TITLE 4
TAX DIVISION

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INTRODUCTION

The Tax Division desires the closest possible cooperation with the Offices of the United States Attorneys to insure the tax litigation under its supervision is handled in an expeditious and professional manner. The information in this manual is designed to describe the kinds of litigation under the jurisdiction of the Tax Division and to explain in some detail the interrelationship of the United States Attorneys' Offices and the Division in particular kinds of cases.

The Tax Division exercises an extensive degree of supervision of tax litigation. The reasons for this are readily apparent. Decisions in the lower and appellate courts protect the revenue and affect the outcome of other cases in litigation as well as those pending at the administrative level. The precedent value of many tax cases also influences taxpayers and their attorneys in the planning of transactions, the preparation of tax returns, and in deciding whether to contest proposed deficiency assessments asserted by the Commissioner. Thus an important function in the handling of tax litigation is 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.

From this it is readily seen that the Tax Division has unique resources with which to supervise the conduct of tax litigation. Though many specific questions which recur with some frequency are discussed in detail within this manual, this manual should be thought of as no more than a handy supplement to the advice which the Tax Division stands ready to give to United States Attorneys' Offices as particular cases arise.

TITLE 4: TAX DIVISION

The Department of Justice is responsible for the conduct of all phases of Federal tax litigation, including the prosecution of tax claims in bankruptcy, probate and insolvency proceedings as well as the defense of mortgage foreclosure suits involving tax liens and the initiation of collection suits against delinquent taxpayers. All tax cases, both Civil and Criminal, must be handled by attorneys who are either employed by the Department of Justice or are authorized by it to represent the United States. There is no authority for the employment by United States Attorneys of Internal Revenue Service attorneys to handle such cases. Where circumstances require the use of Internal Revenue Service attorneys in any case, prior authority therefor must be secured from the Executive Office for United States Attorneys. Such requests should set out the name of the case and the special circumstances which make it impossible for the United States Attorney or his assistants to handle it. Requests for such authorization should be submitted in sufficient time to permit other arrangements to be made should the request be disapproved.

In addition to this Manual, United States Attorneys have been furnished copies of the Tax Division's Manual on "The Trial of Criminal Income Tax Cases" and a "United States Attorneys Guide". Attention is invited to these two publications which will be of assistance to United States Attorneys and their staffs in their relations with the Tax Division and the conduct of tax litigation.

CRIMINAL TAX CASES[1]

ORIGIN

Criminal tax cases are investigated by agents of the Internal Revenue Service. They are processed by personnel of the Service's Enforcement Division through the appropriate office of the Regional Counsel of the Service to the Tax Division.[2] In each case Regional Counsel sends a so-called Criminal Reference Letter stating the Service's 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.[2] The final decision whether to initiate or decline prosecution is made by or on behalf of the Assistant Attorney General in charge of the Tax Division. With the exceptions noted below, United States Attorneys should not present tax cases to a grand jury or otherwise initiate prosecution except on specific authorization of the Tax Division. This includes violations of 26 U.S.C. 7210. 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.

The Department of Justice is responsible for the conduct of all phases of Federal tax litigation, including the prosecution of tax

[1] The Tax Division's *Manual for Criminal Tax Trials* supplements the instructions in this Title and contains an extensive discussion of the statutes and decisions in this area of criminal law and of the procedures to be followed in handling criminal tax cases.

[2] Investigations conducted by the Internal Revenue Service for certain offenses are under the jurisdiction of the Criminal Division, including the following: specific classes of excise tax violations, i.e., liquor tax cases, narcotics tax cases, National Firearms Act cases, Wagering Tax Act cases, and coin-operated gambling and amusement machine tax cases (see Title 2 of this Manual); malfeasance offenses by Internal Revenue Service personnel (26 U.S.C. 7214 and Title 18, U.S.C.); forcible rescue of seized property (26 U.S.C. 7212(b)) and corrupt or forcible interference with an officer or employee acting under the Internal Revenue laws (26 U.S.C. 7212(a)); unauthorized disclosure of information (26 U.S.C. 7213); and counterfeiting, mutilation, removal, or re-use of stamps (26 U.S.C. 7208). See 28 CFR 0.70.

Instructions will, of course, come from the Criminal Division as to the proper handling of these cases.

claims in bankruptcy, probate and insolvency proceedings as well as the defense of mortgage foreclosure suits involving tax liens and the initiation of collection suits against delinquent taxpayers. All tax cases, both Civil and Criminal, must be handled by attorneys who are either employed by the Department of Justice or are authorized by it to represent the United States. There is no authority for the employment by United States Attorneys of Internal Revenue Service attorneys to handle such cases. Where circumstances require the use of Internal Revenue Service attorneys in any case, prior authority therefor must be secured from the Executive Office for United States Attorneys. Such requests should set out the name of the case and the special circumstances which make it impossible for the United States Attorney or his assistants to handle it. Requests for such authorization should be submitted in sufficient time to permit other arrangements to be made should the request be disapproved.

In addition to this Manual, United States Attorneys have been furnished copies of the Tax Division's *Manual for Criminal Tax Trials* and the *United States Attorneys' Guide*. Attention is invited to these two publications which will be of assistance to United States Attorneys and their staffs in their relations with the Tax Division and the conduct of tax litigation.

Certain limited categories of criminal tax cases under the jurisdiction of the Tax Division are referred directly by the Internal Revenue Service to the appropriate United States Attorneys. Institution of such prosecutions do not require the prior approval of the Tax Division. However, any questions regarding their proper handling should be directed to the Tax Division. These are—

Excise Tax Offenses. These include all Internal Revenue Code and Title 18 offenses involving taxes imposed by Subtitles C, D and E—except Chapter 24—of the Internal Revenue Code. (See Fn. 2, *supra*.)

