is given to be named a party defendant in any suit instituted in any Federal or State court having jurisdiction of the subject matter, for the purpose of quieting title to, or for the foreclosure of a mortgage or other lien upon, real or personal property where the United States may have or claim a Federal tax lien upon the property involved.

The Collector is not a proper party defendant in any suit of this character. If a Collector is so named, steps should be taken to have the case dismissed as to him. *Czieslik* v. *Burnet*, 57 F. 2d 715.

Whether the suit is in a State or Federal court, service is provided for in the statute and the provisions made must be strictly complied with as a condition of the consent. Service is made by serving the process of the court, together with a copy of the bill of complaint, upon the United States Attorney (or his Assistant or designee) for the district in which the suit is brought and by sending copies of the process and bill of complaint by registered mail to the Attorney General of the United States at Washington, D. C.

The nature of the interest or lien of the United States in the property involved must be set forth in the complaint with *particularity*. This requirement must be insisted upon, if necessary by appropriate motion. The United States has 60 days after service, or such other time as the court may allow, within which to appear, answer or otherwise plead. In some cases it will be found that the summons issued provides a time appearance (usually 20 days) in conformity with State law. In such cases, the United States Attorney should take steps to protect against a default judgment entered prior to the expiration of 60 days after service. Ordinarily it will suffice to notify plaintiff's counsel of the terms of the statute, but if after such notification, default action is still threatened prior to the expiration of the 60-day period the United States Attorney should move to quash service of summons.

Upon receipt by the Department of a copy of the bill of complaint the Chief Counsel for the Internal Revenue Service is requested to cause to be forwarded directly to the United States Attorney for the district in which the suit is pending, two copies of all available data

and information which may be necessary for the proper protection of whatever interest the United States may have in the property involved. One of these copies should be forwarded to the Department.

In cases in which the records of the Internal Revenue Service disclose no outstanding federal tax lien, and the District Director addresses a letter to the United States Attorney advising him of the fact, a copy of that letter should be forwarded by the United States Attorney directly to the Department. Upon receipt of such a letter, the United States Attorney should proceed to file a disclaimer on behalf of the United States, and the Department should be advised of the date on which such action is taken so that its records may be completed and closed.

In cases in which the records of the Internal Revenue Service disclose that the United States has an outstanding lien or liens against the property involved, an answer should be filed on behalf of the United States even though it appears that prior liens exceed the value of the property. It is not the policy of the Department to allow judgment to be entered against the United States by default. The answer should set forth the nature and the amount of the taxes and interest assessed, the date on which the assessment was made [compare Sections 6202 and 6322, I. R. C. 1954, with Sections 3641 and 3671, I. R. C. 1939] and that demand was made upon the taxpayer, and the date or dates on which the tax lien notices were filed pursuant to the provisions of Section 6323, I. R. C. 1954 [compare Section 3672, I. R. C. 1939], and, in accordance with 28 U. S. C. 2410 (c), should contain a prayer by way of affirmative relief for the foreclosure of the lien of the United States against the property. Two copies of the answer, along with at least one copy of the complaint and the tax data and information, if not previously forwarded, should be forwarded to the Department.

Upon the entry of a judgment in any case, two copies thereof should be forwarded to the Department for a decision on the question of whether or not an appeal should be filed if a controversy exists as to the rights of the United States. No appeal time should be allowed to expire without affirmative instructions to that effect from the Department.

In cases where the property is sold, a copy of the report of sale should be forwarded to the Department. If the report discloses that liens adjudged to have priority absorbed all the avails of the sale, the case is marked "closed" in the Department. If the report discloses a surplus, the Department should be advised of the disposition thereof.

When the United States is a party to an action brought under Title 28 U. S. C., Section 2410, and an application or offer is made for discharge of the property involved from federal tax liens pursuant to

Section 6325 (b), I. R. C. 1954 (new), the following procedure should be followed:

If the offer is first submitted to the United States Attorney, he should forward the offer to the District Director. The District Director investigates the facts and refers the matter through the Regional Counsel to the Chief Counsel, who transmits to the Department the proposed action of the Internal Revenue Service, together with the data relevant thereto, requesting the Department's views as to whether it agrees with the proposed action. The Department will advise the Chief Counsel of its views and the matter will be referred back to the Director for action.

It will ordinarily not be necessary for the United States Attorney to transmit information to the Department with respect to the offer, as the Department will receive such information from the Chief Counsel. The United States Attorney may, however, send to the Department his recommendation with respect to the offer. When the Department advises the Chief Counsel of its views concerning the offer it will also then advise the United States Attorney.

As indicated above, most cases of this character are handled by the United States Attorney. The Department, however, will furnish such assistance as may be requested in individual cases.

INTERVENTION BY THE UNITED STATES

Although the United States is the proper party to be brought into court in an action involving a federal tax lien, sometimes the Collector is made the defendant. When that is done a motion to dismiss as to him should be filed. It may be then necessary for the United States to intervene in order adequately to protect its interest in the property in suit. That question, however, should be determined by consultation with the Department before taking action to intervene. In the event intervention is determined upon, an appropriate petition is filed asking leave to assert the rights of the United States in the property and asking for a determination of the conflicting claims and liens together with an order entered by the court decreeing the sale of the property.

Though there is no statute specifically authorizing intervention by the United States in cases in state or federal courts except in certain constitutional matters, the United States clearly enjoys the same rights as individual litigants enjoy as to intervention in these cases. *Stanley* v. *Schwalby*, 162 U. S. 255. See Rule 24, Federal Rules of Civil Procedure, as to intervention in cases in the federal courts. Procedure relating to intervention in state courts is governed by state law, and the law of the particular state must be consulted in each of these cases.

See 28 U. S. C., Section 2403, as to intervention by the United States in cases involving constitutionality of federal statutes affecting the public interests.

Intervention must be taken generally under the same conditions as attach to the commencement of an original suit. It must be authorized or sanctioned by the Commissioner of Internal Revenue and directed by the Attorney General. The United States intervenes as a party plaintiff.

REMOVAL OF ACTIONS FROM STATE COURTS

Most cases under 28 U. S. C. 2410 are filed in the state courts. The United States, as a general rule, does not seek to remove such cases to the federal courts unless there is a real dispute respecting the rights of the United States and a substantial amount or important principle is involved. Where it appears to be desirable to remove the action to a federal court, the matter should be discussed with the Department. Since the statutes provide only a very limited time (20 days) in which to take steps for removal the suit should be brought to the attention of the Department at the earliest possible moment. The judgment of the United States Attorney is relied upon heavily in deciding the matter. The procedure for removal is set forth in detail in 28 U. S. C. 1441–1450. Removal is probably not available as a course of action in cases where the United States is not made a party-defendant but must intervene as a party-plaintiff.

JURISDICTION OF TAX COURT IN CERTAIN CASES

Section 7422 (e), I. R. C. 1954 (new), provides that if, while a suit for refund of income, estate, or gift taxes is pending in a District Court or in the Court of Claims, the Secretary or his delegate mails the taxpayer a notice of deficiencies with respect to the same taxes involved in the suit, the proceedings in the refund suit shall be stayed during the period within which a petition for redetermination may be filed with the Tax Court and 60 days thereafter. If within that time the taxpayer files a petition for redetermination with the Tax Court, the District Court or Court of Claims loses jurisdiction of the refund suit to the extent the Tax Court acquires jurisdiction of the subject matter of the refund suit. If no petition is filed with the Tax Court within that time, the District Court or Court of Claims acquires jurisdiction of the subject matter.

If no petition is filed with the Tax Court, the United States, if a party, may counterclaim the deficiency, even though not assessed, or if the Collector or Director is a party, the United States may intervene

and set up the deficiency notwithstanding the fact the time may have otherwise expired.

INTERPLEADER SUITS

There will be times when interpleader suits will be filed seeking to make the United States a party to the disposition of property under the orders of a court. 28 U. S. C. 2361 provides for interpleader suits. The United States is not named or mentioned in that section and it has not consented to be sued in an action thereunder. Although it is doubtful whether an interpleader suit may be said to be a suit to quiet title within the meaning of 28 U. S. C. 2410, attempts may be made to institute interpleader, as well as condemnation or partition suits, naming the United States as defendant in the state or federal courts on the authority of that statute. A motion to dismiss for lack of jurisdiction may be filed in such actions since the United States has not consented to be so sued. In many cases the motion may be based upon the additional grounds that, even if 28 U. S. C. 2410 applied, the parties have not met the strict requirements of the statute.

TAX LITIGATION IN THE STATE COURTS

United States as Plaintiff

There are very few situations involving the invocation of state court jurisdiction in relation to tax claims of the United States. The United States frequently is required to file proofs of claim or proceed by intervening petition in state receivership, probate or insolvency proceedings. Almost uniformly the United States resorts to the Federal courts in actions to foreclose tax liens or in other suits to enforce collection of its taxes. However, the United States may resort to the State courts for effecting collection of its taxes. *Merryweather* v. *United States*, 12 F. 2d 407 (C. A. 9); *Sutherland* v. *Wickey*, 133 Ore. 266, 289 Pac. 375. Such suits, of course, should be authorized or sanctioned by the Commissioner of Internal Revenue and directed by the Attorney General. If the United States, in the role of a suitor, files its action in the state court, it would subject itself to the procedures and rules of decision of the forum in which it seeks relief. *United States* v. *The Thekla*, 266 U. S. 328, 341; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134. However, the United States is not bound by laches or by State statutes of limitations. *United States* v. *Summerlin*, 310 U. S. 414.

United States as Defendant

There is no consent statute supporting a suit against the United States in a state court except in cases involving the foreclosure of a

lien or mortgage, or the quieting of title, 28 U. S. C. 2410. Counterclaims in cases where the United States files a claim in a state tribunal are governed by the same rules as original actions. See *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *Eckford*, 6 Wall. 484. Under some circumstances, a setoff might be maintained against the United States in an action of this character. See *United States* v. *Shaw*, *supra*.