Multiple Filings, False and Fictitious Returns Claiming Refunds (18 U.S.C. 287).

Employee Withholding Exemption Certificates (Section 7205, Internal Revenue Code).

"Trust Fund" Cases (Sections 7512 and 7215, Internal Revenue Code).

Social Security Tax Violations.

CONFERENCES

Upon request made during the pendency of a case in the Tax Division, one 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 and any recommended changes in the authorized prosecution to the Tax Division.

INDICTMENT OR INFORMATION

When prosecution is authorized by the Tax Division, 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 the numbered forms included as Appendix A to the *Tax Division's Manual for Criminal Tax Trials*. In any unusual case in which the 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 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 District Director of Internal Revenue or with one of the seven regional Service Centers. In the usual case, therefore, the offense is committed in the judicial district in which the District Director's office or the Service Center is located. Consequently, the great majority of tax prosecutions will be instituted in the one judicial district in which the District Director's office or the Service Center is located. However, in an effort to cause the widest possible geographical distribution of tax prosecutions and to anticipate motions for transfers under 18 U.S.C. 3237(b), the Department has encouraged the development of investigative facts which would provide a basis for venue in the residence district of taxpayers who file in other judicial districts.

Transfers of criminal tax cases for the entry of a plea of guilty under Rule 20, Federal Rules of Criminal Procedure, are sometimes requested by defendants "shopping" for a lenient court. Because of this possibility and because of other considerations that may be known to the Department, a transfer may interfere with the administration of justice. Express authorization must, therefore, be secured from the Tax Division before the United States Attorneys may consent to such transfers.

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 of the Internal Revenue Code. This action has the effect of tolling the statute of limitations for nine months. 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. In the event a case is re-presented to a grand jury after an initial no-bill, the proceedings should be recorded by a court stenographer. A transcript can then be ordered if it is needed to make a determination as to whether or not to authorize a further presentation to a grand jury.

DISMISSAL OF CRIMINAL TAX CASES

Indictments returned or informations filed in criminal tax cases within the supervisory responsibilities of the Tax Division, including those cases which may be directly referred to the United States Attorneys, may not be dismissed without prior approval of the Tax Division, except when the defendant is dead, or when a superseding indictment or information has been returned. The Tax Division should be notified promptly in the event such action is taken.

Form U.S.A.-900 (Appendix, Title 2, Form 1), may be used in requesting Tax Division approval to dismiss an indictment or information in a criminal tax case. Recommendations to dismiss criminal tax cases are the responsibility of the United States Attorney personally and must be signed by him.

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 arraignment and kind of plea;
(c) Dates of trial;
(d) Verdict;
(e) Date and terms of sentence.

In cases of national interest and importance, significant developments should be reported immediately by telephone or telegram.

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 penalties, 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 by the court, 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 in-

dictment or information after entry of a plea of guilty or *nolo contendere* (see preceding paragraph) to the major count or counts. Such dismissals do not require prior Departmental approval. They should not be entered, however, until after sentence has been imposed because a plea of guilty may sometimes be withdrawn before sentence with a consequent loss of effective charges if they have been prematurely dismissed on the assumption that the plea would stand. In referring cases to the United States Attorneys the Tax Division will generally designate the count or counts that will be treated as "major" for this purpose. These general rules should be followed in determining the major count or counts:

1. Felony counts take priority over misdemeanor counts.
2. Tax evasion counts (Section 7201, Internal Revenue Code) take priority over all other counts.
3. The count charging the offense which carries the longest prison sentence will be considered the major count.
4. As between counts under the same statute, the count involving the greatest financial detriment to the United States will be considered the major count.
5. When there is little difference in financial detriment between counts, the determining factor will be the relative flagrancy of the offense.
6. When the determination of the major count or counts is complicated by considerations not covered by the above rules, the United States Attorneys are encouraged to consult the Tax Division.

If the court allows time before imposition of sentence, the Tax Division will authorize the Internal Revenue Service 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 or to the probation officer a full statement of facts including the amount of tax evaded in all years for which the defendant was indicted, 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 tax case.

Consistent with the above, the 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 reports, exhibits, and other material furnished by the Internal Revenue Service for use in the trial to the particular Service Regional Counsel by whom the case was originally referred to the Department, unless directed to dispose of them otherwise.

CIVIL TAX CASES OTHER THAN REFUND SUITS

GENERAL LITIGATION SECTION

I. Organization

The General Litigation Section of the Tax Division is assigned the responsibility of handling and supervising all civil tax litigation in federal and state courts, except cases involving the refund of taxes paid. Subject to the overall supervision of the Chief of the Section, each unit operates under the supervision of an Assistant Chief and a Reviewing Officer. One unit handles cases involving Government immunity from State and local taxes throughout the United States, the other two handle non-refund civil tax cases and are divided in general according to the geographical areas embraced in the seven Internal Revenue Service Regions, as follows:

(a) Northern and Eastern Unit (corresponding to Internal Revenue Service North Atlantic, Mid-Atlantic, Central and Mid-West Regions):

Connecticut	Maryland	North Dakota
Delaware	Massachusetts	Ohio
District of Columbia	Michigan	Pennsylvania
Illinois	Minnesota	Rhode Island
Indiana	Missouri	South Dakota
Iowa	Nebraska	Vermont
Kentucky	New Hampshire	West Virginia
Maine	New Jersey	Wisconsin
	New York	

(b) Southern and Western Unit (corresponding to Internal Revenue Service Southern, Southwestern and Western Regions):

Alabama	Idaho	Puerto Rico
Alaska	Kansas	South Carolina
Arizona	Louisiana	Tennessee
Arkansas	Mississippi	Texas
California	Montana	Utah
Colorado	Nevada	Virginia
Florida	New Mexico	Washington
Georgia	North Carolina	Wyoming
Guam	Oklahoma	
Hawaii	Oregon	

(c) State and Local Unit, which handles federal immunity cases and related matters without regard to geographical limitations.

NOTE: Exceptions to (a) and (b) are the assignment of cases in Virginia to the Southern Unit and special cases assigned to the Senior Trial Attorney.

II. Litigating Responsibility

All types of suits described herein are the responsibility of the Department of Justice and are under the supervision of the General Litigation Section of the Tax Division. All court appearances must be made by representatives of the Department of Justice—either members of the United States Attorneys' staff or Tax Division attorneys.

An early decision will be made by the General Litigation Section as to whether the primary responsibility *for the trial of the case* will rest with the United States Attorney's office or the Tax Division. Preferably, this decision will be made after the responsive pleadings are in and the case is at issue. Even where the primary trial responsibility is placed on the United States Attorney's office, general responsibility for the case remains in the Tax Division and the United States Attorney should keep the Division fully advised of the status and progress of the case and the legal arguments he intends to make.

The Federal Tax Lien Act of 1966 (P.L. 89–719) became law on November 2, 1966, and its provisions apply to all litigation pending on that date. This Act extensively revised the law on tax liens and priorities and the changes effected thereby are reflected in the comments which follow. In addition, a commentary on various provisions of the Act is contained in Tax Division Memorandum No. 495, November 7, 1966, reprinted as part of the Appendix to the United States Attorneys' Guide.

III. Tax Collection Suits

A. Origin and Authorization for Institution of Suit

Usually, the first step toward collection is the assessment of the tax; this may be based either upon the return filed by the taxpayer, Tax Court decision, or a determination by the Internal Revenue Service that an additional tax is due and owing. As soon as practicable after assessment, and within 60 days, the District Director is required to give notice (Internal Revenue Service Form 17) to the taxpayer and make demand for payment pursuant to Section 6303(a) of the 1954 Internal Revenue Code. Upon the neglect or refusal of the taxpayer to pay a tax after demand a lien automatically arises on all the taxpayer's property. (Section 6321 of the 1954 Internal Revenue Code.) Although

proof of demand is a prerequisite to the existence of the lien, the lien relates back to the time of assessment and the lien continues until the liability is satisfied or becomes unenforceable by reason of lapse of time. Section 6322, 1954 Code. See also *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 88; *United States* v. *Vermont*, 377 U.S. 351, 352; *Macatee, Inc.* v. *United States*, 214 F. 2d 797 (C.A. 5th). If the United States secures a judgment against a taxpayer arising out of an assessed tax liability, the tax lien is not merged in the judgment but is independently enforceable until the judgment has been satisfied or becomes unenforceable by reason of lapse of time. Section 6322, 1954 Code, as amended by Section 113 of the Federal Tax Lien Act of 1966, *supra.*

The basic statute of limitations on collection of a tax by levy or by a proceeding in court is six years from the date of the assessment. (Section 6502(a), 1954 Code.) Insofar as collection by *levy* is concerned, this statutory period is neither extended nor curtailed by reason of a judgment against the taxpayer. Section 6502(a), as amended. However, the time may have been extended by agreements in writing (Section 6502(a)) or suspended by operation of law. (Section 6503.) An *extension* customarily takes one of two forms: a waiver, whereby the statute is extended for a specified period of time (see *Stearns Co.* v. *United States*, 291 U.S. 54 (1934); *United States* v. *Price*, 361 U.S. 304 (1960)); or, an agreement embodied in an offer-in-compromise whereby the statute is "suspended" for the period during which the offer is pending, plus one year (*Lesser* v. *United States*, 368 F. 2d 306 (C.A. 2d, 1966); *United States* v. *Myrell*, 329 F. 2d 341 (C.A. 7th, 1964); *Myrick* v. *United States*, 29[illegible] F. 2d 312. C.A. 5th, 1961); *United States* v. *Wilson*, 304 F. 2d [illegible] (1962). The running of the statute is suspended by operation of law for the period during which the Secretary or his delegate is prohibited from assessing or collecting the tax (i.e. pending final determination of a Tax Court proceeding); for the period the taxpayer's assets are in the custody or control of any federal or State court; for the period the taxpayer is outside the United States; for the period of a wrongful seizure of property of a third party. The filing of a collection suit will toll the running of the statute of limitations. *United States* v. *Harris*, 223 F. Supp. 309 (S.D. Fla.), aff'd *per curiam*, 337 F. 2d 856 (C.A. 5th); *In re Feinberg* (N.Y. Ct. App, decided 12/29/66) (67-1 U.S.T.C., Par. 9185).

In rare 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 return. Section

6501(a), I.R.C. 1954, provides the statute of limitations in such cases. 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 assessments. *Welch* v. *Helvering*, 290 U.S. 111; *Paschal* v. *Blieden*, 127 F. 2d 398 (C.A. 8th); *United States* v. *Rindskopf*, 105 U.S. 418; *Fiori* v. *Rothensies*, 99 F. 2d 922 (C.A. 3d).