It is the policy of the Department in suits not authorized by statute (28 U. S. C. 2410), to cause a special appearance to be made on behalf of the United States to object to the jurisdiction of the court. Cases that may be cited in support of such objections are: *United States* v. *Shaw*, *supra*; *Belknap* v. *Schild*, 161 U. S. 10; *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

Collector as Defendant

Normally, the Collector is named defendant in a state court only in lien-foreclosure suits. Since the lien for taxes is a lien in favor of the United States the Collector is neither a necessary nor a proper party to a suit against it under the statute. If in any such suit the Collector is named without making the United States a party, it will usually be sufficient to make a special appearance on his behalf and call attention to the fact that the lien is that of the United States and cannot be adjudicated unless the United States is made a party. The suit should be dismissed against the Collector because he is neither a necessary nor a proper party.

There have been very few attempts in recent years to make the Collector a party to a refund suit in a state court. From a very early time the statutes have made provision for removal to a federal court of a civil suit (28 U. S. C., Sec. 1442)—

> commenced in a State court against * * *
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * * * *

VENUE OF ACTIONS

Suits by the United States

Any civil action for the collection of internal revenue taxes may be brought in the district where the liability for such taxes accrues, in the district of the taxpayer's residence or in the district where the return was filed. 28 U. S. C. 1396. The United States, therefore, has a choice of forum in the institution of civil actions for the collection of internal revenue taxes.

Suits Against the United States

Any civil action against the United States for recovery of internal revenue taxes under 28 U. S. C. 1346 (a) may be prosecuted only in the judicial district where the plaintiff resides. 28 U. S. C. 1402.

Suits Against Collectors

Since actions against Collectors are personal in their nature they must be instituted in the district in which the Collector is a resident. See 28 U. S. C. 1393.

Waiver of Venue

If venue is laid in the wrong district or division the district court in which the action is brought is empowered to transfer the case to any district or division in which it could have been brought. 28 U. S. C. 1406 (a). Improper venue must be raised by timely and sufficient objection or it will be deemed to have been waived. 28 U. S. C. 1406 (b). *Fleinsinger* v. *Bard*, 195 F. 2d 45 (C. A. 7); *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 139 F. 2d 871 (C. A. 3), cert. denied, 322 U. S. 740. See Rule 12 (b), (g), and (h), Fed. Rules Civ. Proc.

PROCEDURE TO ENFORCE AUTHORITY OF REVENUE OFFICERS

Authority to Issue Summons, etc., in Determining Tax Liability

Section 7802, I. R. C. 1954, gives the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, general superintendence of the assessment and collection of all taxes imposed by any internal revenue law. Sections 6201 to 6204, inclusive, I. R. C. 1954, further define the authority of the Commissioner. The assessment and collection of taxes in the field are facilitated by the delegation of the Commissioner's authority to various officers and employees of the Internal Revenue Service under Section 7803 (a), I. R. C. 1954. Authority of the Director to issue summonses for the purpose of determining tax liability, and specific authority for the Commissioner and the Director to examine persons, books and records, is found in Section 7602, 1954 I. R. C. Provision for enforcement of the authority by a judicial officer is found in Section 7604 (b), I. R. C. 1954.

Jurisdiction of District Courts to Enforce Summonses, etc.

Sections 7402 (b) and 7604 (a), I. R. C. 1954, give jurisdiction to the district courts to enforce summonses issued under Section 7602, *supra*. Compare Sections 3678 (c), 3633 (a) and 3615 (e), I. R. C. 1939. See, also, Section 7402 (a), I. R. C. 1954, giving the district courts broad powers generally in issuing orders and process for enforcement of internal revenue laws.

Procedure to Enforce Compliance With Summons

It is frequently necessary to invoke the sanctions designed to enforce compliance with the summonses authorized by the Internal Revenue Code by application to a court for process and an order to compel compliance. The authority of the Secretary or his delegate to examine books, papers, records, and accounts bearing upon matters required to be included in returns, to require the attendance and testimony of taxpayers and persons having knowledge of the taxpayer's affairs, and to have compulsory process of the courts to enforce the authority granted by the laws has been upheld by the Supreme Court. *McCrone* v. *United States*, 307 U. S. 61.

One method of proceeding is to have the most available agent or director, including special agents and deputy directors, verify a petition to be filed in the district court having jurisdiction of the party to be compelled, disclosing that the director's summons has been ignored and asking that the action demanded be now compelled by the court. The petition should not be too broad in scope and should accurately identify the material sought. See *First Nat. Bank of Mobile* v. *United States*, 160 F. 2d 532 (C. A. 5). The court will ordinarily issue an order to show cause, which should be served upon the recalcitrant person or corporation, requiring that he or it comply with the summons or show cause in court why he or it should not be required to do so. It will generally be found that the application for such an order will produce compliance, but it has sometimes been necessary to have offenders punished for contempt. The order to produce or be punished for contempt is appealable and so is the contempt order. Proceedings under this procedure are civil and not criminal contempt. *McCrone* v. *United States*, *supra*.

Authority of United States Attorney to Proceed

Proceedings under this section should ordinarily be initiated at the request of one of the Commissioner's representatives without waiting for authority from the Department.

In respect to certain cases of this type, such as small social security tax violations, such proceedings normally need not be reported to the Department. However, cases involving large amounts or important questions should be reported. The Department stands ready to cooperate by furnishing advice, authorities, and personnel as may be required in connection with such proceedings.

INFORMERS' SUITS AND QUI TAM ACTIONS

Section 7623, I. R. C. 1954, authorizes the Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, to make payments for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, and under this authority rewards may be paid to informers. By a series of Treasury Decisions (most recent is T. D. 5770, 1950–1 Cum. Bull. 126) offers of reward up to 10 percent of amounts collected as the result of information given are made by the Treasury Department. The payment of a reward is discretionary and the amount can be fixed in any sum up to 10 percent of amounts collected. There is no promise to pay a definite sum so that until the award is actually made by the Commissioner, no contract arises on which to base a suit to recover such reward. See *Gordon* v. *United States*, 36 F. Supp. 639 (C. Cls.); *Katzberg* v. *United States*, 36 F. Supp. 1023 (C. Cls); *Briggs* v. *United States*, 15 C. Cls. 48.

31 U. S. C. 1952 ed., Sections 231-233, 235, authorize a *qui tam* action by an informer against a person defrauding the United States. Such suits may be instituted by the informer and he may join the United States. It has been held that these sections do not apply to internal revenue cases, because Section 7623, I. R. C. 1954, *supra*, specifically authorizes informer's rewards, and because Section 7401, I. R. C. 1954, requires the prior approval of the Commissioner and the Attorney General to the commencement of any suit for the recovery of taxes, fines, penalties, or forfeitures. See *United States* v. *Western Pac. R. Co.*, 190 F. 2d 243 (C. A. 9); *Olson* v. *Mellon*, 4 F. Supp. 947, aff'd. 71 F. 2d 1021 (C. A. 3). Any such suits involving the internal revenue laws should be promptly reported to the Tax Division and instructions will be given as to further procedure.

SEIZURE AND FORFEITURE OF PROPERTY SUBJECT TO CERTAIN MANUFACTURERS' EXCISE TAXES

Civil internal revenue proceedings in the district courts for seizure and forfeiture of property subject to manufacturers' excise taxes are comparatively rare. In connection with suits of this nature attention is directed to the provisions of Sections 5761, 5763, 6807, 7301, 7302,

7321–7329, I. R. C. 1954. When proceedings are instituted in the district courts under these statutes involving manufacturers' excise taxes other than liquor taxes, prompt advice of their institution, progress and disposition should be forwarded to the Tax Division.

SUBPOENAS SERVED ON EMPLOYEES OF INTERNAL REVENUE SERVICE

Frequently subpoenas are served upon deputy collectors, revenue agents and other employees of the Internal Revenue Service, in cases not involving federal taxes, and in which the United States or directors are not parties, requiring them to appear in court to produce official documents and records or to testify with respect to matters which have come to their attention in their official capacity.

Art. 80, Treas. Regs. 12 (Rev. Oct. 1, 1920), provides that in such cases the internal revenue officers should appear in court and respectfully decline to produce the records or to give the testimony called for on the ground that he is prohibited therefrom by the Treasury Regulations. Instructions have been issued to the Service personnel regarding this matter in Collector's Mimeograph No. 6811, issued May 15, 1952, which was issued to clarify existing instructions and to establish a uniform policy regarding procedure to be followed where subpoenas are served upon them. In Mimeograph No. 6811 Service employees are instructed to communicate immediately with the United States Attorney when such subpoenas are served on them and to exhibit the Mimeograph to him. In most cases, if there is sufficient time, the Commissioner will issue specific instructions to the employee and request that these also be exhibited to the United States Attorney.

The validity of the above-mentioned Treasury Regulations has been upheld and approved by the Supreme Court. *Boske* v. *Comingore*, 177 U. S. 459. See also *Reeves* v. *Pennsylvania R. Co.*, 80 F. Supp. 107; *The Sultana*, 77 F. Supp. 287; *Connor* v. *Gilmore* (Sup. Ct. of Del.), decided December 28, 1949 (1950 P-H, par. 72,368) (cases involving the power of the courts to order individual taxpayers to produce their own returns or secure copies from the Internal Revenue Service). Cf *Touhy* v. *Ragen*, 340 U. S. 462, involving a subpoena served upon employees of the Department of Justice.

In the event the Director, his deputy or any other employee of the Internal Revenue Service is served with a subpoena and contacts the United States Attorney for the purpose of protecting the interests of the Service representative and those of the Government, the United States Attorney should appear with the individual employee before the court out of which the subpoena was issued. If the necessity

arises the matters set out in the two preceding paragraphs should be submitted to the court. Frequently this will not be necessary since experience has demonstrated that if this prohibition is explained to the attorney who is responsible for the issuance of the subpoena, he will voluntarily release the Service employee from responding thereto without requiring the United States Attorney to seek the aid of the court.