Actions to collect taxes on behalf of the Government originate by a request and authorization from a delegate of the Secretary of the Treasury, and are brought at the direction of the Attorney General, pursuant to Section 7401, I.R.C. 1954. The authority of the Secretary of the Treasury to authorize and request such suits has been delegated to the Chief Counsel of the Internal Revenue Service, and he requests the commencement of a collection action, whether it be to reduce the assessment to judgment or to foreclose the tax lien on specific property, by a letter addressed to the Assistant Attorney General in charge of the Tax Division. These requests are routed to the Chief of the General Litigation Section who assigns them to individual attorneys for handling. An attorney in the General Litigation Section drafts the complaint and then forwards the pleading with a detailed letter setting out a brief statement of the facts and citing the pertinent authorities to the United States Attorney. The United States Attorney should promptly forward advice as to the date the complaint was filed, and, if any changes in form are made, a copy of the amended pleading.

Occasionally, emergencies will arise where it may not be possible to obtain the authorization of the Attorney General and the Chief Counsel in advance of institution of the suit because of statute of limitation requirements or other need to assert the tax claims promptly. In these instances the United States Attorney will either be authorized by telephone to file the suit and the sanction of the Chief Counsel will be obtained subsequently, or complaints will be telephoned to the United States Attorney's office and sanctioned later. Occasionally, the Internal Revenue Service's local office may contact the United States Attorney's office directly with a request to institute suit due to time limitations, but complaints should not be filed on an emergency basis without prior approval of the Chief of the General Litigation Section. Generally, the United States Attorney will telephone the General Litigation Section in these emergency situations.

B. The General Types of Collection Suits Are Summarized as Follows:

1. *Suits to Reduce Assessments to Judgment.*

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. Frequently, it is deemed advisable to reduce the tax assessment to judgment so as to preserve the Government's right of collection beyond the 6-year period for collection. Usually, there is no known property of the taxpayer involved; otherwise, a lien foreclosure normally would be preferable.

2. *Tax Lien Foreclosure Suits.*

(a) *Pleading.*

Methods available to the United States to enforce a lien on specific property are by an administrative levy and by judicial proceedings. Levy is an administrative procedure entailing the seizure and sale of the taxpayer's property under Section 6331, I.R.C. 1954. Judicial proceedings to enforce a tax lien against real and personal property are governed by Section 7403, I.R.C. 1954. The complaint is brought in the name of the United States and it should set forth the legal description of all real estate and the best available description of personal property against which the tax lien is sought to be foreclosed. The complaint should include a careful reference to all taxes which the lien secures, showing the dates of assessment and the dates of notices and demand. Proof of these facts will make available the presumption of the correctness of the assessment. *United States* v. *Rindskopf*, 105 U.S. 418. It is necessary to allege demand because, although the lien arises at the date of assessment, demand is an essential element to the creation of a lien. Section 6321, I.R.C. 1954. Where notice of tax lien has been filed the date and the place of filing are also alleged, because the lien created by Section 6321, I.R.C. 1954, is not "valid" as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice of the lien has been filed. Section 6323(a), as amended. *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 88; *United States* v. *New Britain*, 347 U.S. 81, 88; *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 53. The question of whether a claimant to the taxpayer's property falls within one of these "protected" classes is a federal question and the characterization of a particular claimant by state law as one of the "protected" persons is not binding on the United States. *United States* v. *Gilbert Associates*, 345 U.S. 361; *United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587; *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 85.

In an action to foreclose, Section 7403(b), I.R.C. 1954 requires that the Government make parties to the suit all persons having liens or claiming any interest in the property sought to be subjected to payment of the tax. The court may order the sale of the property and make final determination of the merits of all claims or liens upon the property involved. Where the Government holds a first lien, it is now authorized to bid at the sale of the property. The amount it may bid is limited to the amount of its lien, plus selling expenses. (Section 7403(c), as added by Section 107(b) of the Federal Tax Lien Act.) This authority is similar to that contained in 31 U.S.C., Section 195 and 28 U.S.C., Section 2410(c), discussed below.

(b) *Constructive service of process.*

In an action in a district court to enforce any lien upon or claim of real or personal property or to remove any incumbrance or lien thereon where any defendant cannot be served within the state or does not voluntarily appear, an order may be obtained from the court for constructive service under 28 U.S.C., Section 1655. See also the section, IV–E, *infra*, on service of process outside of the territorial jurisdiction of the district court (long-arm statute).

(c) *Lis pendens.*

If the property sought to be subjected to the tax lien in a foreclosure suit is real property and the law of the state in which the property is located requires a notice of the action or *lis pendens* to be filed to give constructive notice of the action, and the law of the state authorizes filing of such a notice for actions in a federal district court, then state law must be complied with in order to give constructive notice of the action as it relates to the real property. 28 U.S.C., Section 1964.

(d) *Appointment of receivers in lien foreclosure actions.*

In certain situations the court may appoint a receiver at the instance of the United States to facilitate the collection of taxes and, upon certification by the Commissioner pursuant to Section 7403(d), I.R.C. 1954, that it is in the public interest that a receiver be appointed, the receiver may be clothed with all of the powers of a receiver in equity. Section 7402(a) provides that the court has specific powers to issue orders, process, and judgments including the appointment of receivers. The appointment of a receiver should be sought only upon authorization of the Attorney General.

It is the position of the Department that under Section 7403 the United States 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. *Lias*, 103 F. Supp. 341 (N.D. W.Va.), aff'd 196 F. 2d 90 (C.A. 4th); *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9 (C.A. 3rd); *United States* v. *Pettyjohn*, 84 F. Supp. 423 (W.D. Mo.); *United States* v. *Peelle Co.*, 224 F. 2d 667 (C.A. 2d). When invoking Section 7403(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), this certificate is presented to the Court in support of the application for the appointment of a receiver, who would then 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 taxpayer. 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, they 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 Division for consideration, before orders are entered by the court. This includes the question of fees for the receivers and their attorneys.

If the taxpayer'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., Section 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. Sections 957 and 958 touch upon eligibility of certain persons to be appointed receivers, while 28 U.S.C., Sections 959 and 960 relate to the responsibilities of receivers in the conduct of their office.

(e) *Bidding in property at foreclosure sale.*

31 U.S.C., Section 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 he 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.

As to the right of the United States to *redeem* property sold at a mortgage foreclosure proceeding, see 28 U.S.C., Section 2410, and Section 7425, 1954 Code, discussed below under V-A-2 and B.

3. *Penalty Suits for Refusal To Surrender Property Subject to Levy.*

Section 6332, I.R.C. 1954 is intended primarily to facilitate the collection of taxes by levy where property of the taxpayer is in the possession of a person other than the taxpayer. Under the provisions of Section 6331, the Secretary or his delegate may seize through levy property or property rights of a delinquent taxpayer on which there is a federal tax lien (with certain exceptions provided by Section 6334) for the purpose of satisfying his outstanding tax liability. The term "levy" includes the power of distraint and seizure by any means. However, the levy extends only to property possessed or obligations existing at the time thereof and reaches only property subject to levy in the possession of the person levied upon at the time the levy is made.

Section 6332(c)(1) provides that any person who fails to honor a levy shall become individually liable to the United States in his own person or estate in a sum equal to the value of the property or rights not surrendered to the Director but not to exceed the amount of the taxes, including penalties and interest, for which the levy was made, together with costs and interests from the date of levy. Any amount (other than costs) recovered is to be credited against the tax liability for the collection of which the levy was made. (Sections 6332(c)(1) and 6342(a).) In addition to this personal liability, a penalty equal to 50 percent of the amount recoverable is imposed upon any person who

fails or refuses without reasonable cause to honor a levy; no part of this penalty may be credited against the tax liability. (Section 6332(c)(2).)

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 (S.D. N.Y.); *United States* v. *Bank of Shelby*, 68 F. 2d 538 (C.A. 5th); *United States* v. *First Capitol National Bank*, 89 F. 2d 116 (C.A. 8th); *United States* v. *Penn Mut. Life Ins. Co.*, 130 F. 2d 495 (C.A. 3rd). The only two defenses available to the defendant in such suits are that he is not in the possession of property of the taxpayer which is subject to levy or that the property is subject to a prior judicial attachment or execution *United States* v. *Manufacturers Trust Co.*, 198 F.2d 366, 369 (C.A. 2d).

Requests for a suit under the provisions of Section 6332, I.R.C. 1954, as amended, also originate with a request by the Chief Counsel of Internal Revenue. The district courts have jurisdiction of this type of action under Section 7402(a), I.R.C. 1954, and under 28 U.S.C. 1340 and 1345.

4. *Suits To Establish Transferee Liability and To Set Aside Fraudulent Transfers.*

Under Section 7402(a) the district courts have jurisdiction over suits by the United States to set aside transfers of property made by a taxpayer which are fraudulent or which are made without adequate consideration at a time when the transferor is insolvent or rendered insolvent thereby. The United States is entitled as an ordinary creditor to institute a suit under the Fraudulent Conveyance Acts of the various states to set aside such conveyances. *United States* v. *Chamberlain*, 219 U.S. 250.

A transferee assessment may be made, pursuant to Section 6901, against the transferee of the taxpayer's property and suit may be brought upon such an assessment in the same manner as suits brought upon other assessments. Suit also may be brought against the transferee without assessment. *Leighton* v. *United States*, 289 U.S. 506. The assessment of transferee liability is merely an additional remedy for the Government's use in enforcing transferee liability at law or in equity. *Phillips* v. *Commissioner*, 283 U.S. 589.

A transferee may be liable at law, as where he assumes all of a taxpayer's debts in return for valuable consideration. *Kamen Soap Products Co.* v. *Commissioner*, 230 F. 2d 565 (C.A. 2d). Liability in equity exists when the transfer of assets is without adequate consideration

and leaves the taxpayer unable to meet his liabilities. *Phillips* v. *Commissioner*, 283 U.S. 589. The existence of transferee liability, even where an assessment has been made against the transferee, is a question of state law and the assessment of such liability is merely a procedural device. *Commissioner* v. *Stern*, 357 U.S. 39. Thus, the remedies available to the Government, as a creditor, to obtain a judgment against a transferee of the taxpayer or to set aside a fraudulent conveyance will vary slightly from state to state. Where the conveyance is set aside as fraudulent, the liens are foreclosed against the property transferred. In a suit to establish transferee liability, a personal judgment is sought against the transferee. The amount of such a judgment is limited to the value of the assets he receives from the transferor-taxpayer. *Phillips* v. *Commissioner*, 283 U.S. 589.

5. *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 due the United States shall be first satisfied; and the priority established extends as well to cases in which a debtor without sufficient assets to pay all his debts makes a voluntary assignment of his property, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or in which an act of bankruptcy is committed. *United States* v. *Oklahoma*, 261 U.S. 253; *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483. Debts for taxes are included within the meaning of debts due the United States. *Price, Receiver* v. *United States*, 269 U.S. 492.

Section 3467, R.S. (31 U.S.C. 192) 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 due to the United States or so much thereof as may remain due and unpaid. See *United States* v. *Kaplan*, 74 F. 2d 664 (C.A. 2d); *United States* v. *Weisburn*, 48 F. Supp. 393 (E.D. Pa.). Even a court-appointed receiver or distributing agent is liable under the statute. *King* v. *United States*, 379 U.S. 329; *United States* v. *Crocker*, 313 F. 2d 946 (C.A. 9th). But compare *Stephens* v. *United States*, 208 F. 2d 105 (C.A. 5th).