DUTIES OF UNITED STATES ATTORNEYS UPON THE FILING OF SUITS

Against the United States

When suits are filed against the United States, Rule 4 (d) (4), Fed. Rules Civ. Proc., requires service of the complaint and summons on the Attorney General by registered mail and delivery of copies thereof to the United States Attorney, his Assistant or designee. In such cases the United States Attorney should promptly forward to the Department at least one additional copy of the complaint in order that it may be forwarded to the Internal Revenue Service. Where social security, carrier's taxes, or federal unemployment insurance contributions are involved, an additional copy should be forwarded for the use of the Department of Health, Education and Welfare or Railroad Retirement Board. In all cases the United States Attorney should notify the Department of the date the complaint was filed.

Frequently the complaints have numerous lengthy documents attached as exhibits. When additional copies of these documents cannot be secured readily from taxpayer's counsel and considerable time and expense will be required in making copies, these exhibits may be omitted in forwarding copies of the complaint to the Department.

In forwarding copies of the complaint, the Department will greatly appreciate suggestions regarding defenses, if any, which are apparent to the United States Attorney upon examining the complaint, particularly any defense relating to the capacity of the plaintiff to sue as determined by application of state law.

The United States Attorney may sometimes have information not available to the Department disclosing that plaintiff has no cause of action or that there are jurisdictional obstacles standing in the way of plaintiff's recovery. Any information of this character should be promptly transmitted to the Department. If cases give rise to unusual publicity, the Department will be interested in receiving from the United States Attorney news clippings and similar documents reflecting this publicity.

Against the Director

Where suits are filed against the Director he will, of course, be served with a copy of the complaint and summons. In practice, the complaint thus served is forwarded to the office of the Chief Counsel, Internal Revenue Service and except where social security, Federal unemployment insurance contributions, or carrier's taxes are involved, it will be unnecessary to furnish the Department with additional copies of the complaint. However, to expedite the defense of the case, in the event an additional copy of the complaint can be procured, it should be promptly transmitted to the Department.

Rule 4 (d) (5), Fed. Rules Civ. Proc., requires that where a suit is against an officer of the United States, the United States must also be served. This rule probably requires that, in suits against a Collector, both the Collector and the United States should be served. See *Totus* v. *United States*, 39 F. Supp. 7, 11.

Under Rule 12 (a), Fed. Rules Civ. Proc., a Collector, as well as the United States, is entitled to 60 days after service of the complaint on the United States Attorney within which to serve a responsive pleading.

Filing Timely Answers

The United States Attorney should carefully keep a record of the dates for filing answers in all tax cases. While the Department will strive to obtain the necessary information so that the answers can be filed within the 60-day period, it is often impossible to secure the necessary data and information from the Internal Revenue Service so that the answer can be filed within the prescribed time. While the Department will endeavor to keep the United States Attorney advised of all developments in the case, it will be the responsibility of the United States Attorney to see that all rights of the Government or the Collector are fully protected and that necessary extensions are obtained for filing responsive pleadings. If it is found impossible to secure the necessary extensions, the United States Attorney should promptly bring the matter to the attention of the Department.

PREPARATION FOR TRIAL

General

In practice the Department is furnished with the necessary data and information for the defense of tax cases through the office of the Chief Counsel, Internal Revenue Service. In some tax cases, it is necessary to secure certain information from other departments and agencies of the Government.

The Chief Counsel cannot begin the accumulation of the necessary data and information until he receives a copy of the complaint. Preparation of the case in the office of the Chief Counsel includes the assembling of the tax returns, revenue agents' reports and other data, and a careful examination of various authorities dealing with the questions involved. Frequently, the data in the files will be found to be insufficient and a supplemental investigation will be necessary in connection with points raised by the taxpayer in his complaint. As a result of the decentralization of the Internal Revenue Service returns and other papers are frequently scattered in various field offices of the Service and considerable time is required for the assembly of all of the necessary data.

Preparation and Filing of Pleadings

Upon receipt of the necessary data and information from the Internal Revenue Service, the Department will advise the United States Attorney of the position that should be taken in the case and will furnish him with the pertinent facts as disclosed by the files of the Service, a statement of the questions involved, authorities in support of the position taken, and suggestions as to the procedure to be followed and evidence to be introduced in the case. Whenever it is possible, and in most cases, the Department will prepare the draft of the answer or other responsive pleading and transmit it to the United States Attorney for use in the case. The United States Attorney is invited to make suggestions to the Department as to form or comments concerning errors or omissions in any pleading.

The United States Attorney should advise the Department promptly of the date of filing the responsive pleading, and whenever it is prepared and filed by the United States Attorney he should forward two copies (three when social security taxes, carrier's taxes and railroad unemployment insurance contributions are involved). If any changes are made in the pleading prepared by the Tax Division, the United States Attorney should advise the Department promptly of the changes so made, furnishing two copies of any rewritten pages.

Use of Photostat Copies

In the trial of tax cases, it is frequently necessary to introduce in evidence certain documents from the files of the Internal Revenue Service. In such cases, if time permits, the Department will procure from the Service certified photostat copies of the papers desired to be introduced as evidence in the case, and photostat copies of documents to be attached as exhibits to written stipulations of fact, or for the information of the United States Attorney. When these photostats are received by the Department they will be forwarded

promptly to the United States Attorney and should be carefully preserved by him in the files for further use in the case. When it is impossible, by reason of the time element, to secure certified copies of pertinent papers from the Service's files, it is the general practice to introduce in evidence the original papers. In such cases the United States Attorney should secure the authorization of the court to substitute photostat copies for the original papers in the files of the court. For admissibility in evidence of certified copies of the records and papers in the files of the Service see 28 U. S. C. 1733.

Stipulation of Facts

The Department encourages the stipulation of facts in tax cases insofar as they can be verified, and in the trial of tax cases it is the practice to stipulate many of the facts. Stipulations are widely used with respect to documentary evidence. Frequently taxpayer's counsel will suggest preparation of a stipulation. While the Department has no hard and fast rule on the subject, since the taxpayer has the burden of proof in tax cases, it is generally advisable to have the first draft of the stipulation prepared by the taxpayer's counsel and submitted through the United States Attorney to the Tax Division in duplicate.

In some instances the final approval of the stipulation may require considerable correspondence before it is in form satisfactory to both sides of the case. It is therefore desirable that the Department receive the drafts of any suggested stipulation as far in advance of the trial date as possible. The stipulation is customarily drafted so as to be subject to objection by either side as to the relevancy or materiality of any facts stipulated, and also subject to the right of either party to offer evidence not inconsistent with any facts stipulated.

Investigations Preliminary to Trial

Frequently cases for trial will require additional investigations on questions which have not been fully developed. In practice such investigations are made by the Internal Revenue Service through its staff of special agents, revenue agents, deputy directors, engineers, or auditors, depending upon the nature of the investigations and the questions involved. In some cases the nature of the investigation will require the cooperation of the United States Attorney and the Department will give suggestions in such matters as far as practicable. In certain cases it will be deemed expedient and proper that the investigations by the agents be carried on under the direct supervision of the United States Attorney. In other cases, particularly those involving issues that are purely factual, the Department may deem it advisable to take the depositions of the plaintiffs and other witnesses relied

upon by plaintiffs, pursuant to Rules 26, 30, 31, and 33, Fed. Rules Civ. Proc.

The Department will, in some instances, deem it advisable to file requests for admissions under Rule 36, Fed. Rules Civ. Proc. Frequently Rule 36 is used by the taxpayer to secure admissions of undisputed matters by the United States or Collector. Of course any requests for admissions filed by the taxpayer should be promptly forwarded to the Department in duplicate. In many cases it will be impossible to properly answer requests for admissions within the 10-day period prescribed by Rule 36. The United States Attorney should therefore take appropriate action to protect the Government's interests in securing an extension of time for answering the requests without waiting for specific directions from the Department to take such action.

Whenever valuation and auditing questions are presented in tax cases they are usually referred to the Court Defense Section of the Service which is staffed by competent engineers, valuation experts and auditors who, in some instances, can qualify as witnesses on behalf of the Government. Whenever valuation questions are presented, it is the custom and practice of the Tax Division to ask the Service for a valuation report. In some cases involving valuation questions the matter must be referred to field experts of the Service for consideration which will require additional time between the date of filing the answer and the trial of the case. In other cases it will be necessary to employ outside expert testimony. Where outside expert testimony is necessary in cases handled by the United States Attorney, he should follow the instructions set out in Title 8 under Expert Witnesses.

Pretrial Conference

Where, under any local district court rule or standing order, civil actions are as a matter of course placed upon a pretrial calendar within a prescribed time after the commencement of the action or filing the answer, the United States Attorney is requested to call such rules to the attention of the Department immediately after commencement of the action, and in all events in time for appropriate advice and suggestions in connection with the proposed pretrial conference to be forwarded to the United States Attorney along with a draft of the answer and defensive data.

Due to the varying types of procedure followed in pretrial conferences (largely within the discretion of the court), it is difficult to formulate any set procedure to be followed in such conferences. These conferences are ordinarily handled by the United States Attorney, although in some instances it may be desirable that a representa-

tive of the Tax Division be present. The Department should be advised as far in advance as possible of the date of the pretrial conferences. If, during the course of the pretrial conference, some question arises upon which the United States Attorney is unable to take a definite position, it is suggested that the conference be adjourned, if possible, until he can secure the Department's views in such matters.

Trial Briefs

In all cases either triable by court or jury where trial briefs are required in advance under the rules or practice of the court, the United States Attorney should advise the Department of the rule in ample time so that there may be a prompt compliance therewith.

TRIAL BY JURY

When Permissible

In suits against Directors or former Collectors it is permissible for either party to request a jury trial within the limitations provided in Rule 38 (b), Fed. Rules Civ. Proc. Prior to July 30, 1954, a jury trial was not permitted in tax suits against the United States. However, 28 U. S. C., Section 2402 (a) as amended by Section 2 of the Act of July 30, 1954, c. 648, 68 Stat. 589, now permits a jury trial in tax suits against the United States subject to the provisions of Rule 38 (b) of the Fed. Rules Civ. Proc. This gives rise to the question whether the amendment is jurisdictional and has no application to suits filed prior to July 30, 1954. In any event, the Tax Division should be immediately informed of any demand for a jury trial.

Taxpayers frequently demand trial by jury. In most instances the Tax Division prefers a trial before the court without the intervention of a jury. Whenever the United States Attorney considers that a jury trial is advisable, advice to that effect, together with the reasons for his views, should be submitted to the Department as soon as possible in order that the matter may be given adequate consideration.

Jointly-Conducted Trials

Even though a representative of the Tax Division is present and participates in the trial, the United States Attorney or Assistant should arrange to be present throughout the trial. The Department welcomes all aid and assistance that can be furnished by the United States Attorney, or his Assistants, in the preparation of the case, selection of the jury, and suggestions, with respect to the conduct of the trial, examination of witnesses, and other matters. Ordinarily in tax cases the Department's representative will assume the burden of directing the trial, but a jury trial conducted jointly by a representative of

the Department and an Assistant United States Attorney is frequently desirable.

Where jury trials are handled by the United States Attorney alone, the Department stands ready to cooperate in any manner and will be glad to prepare and submit in advance of the trial appropriate forms of verdict, general or special, proposed instructions to the jury, and its views as to the nature and extent of evidence to be introduced by the Government or developed on cross-examination of plaintiff's witnesses and on questions of law that will probably arise at the trial. The results of all jury trials should be promptly reported to the Department.

Filing Proper Motions

In all jury trials where the verdict is wholly or in part against the Government, the United States Attorney should be careful to protect the rights of the Government by the timely filing of a motion for judgment notwithstanding the verdict under Rule 50 (b), Fed. Rules Civ. Proc., or a motion for a new trial under Rule 59 (b), Id., where it appears that such motions are appropriate.

Rule 50 (b) provides that a motion for judgment notwithstanding the verdict must be filed within 10 days after receipt of the verdict or, if no verdict is returned (as in case of a disagreement), within 10 days after discharge of the jury. This motion lies only where there has been a motion for a directed verdict at the close of all of the evidence which is either denied or not granted by the court.

Rule 59 (b) provides that motions for a new trial must be filed within 10 days after entry of judgment, except that when based on newly discovered evidence they may be filed at any time before expiration of the time for appeal. The motions on account of newly discovered evidence filed after the 10-day period must be with leave of court upon notice, hearing and assuring of due diligence. If a motion for judgment notwithstanding the verdict is not filed as provided by Rule 50 (b), and the appellate court considers that the district court erred in refusing the Government's motion for directed verdict at the close of all of the evidence, the appellate court will direct a new trial of the case in the court below; if the motion had been timely filed, the Government will be entitled to judgment. See *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48; and *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212.

TRIAL WITHOUT A JURY

General

Where the trial of a tax case is before the court without a jury, it will, as in other tax cases, normally be conducted by a representative

of the Department Where cases are tried by the United States Attorney alone, he should secure the views of the Department on all questions presented before proceeding to trial. He should, of course, carefully avoid entering into any stipulations or agreements which may injure the Government's position, or which may be embarrassing upon appeal. Any stipulation or agreements which are proposed to be entered into should be submitted to the Department for approval prior to their execution.

Transcripts of Testimony

It is ordinarily desirable in the preparation of briefs that transcript of testimony be secured for use by both the United States Attorney and the Tax Division in determining whether to recommend an appeal from an adverse decision. In ordering transcripts of testimony the United States Attorney should follow the procedure set forth in Title 8 under Court Reporting and Transcripts.

Evidence in Suits to Enforce Tax Liens

In cases involving the enforcement of tax liens under Section 7403, I. R. C. 1954 or 28 U. S. C. 2410, careful attention should be given to establishing by proper evidence or stipulation all facts necessary to establish that the United States acquired a lien within the appropriate provisions of the statute. Care should be taken to show the dates on which the assessment was made [compare Sections 6203 and 6322, I. R. C. 1954, with Sections 3641 and 3671, I. R. C. 1939], and on which the Director made demand for payment of the taxes, and to develop the facts relative to the filing of notices of tax lien under Section 6323, I. R. C. 1954. Compare Section 3672, I. R. C. 1939.

Preparation of Briefs

In all cases tried by representatives of the Department, the Department will prepare the briefs as required by the court. Where the case is tried by the United States Attorney without the assistance of a representative of the Department, it is sometimes the practice for the brief to be prepared by the United States Attorney. However, in such cases a draft of the brief should be submitted to the Department for suggestions and approval prior to filing the brief in the court.

Reporting of Decision

In all cases the United States Attorney should forward at once to the Department two copies of the court's opinion, findings, conclusions, and judgment order when entered. In nonjury cases involving social security or railroad retirement taxes, three copies of the opinion, findings, conclusion and judgment should be supplied.

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Note:

Pages 37-38 were not included in the print original.

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for the Collector's action in collecting the tax. This certificate of probable cause is provided for in 28 U. S. C. 2006, and Rule 69 (b), Fed. Rules Civ. Proc. It relieves the Collector from personal liability for the judgment and provides that the amount so recovered shall be paid out of the proper appropriation from the United States Treasury. It is important that the United States Attorney see that a certificate of probable cause is entered by the court as part of the final judgment order, or promptly thereafter, irrespective of whether any appeal is taken in the case. This is necessary in order to protect the individual Collector from having a judgment lien appear against his property and to expedite payment of the judgment, thereby saving some interest that would otherwise accrue.

A standard form of certificate of probable cause is as follows:

> The court finds that the defendant as Collector of Internal Revenue acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of said taxes and that a certificate of probable cause should therefore be granted.
>
> It is therefore ordered that a certificate of probable cause be and the same is hereby issued and entered in the above-entitled cause and that the said _____ Collector of Internal Revenue for the _____ Collection District of _____ _____ is hereby ordered relieved from the payment of said judgment and said judgment is ordered paid out of the proper appropriation from the United States Treasury.

The word Director should of course be substituted for Collector if the Director is the judgment defendant.

COLLECTION OF JUDGMENTS IN FAVOR OF UNITED STATES

Proceedings Before Judgment

Under Rule 64, Fed. Rules Civ. Proc., all remedies providing for the seizure of a defendant's property for the purpose of securing satisfaction of judgment are available under the circumstances and in the manner provided by the law of the state in which the district court is held when such ancillary remedy is sought, except that any federal statutes providing otherwise shall govern such proceedings to the extent that they apply. For Federal statutes involving attachments, see Advisory Notes to Rule 64, Fed. Rules Civ. Proc. These remedies are open to the United States as plaintiff, to the same extent as any other litigant plaintiff. Cf. *Stanley v. Schwalby*, 162 U. S. 255.

Normal Procedure After Judgment

Where judgments are rendered in favor of the United States for the collection of taxes, the Department looks to the United States Attorney to supply the initiative in order to collect them if possible. The United States Attorney should keep in frequent touch with the Director's office concerning unpaid judgments, requesting advice at stated intervals, and should in general make such investigations and take such steps as are suitable for enforcing collection. Under the provisions of Section 7406, I. R. C. 1954, all judgments and monies recovered or received for taxes, costs, forfeitures, and penalties shall be paid to Directors as internal revenue taxes are to be paid. See Section 3611, I. R. C. 1954 (new), for provisions on payment by check or money order. If the United States Attorney discovers that extraordinary remedies are needed for the collection of a judgment, the Department will be glad to state its views upon request.

Execution and Supplementary Proceedings After Judgment

Under Rule 69, Fed. Rules Civ. Proc., a judgment for the payment of money is generally enforceable by a writ of execution unless the district court directs otherwise; and the procedure upon execution and in any supplementary proceedings in aid of judgment is governed by the existing practice of the state in which the district court is held, except to the extent provided otherwise by any federal statute. Rule 69 also permits the examination of any person, including the judgment debtor, either in the manner provided by those rules for taking depositions or in the manner provided by the local state practice. The Rule, therefore, is substantially broader than Section 916 of the Revised Statutes, which it has now superseded. See Advisory Notes to Rule 69, Fed. Rules Civ. Proc.; Section 3800. See also *Schram* v. *Carlucci*, 41 F. Supp. 36.

Execution Running Outside the State

All writs of execution upon judgments obtained for the use of the United States in any district court in one state may run to and be executed in any other state or in any territory, but all such writs shall be issued from and made returnable to the court in which the judgment was obtained. See *Toland* v. *Sprague*, 12 Pet. 300, 328; *Pierce* v. *United States*, 255 U. S. 398; 14 Op. A. G. 384; 28 U. S. C. 2413.

SATISFACTION OF JUDGMENTS AGAINST THE UNITED STATES

Where judgments are rendered against the United States or the Director in tax-refund suits, and in the latter case are converted into claims against the United States through a certificate of probable cause, and where the United States Attorney is advised that the Solicitor General has determined that no appeal will be taken or is notified that the judgment has become final after appeal, the United States Attorney should request taxpayer's counsel to file a judgment claim for refund. A prompt filing of this judgment claim will stop the running of interest and should therefore be attended to at the earliest possible date. The judgment claim is paid by and should be filed directly with the Commissioner of Internal Revenue, Washington, D. C., and should be accompanied by two certified copies of the judgment or two copies of the mandate of the higher court if an appeal has been taken. If the appeal has been waived, there should be forwarded two certified copies of the waiver. Where costs are claimed an itemized bill of such costs receipted by the clerk of the court should accompany the judgment claim. For procedure in filing judgment claims see Treasury Regulations 111, Sections 29.322–4 and 29.322–5.