The remedy is by suit in the United States district court to enforce the personal liability of the fiduciary. Requests for action of this nature originate with the Chief Counsel and the procedures are the

same as those followed in collection cases. This remedy 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; *Commissioner* v. *Stern*, 357 U.S. 39, 42.

6. *Suits to Establish Taxes and Lien Rights With Respect to Property in Custodia Legis.*

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 Chief Counsel 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.

7. *Suits on Bonds To Stay Collection of Taxes.*

Where extensions of the time for payment of taxes have been granted by the Internal Revenue Service 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 District Director 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. 5th); *Bowers* v. *American Surety Co.*, 30 F. 2d 244 (C.A. 2d), certiorari denied, 279 U.S. 865.

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

8. *Suits for Erroneous Refund.*

Internal Revenue taxes which have been erroneously refunded may be recovered in suits brought by the United States under Section 7405(a), I.R.C. 1954. There is a two-year statute of limitations (five years in case of fraud) which runs from the date the refund was actually made to the taxpayer (Section 6531(b)). *United States* v. *Wurts*, 303 U.S. 414. Requests for suits under Section 7405 originate with the Chief Counsel in the same manner as collection suits and the pleadings are prepared by the General Litigation Section.

9. *Forcible Opening of Safety Deposit Boxes.*

Under the power granted to the court by Section 7402(a), the Chief Counsel of Internal Revenue occasionally requests the Department to file a petition requesting an order to open a safety deposit box in aid of locating assets with which to satisfy tax liabilities. These requests are handled in the same manner as other requests to institute suit by the Chief Counsel.

10. *Suit for Tortious Conversion of Property Subject to Federal Tax Lien.*

The United States, as a creditor of a taxpayer, is not limited to statutory remedies for enforcement of its liens against the taxpayer's property, but may take advantage of common law and equitable remedies available to creditors for the enforcement of its liens. *United States* v. *Haar*, 27 F. 2d 250 (C.A. 5th), cert. den. 278 U.S. 634; *United States* v. *Canfield*, 29 F. Supp. 734 (S.D. Cal.). Thus, occasionally the Department is requested by the Chief Counsel to institute a civil action for damages for the tortious conversion of property subject to a federal tax lien. See *United States* v. *Webster-Robinson Machinery & Supply Co., Inc.* (W.D. Wash., 2/19/65) (65–1 U.S.T.C., par. 9255); *United States* v. *Allen*, 207 F. Supp. 545 (E.D. Wash.); see also *United States* v. *Carson*, 372 F. 2d 429 (C.A. 6th)—a non-tax case. The measure of damages is the fair market value at the time of the conversion.

11. *Writ of Ne Exeat Republica.*

Writs of *ne exeat republica* are expressly authorized by Section 7402(a) of the Internal Revenue Code of 1954. General authority for the federal courts to issue such writs is found in 28 U.S.C., Section 1651. A writ of *ne exeat* is one which issues from a court of equity to restrain a person from going beyond the confines of the country, or more especially from going beyond the limits of the jurisdiction of the court, until he has satisfied the plaintiff's claim or has given bond for the satisfaction of the decree of the court. This remedy is used in-

frequently and should not be sought without prior approval of the Tax Division. See *United States v. Robbins*, 235 F. Supp. 353 (E.D. Ark.).

12. *Petitions To Perpetuate Testimony.*

Quite frequently petitions are filed pursuant to the provisions of Rule 27 of the Federal Rules of Civil Procedure for the purpose of taking a deposition to perpetuate testimony for use in connection with anticipated tax litigation. Such petitions are handled by General Litigation Section attorneys. Advice is requested of the Chief Counsel's office as to whether such petitions should be opposed. If not, that office prepares and submits background information on the case for the use of this office. When completed, the deposition is made a part of the files of the Department and the Chief Counsel's office is so notified and advised that it will be made available upon request.

13. *Intervention by the United States in Court Actions.*

Section 7424, as amended by Section 108 of the Federal Tax Lien Act of 1966, specifically grants the United States the right to intervene in any civil action to assert a federal tax lien on property which is the subject of such action. Where the United States intervenes in a state court action, it has the same right of removal as is given it in cases where it is named a party to an action under 28 U.S.C., Section 2410(a), and removal is taken pursuant to the provisions of 28 U.S.C., Section 1444. Where the Government's application to intervene is denied, the adjudication in such action has no effect upon the tax lien, and the lien may be enforced against the property by levy or foreclosure.

Intervention may be commenced only with the authorization of the Chief Counsel and at the direction of the Attorney General. Whether or not such action should be removed to a federal district court is normally made on an *ad hoc* basis.

Procedures relating to intervention in state courts are governed by state law and, of course, the law of the particular state must be examined in each instance. 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 form 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, 144. However, the United States is not bound by laches or by state statutes of limitations. *United States* v. *Summerlin*, 310 U.S. 414.

Where the United States files a claim or intervenes in a state court proceeding, counterclaims or setoffs against the United States are governed by the same jurisdictional requirements as original actions, and jurisdiction of such claims against the United States does not

exist unless there is a specific congressional authority for it. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506; *Nassau Smelting & Refining Works* v. *United States*, 266 U.S. 101; *United States* v. *Shaw*, 309 U.S. 495. This proposition is applicable to suits in federal district courts also. Rule 13(d) Fed. Rules Civ. Proc. However, setoff might be maintained against the United States under some circumstances. See *United States* v. *Shaw*, *supra*.

Generally, appropriate pleadings will be prepared by a section attorney and forwarded to the United States Attorney together with a letter of instruction.

IV. Procedures in Collection Suits

A. Proof of Assessment.

In the usual tax collection case, it is necessary to prove the assessment of the tax, (1) because the tax lien arises upon assessment of the tax (Section 6321, I.R.C. 1954), and (2) because, when proved, it establishes a *prima facie* case of liability casting the burden on the taxpayer of showing that he does not owe the tax. *United States* v. *Rindskopf*, 105 U.S. 418; *Wickwire* v. *Reinecke*, 275 U.S. 101; *United States* v. *O'Connor*, 291 F. 2d 520 (C.A. 2d); *United States* v. *Lease*, 346 F. 2d 696 (C.A. 2d); *Lesser* v. *United States*, 362 F. 2d 306 (C.A. 2d); *Paschal* v. *Blieden*, 127 F. 2d 398 (C.A. 8th); *United States* v. *Strebler*, 313 F. 2d 402 (C.A. 8th); *United States* v. *Molitor*, 337 F. 2d 917 (C.A. 9th).

In the bulk of the cases the existence of the assessment is either stipulated or the proof offered is not contested. However, in a few rare cases it has been necessary to offer strict proof of the assessment.

Prior to the Internal Revenue Code of 1954 the assessment was accomplished when the Commissioner of Internal Revenue signed a certificate (Form 23–C) to which was attached an Assessment List (Form 23–E). The list specifically named each taxpayer and identified the amount and nature of the liability. Proof of this type of assessment can be made by offering certified and authenticated copies of the assessment certificate and an extract of the list showing the taxpayer's name and liabilities.

In the early 1950's the assessment procedure was changed. The assessment was made as before by an Internal Revenue official signing an Assessment Certificate (Form 23–C). However, this assessment usually covers the total number of assessments made for a period of time and there is no simple underlying document which identifies the taxpayer, such as the Assessment List used under the former procedure. For this reason, it is sometimes necessary to offer in evidence a series of docu-

ments which can ultimately be explained by an Internal Revenue employee knowledgeable with such procedure. The problem of proof in such a case is the identification of the taxpayer included in the general summary of the liabilities reflected on the assessment certificate. The key to the relationship is an account number which originates either by being stamped on the tax return or the Revenue agent's report on which the assessment is based. The procedure varies somewhat from one District Director's office to another, and varies slightly with the type of assessment involved, but usually the account number can be traced to an Assessment List (Revised Form 23–E) or similar document on which the amount of the assessment is set forth. The total of the assessments listed on the Assessment List can be traced to an Accounting Abstract and Journal, also referred to as an Accounting Summary Journal (Form 1974) or an Assessments Journal-Current Returns (Form 2278), the total of which can be traced to the Assessment Certificate (Form 23–C). In addition, a unit ledger account card is maintained for each assessment made against each taxpayer. On it, the assessment is set forth and all subsequent payments, credits and abatements are recorded. This document gives the history of the assessment and the current outstanding balance.

The unit ledger account card, containing the history of a particular assessment, will sometimes reflect a zero balance due because the account has been "written off" as uncollectible. However, this is an accounting entry and it does not mean that the balance due on the assessment at the time it was "written off" is not due and owing. This can be explained by testimony. Also the taxpayer is notified of an assessment and demand for payment is made on a Form 17. Both copies of this form are sent to the taxpayer. Therefore, notice and demand is proved by testimony that such forms are prepared and sent in the ordinary course of business and that the date it is sent is recorded on the unit ledger account card. Copies of the foregoing forms, with the exception of Form 17, may be obtained from the Internal Revenue Service under seal so as to be admissable in evidence under Rule 44, Fed. Rules Civ. Proc. A Certificate of Assessments and Payments (Form 899) giving a history of all assessments involved in a suit also may be obtained from the Revenue Service. It is helpful in explaining the assessments, but it is not an original record of the Revenue Service.

It may be noted that the change-over by the Internal Revenue Service to the Automatic Data Processing (ADP) system of operation will soon reach a stage where a printout of a computer transcript of a tax account can be obtained for the more current tax years. Since such a transcript will constitute an original record of an assessment, it will necessitate a change in the above-described procedure for proving an

assessment for current tax years. As soon as such procedure is fully developed, an explanation will be made available.

The fact that a notice of federal tax lien has been filed is proved by obtaining a copy of the notice certified by and under the seal of the local official with whom the notice was filed, thus making it admissable under Rule 44, Fed. Rules Civ. Proc.

Every effort should be made to stipulate to the facts that the assessments involved in the suit were made, that notice was given and demand for payment was made, and that notice of lien was filed, leaving only the questions of the correctness of the assessments and the priorities of the various claims for trial.

B. Venue of Civil Suits To Collect Taxes.

A civil action seeking only a personal judgment for 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. Where the United States seeks to foreclose its tax liens against property, suit is instituted in the judicial district in which the real property or tangible personal property is located; if the property is an intangible, such as a debt or an account receivable, then the suit is instituted in the district where the taxpayer's debtor is located. Persons claiming an interest in or lien upon such property who reside outside of the state in which the property if located may be served pursuant to 28 U.S.C. 1655. The taxpayer also may be served pursuant to that statute when he resides outside of the state in which the property is located.

Occasionally, after suit has been instituted in a district court, it becomes necessary to have the suit transferred to another district, e.g., if, unknown to the Government, the taxpayer has moved prior to service of process and the institution of suit in the district in which he now resides is barred by the statute of limitations. 28 U.S.C. 1404 (a) provides that, for the convenience of parties and witnesses, in the interests of justice, a district court upon motion or consent of the parties, may transfer a civil action to any other district court or division where it might have been brought. Such a transfer may be made even in the absence of jurisdiction over the person of the taxpayer. *United States* v. *Berkowitz*, 328 F. 2d 358 (C.A. 3rd), certiorari denied, 379 U.S. 821; *Goldwar, Inc.* v. *Heiman*, 369 U.S. 463.