INTEREST INCLUDIBLE IN JUDGMENTS

Interest on overpayments runs at the rate of 6 percent per annum upon the amount of the overpayment from the date of payment or collection thereof to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner of Internal Revenue. Section 6611, I. R. C. 1954. Compare Section 3771, I. R. C. 1939. It is important that the judgment correctly follow the statute in providing for interest. It is suggested that the judgment order provide for payment of interest "according to law" and in that case the Internal Revenue Service will compute the proper amount of interest upon receipt of the judgment claim for refund.

COSTS IN TAX SUITS

Under 28 U. S. C. 2412 costs are allowable against the United States in tax suits only where the Government puts in issue taxpayer's right to recover. The court may in its discretion allow costs in these cases to the prevailing party from the time of joining issue. Costs shall include only amounts actually incurred for witnesses and fees paid to the clerk of the court.

A different rule applies as to costs in suits against the Director or former Collector for the refund of taxes. In those cases costs are allowable as in other civil actions even though the judgment against the Collector is later transformed into one against the United States pursuant to a certificate of probable cause. *Mellon* v. *Heiner*, 30 F. Supp. 948; *Allis* v. *LaBudde*, 131 F. 2d 78 (C. A. 7); *Sampson Tire & Rubber Corp.* v. *Rogan*, 140 F. 2d 457 (C. A. 9).

In taxing costs in suits either against the Collector or the United States it should be borne in mind that the only amounts allowable for witnesses are those prescribed by statute. 28 U. S. C. 1821. Consequently fees of expert witnesses are taxable as costs only to the same extent as the statutory fees allowed ordinary witnesses. *Henkel* v. *Chicago, etc. Ry.*, 284 U. S. 444; *In re First Bond & Mortgage Co.*, 74 F. 2d 930 (C. A. 5); *Treadwell* v. *Mutual Life Ins. Co. of New York*, 20 F. Supp. 494.

BIDDING IN PROPERTY AT FORECLOSURE SALE

31 U. S. C. 195 sets forth the procedure for purchase by the United States at an execution sale of "lands and tenements of a debtor."

Where a judgment has been rendered in favor of the United States and property of the debtor is ordered sold by the court to satisfy such judgment, the United States Attorney should report the facts concerning the proposed sale to the Department. It is the practice in cases of this character, where it appears likely that the property may be sold for less than its fair value and where the liens of the United States are prior to all other liens, for the Department to suggest that the Treasury Department appoint the United States Attorney or one of his assistants as agent for the Treasury Department under Section 195, to bid on the property on behalf of the United States. Upon receipt of the proper appointment, instructions will be given the United States Attorney concerning the amounts that should be bid for the property and other steps that he should take to protect the Government's interests. The deed to property so purchased for the United States will be taken in the name of the United States. The United States Attorney should have the deed recorded promptly and take any other action required under state law to protect the Government's title. Any expense necessary should be reported to the Department on Form 25–B.

CRIMINAL TAX CASES

ORIGIN

Criminal tax cases are investigated by agents of the Internal Revenue Service. They are processed by personnel of the Service's Enforcement Division and are referred to the Tax Division by the various offices of the Regional Counsel of the Service by letters stating the recommendation and enclosing the reports and exhibits.

RESPONSIBILITY FOR DECISION TO INITIATE PROSECUTION

Proposed tax prosecutions, with the exceptions hereinafter noted, are reviewed and processed by the Criminal Section of the Tax Division. The term "tax prosecutions" includes all offenses defined in the Internal Revenue Code and such offenses defined in Title 18, U. S. C. as may be investigated by agents of Internal Revenue Service in connection with enforcement of the internal revenue laws. The final decision whether to initiate or decline prosecution is made by or on behalf of the Assistant Attorney General in charge of that Division. The United States Attorney should not present tax cases to a grand jury or otherwise initiate prosecution except on specific authorization of the Department. If circumstances arise which make it appear to United States Attorneys that action should be taken prior to such authorization, they should immediately communicate with the Tax Division.

Criminal cases involving offenses defined by the Internal Revenue Code or Title 18, U. S. C. in relation to all federal *excise taxes* will be referred directly to the appropriate United States Attorneys from the Internal Revenue Service. (The term "excise taxes" here means the taxes imposed in Subtitles B and C of the Internal Revenue Code of 1939, and the taxes imposed by Subtitle C—except Chapter 24—, Subtitle D and Subtitle E of the Internal Revenue Code of 1954.) Excise tax prosecutions so referred may be instituted without the prior approval of the Department. However, this procedure does not affect existing instructions issued by the Criminal Division regarding the handling of specific classes of excise tax fraud cases assigned to that Division, i. e., liquor tax cases, narcotics tax cases, National Firearms Act cases, or cases arising under the Wagering Tax Act. All other categories of excise tax prosecutions are assigned to the Tax Division and any questions arising regarding their proper handling should be directed to the Tax Division.

CONFERENCES

Upon request made during the pendency of a case in the Tax Division, a conference will be granted to permit presentation of the taxpayer's contentions. If the exigencies of time or other circumstances prevent the granting of a conference in the Tax Division, the United States Attorney may be requested to confer with the taxpayer's representatives and to submit a report thereon to the Tax Division.

INDICTMENT OR INFORMATION

When prosecution is authorized by the Assistant Attorney General the reports and exhibits in the case are transmitted to the appropriate United States Attorney with instructions to initiate criminal proceedings. The transmittal letter designates the appropriate indictment or information form to be followed, with reference to mimeographed forms previously prepared in the Tax Division for transmittal to all United States Attorneys. Copies of these forms are available upon request. In any unusual case in which the mimeographed form of indictment or information should not be literally followed, either a proposed form will be prepared in the Tax Division or the Division's transmittal letter will suggest to the United States Attorney how the mimeographed form should be varied to conform to the particular facts in the case.

VENUE OF TAX PROSECUTIONS

Most criminal tax offenses arise under the Internal Revenue Code and involve the filing or nonfiling of returns with a particular Director of Internal Revenue. See Appendix B. In the usual case, therefore, the offense is committed in the judicial district in which the Director's office is located. Consequently, in those States which have two or more judicial districts but only one internal revenue collection district, the great majority of tax prosecutions will be instituted in the one judicial district in which the Director's office is located. However, in an effort to cause the widest possible geographical distribution of tax prosecutions, the Department has encouraged the development of investigative facts which would provide a basis for venue in the residence district of taxpayers in those instances in which the returns are filed in other judicial districts.

FILING OF COMMISSIONER'S COMPLAINTS

In the event the statute of limitations is about to expire, a complaint may be filed with the United States Commissioner as provided in Section 6531, I. R. C. 1954. This action has the effect of tolling the

statute of limitations for a period of 9 months from the date of filing. The provisions of Section 6531 with respect to the filing of a complaint to toll the running of the statute of limitations are effective on and after August 16, 1954, with respect to offenses committed before that date as well as thereafter. When a complaint is filed, the Department should be notified immediately.

GRAND JURY PROCEDURE

Criminal tax cases should be presented to grand juries in the same manner as other criminal cases.

The Department ordinarily is opposed to the presentation of defensive evidence or to the appearance of a prospective defendant before the grand jury, since it is normally the function of the grand jury to examine only the Government's evidence in order to determine whether there is reason to believe that an offense has been committed. However, in recognition of the broad powers of inquiry of the grand jury, the United States Attorney should abide by the grand jury's decision in these matters, after first stating the Department's position.

DISMISSAL

Indictments returned or informations filed in criminal tax cases may not be dismissed without prior approval of the Department, except when the defendant is dead or permanently disabled by insanity, or when a superseding indictment or information has been returned. The Department should be notified promptly in the event such action is taken.

STATUS REPORTS

Once a case is in the hands of the United States Attorney it is imperative that he inform the Tax Division fully and promptly of all developments. The following information is required for the records of the Department:

(a) Date the indictment or no-bill is returned, or the information filed;
(b) Date of preliminary examination;
(c) Date of arraignment and kind of plea;
(d) Dates of trial;
(e) Verdict;
(f) Date and terms of sentence.

EFFECT OF PAYMENT OF TAX

Prior to final disposition of the criminal liability, no negotiations with the taxpayer for the separate settlement of his civil tax liability

will be authorized. If a taxpayer voluntarily makes a payment on his civil tax deficiencies it must be made to the Director of Internal Revenue. Such payments made pending criminal action are placed in a "suspense account," since normally no assessment is made prior to disposition of the criminal liability.

The taxpayer's action in voluntarily paying the tax, including civil fraud penalities, should not be allowed to affect the handling of the criminal prosecution, since the civil and criminal liabilities are separate and distinct. In no event should disposition of the criminal case be unduly delayed because of controversies with respect to the related civil liability.

DISPOSITION OF CASE BY PLEA

A large percentage of criminal tax cases will be concluded by entry of a plea of guilty and sentence. United States Attorneys are instructed not to consent to a plea of *nolo contendere* in tax cases except in the most unusual circumstances and then only after their recommendation for so doing has been reviewed and approved by the Assistant Attorney General in charge of the Tax Division or by the Office of the Attorney General. In the event a plea of *nolo contendere* is accepted, the United States Attorney should be aware that the Supreme Court in *Hudson* v. *United States*, 272 U. S. 451, has held such a plea sufficient to support imprisonment in a penitentiary, in addition to the imposition of a fine.

If it conforms to the practice of a particular United States Attorney's office and is acceptable to the court, the Department will interpose no objection to the dismissal of the remaining counts of an indictment or information after entry of a plea of guilty or *nolo contendere* (see preceding paragraph), to the major count or counts. If the court allows time, before imposition of sentence, the Tax Division will authorize the Treasury Department to negotiate with the defendant concerning his over-all civil liability. However, care should be taken to assure that such procedure will not interfere with the reasonably prompt imposition of sentence.

RECOMMENDATIONS AS TO SENTENCE

When a plea of guilty or *nolo contendere* is entered, the United States Attorney should present to the court a full statement of facts including the amount of tax avoided, the means utilized to perpetrate and conceal the fraud, the past criminal record of the taxpayer and other information which the court may consider important in imposing sentence.

No recommendation as to sentence is made by the Government unless the sentencing court specifically so requests. It is considered

preferable to have the matter of sentence handled entirely by the court. It should be made clear to the court that failure to make a recommendation should not be construed as a recommendation for leniency. When recommendations are required by the court, it is the policy of the Department to request imposition of a jail sentence in addition to a fine. In the view of the Department, the payment of the civil tax liability, plus a fine and suspended sentence or probation, does not ordinarily constitute a satisfactory disposition of a criminal case.

United States Attorneys may follow the same policy as to the making of sentence recommendations as they follow in other criminal cases.

APPEALS IN CRIMINAL TAX CASES

See Title 6, Appeals.

RETURN OF REPORTS AND EXHIBITS

Upon the completion of a criminal tax prosecution by plea or verdict, the United States Attorney should return all records, exhibits, and other material furnished by the Internal Revenue Service for use in the trial to the particular Service Enforcement Counsel by whom the case was originally referred to the Department, unless directed to dispose of them otherwise.

COMPROMISES AND ADMINISTRATIVE SETTLEMENTS

AUTHORITY OF ATTORNEY GENERAL TO COMPROMISE CASES

The Attorney General, by virtue of the authority vested in his office, has plenary power to compromise or settle any civil or criminal case arising under the internal revenue laws after reference to the Department of Justice for prosecution or defense. Section 7122, I. R. C. 1954, is supplemental to, and declaratory of that power. It is discussed at length in 38 Op. A. G. 98 (1934). The following excerpt from that opinion summarizes the extent of the power (p. 102) by saying that it is—

> * * * to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper

to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution.

FORM OF OFFERS IN COMPROMISE

As a general rule, the Department does not require any printed forms to be used in connection with offers in compromise of tax cases. Ordinarily it is sufficient if the offer is in writing, is definite and unambiguous, sets forth clearly the proposed basis of compromise, and is submitted to the Department in duplicate. The offer should be specific with respect to interest to be paid or refunded. Where both assessed and accrued interest are involved, an express provision should be made for each type. General expressions, such as "with interest" and "with interest according to law," are interpreted by the Department to mean statutory interest as provided by Section 6611 (b) (2), I. R. C. 1954.

There is no objection to the use of Treasury Forms 656 and 656–C in submitting offers in compromise of claims against the taxpayer. In cases in which the offer is based upon inability to pay, a sworn statement of assets and liabilities on Treasury Form 433 should accompany the offer. These Treasury forms are available at the local offices of the Director of Internal Revenue.

OFFERS SUBMITTED TO THE UNITED STATES ATTORNEY

The offer in a case in suit, or referred to the United States Attorney for institution of suit, should be submitted to the United States Attorney rather than to the Director of Internal Revenue. Upon receipt of an offer the United States Attorney should forward it in duplicate directly to the Tax Division, together with his comments and recommendation if it is a case in which he has taken active part.

Normally it is not necessary that amounts offered to the Government accompany the offer when it is submitted. However, unless provision is made otherwise, it will be assumed that payment will be made immediately upon receipt of notice of acceptance. Payment of amounts offered should be in the form of a cashier's or certified check, or money order, payable to the Treasurer of the United States. The check or money order normally will be held, and not cashed, by the Department until final action is taken on the offer. In the event the offer is rejected the check or money order will be returned to the offerer, unless he has requested that it be credited to his liability.

United States Attorneys should make a suitable allowance of time to permit action on offers in compromise. It is the Department's policy to obtain the recommendation of the Chief Counsel, Internal

Revenue Service, on all offers in compromise of tax cases. Moreover, additional computations and/or investigation by the Service might be necessary before the Department will be in a position to act on the offer. Also, certain necessary procedures must be followed within the Department in taking action on offers, including reference to the Attorney General in the more important cases. For all of these reasons United States Attorneys should urge the proponents and the courts to allow ample time for the orderly processing of offers. The amount of time required for this purpose will vary, depending upon the nature and complexity of each case, but a *minimum* of 30 days should be allowed in any event.

OFFERS SUBMITTED TO THE DEPARTMENT

Frequently compromise proposals are submitted directly to the Department. It is the Department's general practice in such instances to request the United States Attorney's recommendation on the offer, especially when the United States Attorney has had an active part in the case, or if matters particularly within his knowledge are involved.

During compromise negotiations the Department will rely upon the United States Attorney to secure any additional time for the next step in the court proceeding which may be necessary in order to protect the Government's interest and to permit final action of the Department on the proposal.

OPPORTUNITY FOR CONFERENCE REGARDING OFFERS

In the event the proponent or his counsel desires to confer with the Tax Division he should be advised that opportunity for an informal conference in Washington will be afforded upon timely request. In appropriate cases the United States Attorney, or one of his assistants, will be requested to participate in these conferences.

INVITATION OF OFFERS BY DEPARTMENT

Although it is the policy of the Department not to propose offers in compromise, the United States Attorney is in a position to suggest informally, without in any manner committing the Government, that offers be submitted in appropriate cases. Sometimes the Department will request the United States Attorney to follow this procedure. In such instances the United States Attorney should caution the taxpayer or his counsel that the compromise is subject to final action by the Department, and that the recommendations of the United States Attorney and the trial attorney of the Tax Division are not binding upon the Attorney General.

TIMELY SUBMISSION OF OFFERS

If taxpayer's counsel indicates an intention to submit an offer in a tax case he should be advised to do so in the early stages of the proceeding—before the Department and the court have been required to expend a considerable amount of time and money in the litigation. Submission of offers on the eve of trial, especially when the Department has been put to the expense of sending an attorney from Washington for that purpose, should be discouraged. Taxpayer's counsel should be advised that, as a general rule, the sooner he submits his offer, the better the prospects of its acceptance.

COMPROMISE OF CRIMINAL LIABILITIES

The policy of the Department with respect to compromising criminal tax liabilities is as follows: If it is concluded that the case should not be prosecuted it is referred back to the Internal Revenue Service together with any offer that might be pending. On the other hand, if it is concluded that the case is an appropriate one for prosecution, it cannot be compromised by the payment of money alone. The only way in which the criminal liability may be disposed of, other than by trial, is by an unconditional plea of guilty, or *nolo contendere* (see instructions, *supra*), to one or more of the major counts of the indictment.

It is the view of the Department, sustained by decisions of the courts, that collection of the related civil liabilities, including fraud penalties, is a matter entirely separate and apart from the criminal aspects of a case. The latter, therefore, should receive priority in disposition. In the event, however, that adequate provision is made with respect to the criminal liability, as outlined in the preceding paragraph, the defendant may also include in his proposal an offer to settle his civil liabilities. This method of disposing of a case is classed as a compromise, and requires the same approval by the Department as any other offer in settlement. In disposing of both civil and criminal liabilities in this manner no amount greater than the full taxes, penalties, and interest will be accepted. In such compromises the taxpayer may be given a reasonable opportunity to demonstrate that the civil liability proposed by the Internal Revenue Service clearly is excessive. In general the same standards are applied to the determination of the adequacy of the money payment as are applied in civil cases having no related criminal features.

Because such offers contain little element of compromise and because the Department is guided largely by the recommendation of the Internal Revenue Service as to the sufficiency of the civil aspect

of such offers, the Department has encouraged an alternative arrangement in lieu of offers in compromise, that is, to secure the entry of a plea to at least one major count of the indictment or information and then, pending sentence, if the court is agreeable, to return jurisdiction of the civil tax aspects of the case to the Internal Revenue Service for prompt adjustment of the civil liability.

The policy of the Department in accepting offers involving pleas of guilty or *nolo contendere* is to so condition the acceptance that the Government may make a statement of facts at the time of entry of the plea but will make no commitment as to recommendation for punishment.

DEPARTMENT'S APPROVAL REQUIRED

No agreements should be entered into by United States Attorneys with respect to compromising internal revenue cases, either criminal or civil, without the approval of the Department.

AUTHORITY OF ATTORNEY GENERAL TO MAKE ADMINISTRATIVE SETTLEMENTS

38 Op. A. G. 124, 126 (1934), declares that the Attorney General "may dismiss a suit or abandon defense at any stage when in his sound professional discretion it is meet and proper to do so." This authority is wholly distinct from his power to compromise, and should not be confused therewith. A compromise is based upon mutuality of consideration whereas there is no mutuality of consideration when the Department simply dismisses or abandons defense of a suit.

EFFECT OF ADMINISTRATIVE SETTLEMENT

When the Department does abandon defense of a taxpayer's suit for refund, a so-called "administrative settlement" results. Such settlement is in recognition of the fact that the Government has no substantial defense to the taxpayer's claim. The result of the Government's abandonment of the defense is that the taxpayer gets substantially the same benefits as he would by winning his case in court and a refund of all but the amount that is barred by limitations is made to him.

CLOSING OUT CASES COMPROMISED OR ADMINISTRATIVELY SETTLED

After an offer in compromise of a taxpayer's suit for refund has been approved by the Department the normal procedure is to authorize the Internal Revenue Service to make an administrative refund

of the amount of the offer. The Service usually requires about 60 days to effect the refund. Where a refund of income, war-profits, excess-profits, estate, or gift taxes in excess of $100,000 is involved, additional time must be allowed in order to permit compliance with Section 6405 (a), I. R. C. 1954. In the letter notifying him of acceptance of the offer the taxpayer's counsel is requested by the Department to deposit a stipulation of dismissal of the suit with the United States Attorney, to be filed in court when the refund has been made. When the dismissal order has been entered the United States Attorney should advise the Department so that the case may be marked closed.

The same procedure as that outlined in the preceding paragraph is followed in closing out cases which have been administratively settled.

Upon acceptance of an offer in compromise of a suit by the Government to collect taxes, the United States Attorney normally is requested by the Department to secure full payment of the amount offered, forward it to the Department, and then dismiss the suit. In such cases payments should be made to the Director of Internal Revenue only in cases in which instructions to that effect have been issued by the Department.

STIPULATED JUDGMENTS

It is contrary to the policy of the Department to stipulate for judgment in compromise or administrative settlement cases, and the United States Attorney should never do so without prior authority from the Department.

COSTS

There is no authority for the payment of plaintiff's costs in compromising suits for refund, and the United States Attorneys should so advise proponents.

APPENDIX A

I. SUMMARY OF PERIODS OF LIMITATION AS PROVIDED BY THE INTERNAL REVENUE CODE OF 1939, AS AMENDED

A. Limitation Upon Assessment or Proceedings in Court Without Assessment

Tax	Circumstances involved	Code section	Time limit
1. Income and profits.	(a) General rule	275 (a)	3 years after return is filed.
	(b) Request for assessment on income received during lifetime of a decedent, or by his estate; or by a corporation undergoing dissolution.	275 (b)	18 months after request, but [illegible] cannot be made before return is filed.
	(c) Omission of 25 percent of gross income.	275 (c)	[illegible] years after return is filed.
	(d) Omission from gross income of amounts from (1) foreign personal-holding companies, (2) personal service corporations.	275 (d), 394 (f).	7 years after return is filed.
	(e) Omission of corporate distributions in liquidation.	275 (e)	4 years after return is filed.
	(f) Corporation makes no return but each shareholder reports his share of income from the corporation.	275 (g)	4 years after the last date on which any shareholder's return was filed.
	(g) False or fradulent return with intent to evade tax.	276 (a)	No limitation.
	(h) Failure to file return	276 (a)	No limitation.
	(i) Agreement in writing between Commissioner and taxpayer to extend period.	276 (b)	Assessment may be made at any time prior to expiration of the agreed time.

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A. Limitation Upon Assessment or Proceedings in Court Without Assessment—Continued

Tax	Circumstances involved	Code section	Time limit
	(j) Deficiency caused by operation of net operating loss carry-back or unused excess profits credit carry-back: (1) if an excess profits tax return was required for the year of the loss or unused credit, (2) if an excess profits tax return not required.	276 (d)-------	Limitation imposed by Sec. 275 or 276 (a) or (b) whichever is the longer.
	(k) Gain upon the sale or exchange of a residence.	112 (n) (7), 276 (e).	3 years after taxpayer notifies the taxing authorities of the cost of new residence or his intention not to replace.
	(l) Gain upon involuntary conversion.	112 (f) (3) (c), 276 (e).	3 years after taxpayer notifies taxing authorities of intention to replace or not to replace the property.
	(m) Determination of a deficiency under Sec. 130, for any year preceding the fifth.	130 (c)-------	1 year beyond the time fixed for assessment of the fifth taxable year.
	(n) Assessment of liability of initial transferee.	311 (b) (1)----	1 year after expiration of period of limitation against taxpayer.
	(o) Assessment of a transferee of a transferee.	311 (b) (2)----	1 year after expiration of period against preceding transferee, but not more than 3 years after expiration of period against taxpayer; except if court proceedings for collection has begun, then 1 year after return of execution in court proceedings.

A. Limitation Upon Assessment or Proceedings in Court Without Assessment—Continued

Tax	Circumstances involved	Code section	Time limit
	(p) Assessment of liability of fiduciary.	311 (b) (3)----	1 year after the liability arises, or not later than expiration of the period for collection of the tax, whichever is later.
	(q) Where Commissioner and transferee or fiduciary agree to period of assessment.	311 (b) (4)----	At any time during agreed period.
	(r) Where taxpayer deceased or corporation dissolved.	311 (c)----	Same period as if death or dissolution has not occurred.
2. Estate----	(a) General rule----	874 (a)----	3 years after return filed.
	(b) False return----	874 (b) (1)----	At any time.
	(c) No return----	874 (b) (1)----	At any time.
3. Gift----	(a) General rule----	1016 (a)----	3 years after return filed.
	(b) False return----	1016 (b) (1)----	At any time.
	(c) No return----	1016 (b) (1)----	At any time.
4. Miscellaneous.	(a) General rule (except income, war-profits, excess-profits, estate, gift taxes and certain employment taxes).	3312 (a)----	Assessment: 4 years after taxes become due. Court action without assessment: 5 years after taxes become due.
	(b) False returns----	3312 (b)----	At any time.
	(c) No return----	3312 (b)----	At any time.
	(d) Willful attempt to evade tax.	3312 (c)----	At any time.

NOTE.—The assessment period is suspended until a notice of deficiency is mailed to taxpayer. After the mailing of the notice the taxpayer has 90 days to petition the Tax Court for redetermination of the deficiency. Secs. 272 (a) (1) (income tax); 872 (a) (1) (estate tax); 1012 (a) (1) (gift tax); I. R. C. If there is a petition to the Tax Court the assessment period is suspended until the decision of the Tax Court becomes final and for 60 days thereafter. Secs. 277 (income tax); 311 (d) (liability of fiduciaries and transferees); 875 (estate); 1017 (gift); I. R. C.

Returns filed before the due date will be considered as filed on the last date provided by law. Sec. 275 (f), I. R. C.

See Sec. 3804 for limitation of time for performing acts postponed by war where individual continuously outside the Americas after December 6, 1941, or in military and naval forces overseas.

B. Limitation Upon Collection After Assessment

Tax	Circumstances involved	Code section	Time limit
1. Income	(a) Where assessment timely made, tax may be collected by distraint or court proceedings.	276 (c)	Within 6 years after assessment, or prior to expiration of agreed period.
2. Estate	(a) Where assessment timely made, tax may be collected by distraint, or court proceedings.	874 (b) (2)	Within 6 years after assessment, or prior to expiration of agreed period.
3. Gift	(a) Where assessment timely made, tax may be collected by distraint or court proceedings.	1016 (b) (2)	Within 6 years after assessment, or prior to expiration of agreed period.
4. Miscellaneous.	(a) Where assessment timely made, tax may be collected by distraint or court action.	3312 (d)	Within 6 years, or prior to expiration of agreed period.

NOTE.—Sections of the Code relating to periods of limitation on assessment or collection but not included in this summary because of their limited application are 274 (b) (collection of unpaid claims in bankruptcy or receivership); 506 (2) (deficiency dividends of personal holding companies); 3798 (exemption of insolvent banks from tax); 3801 (b) (mitigation of effect of limitations in income tax cases); 3805 (due date of returns extended for China Trade Corp.).

C. Limitation Upon Claims for Refunds and Credits

Tax	Circumstances involved	Code section	Time limit
1. Income and profits taxes.	(a) When return is filed and tax paid.	322 (b) (1)	3 years from time return is filed, or 2 years from time tax is paid, whichever expires later.
	(b) When no return is filed.	322 (b) (1)	2 years from time tax is paid, unless claim is filed before expiration of period.
	(c) When claim relates to overpayment on account of bad debts or worthless securities.	322 (b) (5)	7 years from date prescribed for filing return.

C. Limitations Upon Claims for Refunds and Credits—Continued

Tax	Circumstances involved	Code section	Time limit
	(d) When claim in (c), *supra*, relates to deductibility of the debt or loss on a carry-back.	322 (b) (5)---	Election as to (c) or (e), whichever expires later.
	(e) When the claim is attributable to a net operating loss carry-back or unused excess profits credit carry-back.	322 (b) (6)---	Period expiring with 15th day of 39th month following the end of the taxable year of the carry-back.
2. Estate----	(a) General rule----------	910----------	Within 3 years after payment.
3. Gift------	(a) Overpayment to be credited against gift tax due and balance refunded.	1027 (b) (1)---	Within 3 years from time tax paid, unless a claim is filed within the period.
4. Miscellaneous.	(a) All claims for refunds or credits of tax or penalties, except income, war-profits, excess-profits, estate and gift taxes.	3313----------	4 years after payment of the tax.

NOTE.—Returns filed before the due date are considered as filed on due date. Sec. 322 (b) (4).

Period may be extended by agreement between Commissioner and taxpayer. Sec. 322 (b) (3).

D. Limitation Upon Suits for Recovery of Erroneous Refunds

Tax	Circumstances involved	Code section	Time limit
All taxes----	(a) Any refund of tax, interest, penalty, additional amount or addition to the tax erroneously refunded.	3746-------	2 years after making of the refund.
	(b) When making of the refund was induced by fraud or the misrepresentation of a material fact.	3746 (c)----	5 years after making of the refund.

NOTE.—Tables A, B, C, and D relate only to taxes governed by the provisions of the Internal Revenue Code. Where the tax is for 1938 or prior years, the periods of limitation will be governed by the provisions of the applicable revenue act, and may differ from the time specified in the Internal Revenue Code.

II. SUMMARY OF PERIODS OF LIMITATION AS PROVIDED BY THE INTERNAL REVENUE CODE OF 1954

A. Limitation Upon Assessment or Proceedings in Court Without Assessment

Tax	Circumstances involved	Code section (1954)	Time limit
1. Income, profits, estate, gifts, and miscellaneous.	(a) General rule	6501(a)	3 years after return is filed.
	(b) Request for assessment on income received during lifetime of a decedent, or by his estate; or by a corporation undergoing dissolution.	6501 (d)	18 months after request, but request cannot be made before return is filed. Limited to 3 years after return is filed.
	(c) Omission of 25 percent of gross amount.	6501 (e)	6 years after return is filed.
	(d) Omission from gross income of amounts from foreign personal-holding companies.	6501 (e) (1) (B).	6 years after return is filed.
	(e) Failure of a personal-holding company to file with its return the items of gross income or the names and addresses of persons who owned (within Sec. 544) more than 50 percent of its capital stock.	6501 (f)	3 years after return is filed.
	(f) False or fraudulent return with intent to evade tax.	6501 (c) (1)	No limitation.
	(g) Willful attempt to evade tax.	6501 (c) (2)	No limitation.
	(h) Failure to file return.	6501 (c) (3)	No limitation.
	(i) Agreement in writing between Commissioner and taxpayer to extend period.	6501 (c) (4)	Assessment may be made at any time prior to expiration of the agreed time.

A. Limitation Upon Assessment or Proceedings in Court Without Assessment—Continued

Tax	Circumstances involved	Code section (1954)	Time limit
1. Income, profits, estate, gifts, and miscellaneous—Continued.	(j) Gain upon the sale or exchange of a residence.	1034 (j)_____	3 years after taxpayer notifies the taxing authorities of the cost of new residence or his intention not to replace.
	(k) Gain upon involuntary conversion.	1033 (a) (3) (C).	3 years after taxpayer notifies taxing authorities of intention to replace or not to replace the property.
	(l) Determination of a deficiency under Sec. 270 for any year preceding the fifth.	270 (d)_____	1 year before the time fixed for the assessment of the fifth taxable year.
	(m) Assessment of liability of initial transferee.	6901 (c) (1)___	1 year after expiration of period of limitation against taxpayer.
	(n) Assessment of a transferee of a transferee.	6901 (c) (2)___	1 year after expiration of period against preceding transferee, but not more than 3 years after expiration of period against taxpayer; except if court proceedings for collection has begun, then 1 year after return of execution in court proceedings.
	(o) Assessment of liability of fiduciary.	6901 (c) (3)__	1 year after the liability arises, or not later than expiration of the period for collection of the tax, whichever is later.

A. Limitation Upon Assessment or Proceedings in Court Without Assessment—Continued

Tax	Circumstances involved	Code section (1954)	Time limit
1. Income, profits, estate, gifts and miscellaneous—Continued.	(p) Where Commissioner and transferee or fiduciary agree to period of assessment.	6901 (d) (1)	At any time during agreed period.
	(q) Where taxpayer deceased or corporation dissolved.	6901 (e)	Same period as if death or dissolution has not occurred.

NOTES.—The assessment period is suspended until a notice of deficiency is mailed to taxpayer. After the mailing of the notice the taxpayer has 90 days to petition the Tax Court for redetermination of the deficiency. Sec. 6213 (a) (income tax, estate tax, and gift tax), 1954 I. R. C. If there is a petition to the Tax Court the assessment period is suspended until the decision of the Tax Court becomes final and for 60 days thereafter. Sec. 6503 (a) (1) (income, estate and gift tax); 6901 (f) (liability of fiduciaries and transferees), 1954 I. R. C.

Returns filed before the due date will be considered as filed on the last date provided by law. Sec. 6501 (B) (1), I. R. C.

See Sec. 7508 for limitation of time for performing acts postponed by war where individual continuously outside the Americas after December 6, 1941, or in military and naval forces overseas.

B. Limitation Upon Collection After Assessment

Tax	Circumstances involved	Code section (1954)	Time limit
1. Income, estate, gift, and miscellaneous.	(a) Where assessment timely made, tax may be collected by distraint or court proceedings.	6502 (a)	Within 6 years after assessment, or prior to expiration of agreed period.

NOTE.—Sections of the Code relating to periods of limitation on assessment or collection but not included in this summary because of their limited application are 6503 (b) (collection of unpaid claims in bankruptcy or receivership); 547 (b) (deficiency dividends of personal holding companies); 7507 (exemption of insolvent banks from tax); 1311 (mitigation of effect of limitations in income tax cases); 6072 (e) (due date of returns extended for China Trade Corp.).

C. Limitation Upon Claims for Refunds and Credits

Tax	Circumstances involved	Code section (1954)	Time limit
1. Income, profits, estate, gifts, and miscellaneous.	(a) When return is filed and tax paid.	6511 (a)------	3 years from time return is filed, or 2 years from time tax is paid, whichever expires later.
	(b) When no return is filed.	6511 (a)------	2 years from time tax is paid.
	(c) When claim relates to overpayment on account of bad debts or worthless securities.	6511 (d) (1)--	7 years from date prescribed for filing return.
	(d) When claim in (c), *supra*, relates to deductibility of the debt or loss on a carryback.	6511 (d) (1)--	Election as to (c) or (e), whichever expires later.
	(e) When the claim is attributable to a net operating loss carryback or unused excess profits credit carryback.	6511 (d) (2)--	Period expiring with 15th day of 39th month following the end of the taxable year of the carryback.
2. Stamp----	When tax is paid--------	6511 (a)------	3 years from time tax was paid.

NOTE.—Returns filed before the due date are considered as filed on due date. Sec. 6513 (a). Period may be extended by agreement between Commissioner and taxpayer. Sec. 6501 (c) (4).

D. Limitation Upon Suits for Recovery of Erroneous Refunds

Tax	Circumstances involved	Code section (1954)	Time limit
All taxes----	(a) Any refund of tax, interest, penalty, additional amount or addition to the tax erroneously refunded.	6532 (b)------	2 years after making of the refund.
	(b) When making of the refund was induced by fraud or the misrepresentation of a material fact.	6532 (b)------	5 years after making of the refund.

NOTE.—Tables A, B, C, and D relate only to taxes governed by the provisions of the 1954 Internal Revenue Code. Where the tax is for 1953 or prior years, the periods of limitation will be governed by the provisions of the applicable revenue act.

APPENDIX B*

TABLE OF PRINCIPAL CRIMINAL TAX STATUTES

Offense	Penal statute	Maximum penalty	Statute of limitations	Period of limitations
Willfully attempting to evade and defeat any tax imposed by Chapter 1 of the Internal Revenue Code.	Sec. 145 (b), I. R. C.	$10,000 fine or 5 years' imprisonment, or both.	Sec. 3748 (a) (2), I. R. C.	6 years.
Willfully failing to file returns, submit information or pay tax.	Sec. 145 (a), I. R. C.	$10,000 fine or 1 year's imprisonment, or both.	Sec. 3748 (a), I. R. C.	3 years.
Willfully aiding or assisting in, or procuring, counseling, or advising the preparation or presentation of false or fraudulent return, affidavit, claim, or document.	Sec. 3793 (b), (1), I. R. C.	$10,000 fine or 5 years' imprisonment, or both.	Sec. 3748 (a) (3), I. R. C.	6 years.
Conspiring to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.	18 U. S. C. 371	$10,000 fine or 2 years' imprisonment, or both.	Sec. 3748 (a), I. R. C.	6 years.
Willfully making false statements or representations in any matter within the jurisdiction of any department or agency of the United States.	18 U. S. C. 1001	$10,000 fine or 10 years' imprisonment, or both.	18 U. S. C. 3282	3 years.
Willfully making and subscribing a false return	Sec. 3807, I. R. C.	Penalties prescribed for perjury. Sec. 125 of the Criminal Code.	Sec. 3748 (a), I. R. C.	3 years.
Willfully attempting to evade and defeat excise taxes imposed by Sections 2400, 2401, 2402 of the Internal Revenue Code.	Sec. 2707 (c), I. R. C.	$10,000 fine or 5 years, or both.	Sec. 3748 (a) (2), I. R. C.	6 years.
Willfully attempting to evade and defeat Social Security taxes imposed by Titles VIII or IX of the Social Security Act.	Sec. 2707 (c), I. R. C.	$10,000 fine or 5 years, or both.	Sec. 3748 (a) (2), I. R. C.	6 years.

* All I. R. C. citations are to 1939 code. See Supplemental Appendix B for 1954 statutory changes.

SUPPLEMENTAL APPENDIX B

TABLE OF PRINCIPAL CRIMINAL TAX STATUTES: I. R. C., 1954

Offense	Penal statute	Maximum penalty	Statute of limitations	Period of limitations
Willfully attempting to evade and defeat any tax imposed by the Internal Revenue Code of 1954.	Sec. 7201, I. R. C., 1954.	$10,000 fine or 5 years' imprisonment, or both.	Sec. 6531, I. R. C., 1954.	6 years.
Willfully failing to file returns, or pay tax	Sec. 7203, I. R. C., 1954.	$10,000 fine or 1 year's imprisonment, or both.	Sec. 6531, I. R. C., 1954.	6 years.
Willfully making and subscribing a false return	Sec. 7206 (1), I. R. C., 1954.	$5,000 fine or 3 years' imprisonment, or both.	Sec. 6531, I. R. C., 1954.	6 years.
Willfully aiding or assisting in, or procuring, counseling, or advising the preparation or presentation of false or fraudulent return, affidavit, claim or document.	Sec. 7206 (2), I. R. C., 1954.	$5,000 fine or 3 years' imprisonment, or both.	Sec. 6531, I. R. C., 1954.	6 years.
Willfully delivering or disclosing list, return, account, etc., known to be fraudulent or false as to a material matter.	Sec. 7207, I. R. C., 1954.	$1,000 fine or 1 year's imprisonment, or both.	Sec. 6531, I. R. C., 1954.	6 years.
Conspiring to attempt to evade or defeat any tax, or to defraud the United States in any manner or for any purpose.	18 U. S. C. 371	$10,000 fine or 2 years' imprisonment, or both.	Sec. 6531, I. R. C., 1954.	6 years.
Willfully making false statements or representations in any matter within the jurisdiction of any department or agency of the United States.	18 U. S. C. 1001	$10,000 fine or 10 years' imprisonment, or both.	18 U. S. C. 3282, as amended (Sec. 10 (a) and (b), P. L. 769, 83d Cong., 2d Sess.).	5 years.