C. Right To Contest Merits of Tax in Collection Suits.

The Government has conceded that a taxpayer may contest the merits of a tax assessment in a suit to foreclose tax liens under Section 7403, I.R.C. 1954. *United States* v. *O'Connor*, 291 F. 2d 520 (C.A. 2d).

In addition, we have not objected to a taxpayer contesting the tax assessment in a government suit to reduce an assessment to judgment or in any action in which the Government seeks a judgment against the taxpayer. However, third parties may not contest the merits of the assessment. *Graham* v. *United States*, 243 F. 2d 919 (C.A. 9th). As to the burden of proof, see Proof of Assessment, *supra*.

D. Right to Jury Trial in Tax Collection Suits.

When a tax collection suit is equitable in nature, such as an action under Section 7403, I.R.C. 1954 to foreclose federal tax liens against the taxpayer's property or property transferred by the taxpayer to others, there is no right to a jury trial. *Damsky* v. *Zavatt*, 289 F. 2d 46 (C.A. 2d). However, when the suit is not equitable in nature, such as a suit to reduce an assessment to judgment or a suit to impose a penalty under Section 6332(b), I.R.C. 1954, for failure to honor a levy, there is a right to a jury trial. (See Rule 38, F.R.C.P.) For cases where an advisory jury may be called in the court's discretion see Rule 39(b)(c), F.R.C.P.

E. Service of Process Outside of Territorial Jurisdiction of District Court.

As noted above, Section III–B–2(b), in actions to foreclose federal tax liens against real or personal property located in the judicial district, any defendant, the taxpayer or competing claimants to the property who cannot be served in the state or who do not voluntarily appear may be constructively served pursuant to 28 U.S.C. 1655.

In addition, many states have enacted so-called "long arm statutes" providing for service outside of the state on persons who have had certain types of contracts within the state. By virtue of Rules 4(a), 4(f) and 4(i), Fed. Rules Civ. Proc., these state statutes can be invoked to obtain personal service outside of the state in which the district court is located and even outside of the United States. See *United States v. Montreal Trust Co.*, 35 F.R.D. 216 (S.D. N.Y.); also 358 F. 2d 209 (C.A. 2d)) rev'g and rem'g 235 F. Supp. 345 (S.D. N.Y.), cert. den. 384 U.S. 919. And see *United States* v. *First Nat. City Bank*, 379 U.S. 378; *Magnaflux Corp.* v. *Foerster*, 223 F. Supp. 552 (N.D. Ill.); *Securities & Exchange Comm.* v. *Briggs*, 234 F. Supp. 618 (N.D. Ohio); Uniform Interstate and International Procedure Act, Vol. 9B Uniform Laws annotated (1966 ed.), pp. 305–337.

In any case in which it is determined that service should be attempted outside of the United States, the matter should be referred to the Tax Division and the United States Attorney should not seek to obtain such service without prior reference to the Tax Division.

F. Collection of Judgments in Favor of the United States.

When 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. In most instances, the collection procedures which the United States Attorney's office follows do not involve any individual court proceedings. In such cases, responsibility for supervision of collection activities will generally be transferred to the Litigation Control Unit of the Tax Division. Procedures which should be followed in routine cases are set forth, *infra* (Post-Litigation Actions: Collection Matters). In some cases, however, it may be determined that it is more appropriate to have the General Litigation Section attorney supervise the collection activity. In either event, the United States Attorney's office will be advised of the transfer of supervision responsibility within the Tax Division.

If the United States Attorney discovers that extraordinary remedies are needed for the collection of a judgment, he should so advise the Tax Division. If further court proceedings are necessary, prior authorization of the Division should be obtained.

In the event it is deemed advisable to take steps to protect the interests of the Government, the United States Attorneys are reminded that prior to entry of judgment, Rule 64, Fed. Rules Civ. Proc. makes all remedies providing for the seizure of a defendant's property for the purpose of securing satisfaction of judgment available under the circumstances and in the manner provided by the law of the state in which the district court is held, 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.

G. Enforcement of Internal Revenue Summons.

1. *Authority To Issue Summons in Determining Tax Liability.*

Section 6201, I.R.C. 1954, provides the general authority to make inquiries, determinations, and assessments of all taxes. Additional assessment authority is found in other portions of the Internal Revenue Code, such as Sections 6851, 6861 and 6871, I.R.C. 1954. The assessment and collection of taxes in the field are facilitated by the delegation of the Secretary of the Treasury's authority to various officers and employees of the Internal Revenue Service. Authority of the District Director to issue summonses for the purpose of determining tax

liability, and specific authority for the Commissioner and the District Director to examine persons, books and records are found in Section 7602, I.R.C. 1954.

2. *Jurisdiction of District Courts to Enforce Summons.*

Sections 7402(b) and 7604(a), I.R.C. 1954, give jurisdiction to the district courts to enforce summonses issued under Section 7602. Section 7402(a), I.R.C. 1954, gives the district courts broad powers generally in issuing orders and process for the enforcement of internal revenue laws. In initiating summons enforcement proceedings of a summary nature (petition and show cause order), United States Attorneys are admonished to insure that the provisions of 28 U.S.C., Section 1691, requiring that all writs and process be under the seal of the court and signed by the clerk, are complied with. Failure to do so may void the entire proceeding.

3. *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 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 Internal Revenue Code has been upheld by the Supreme Court. *Reisman* v. *Caplin*, 375 U.S. 440, *McCrone* v. *United States*, 307 U.S. 61.

Even if the summons requires the production of books and records for years normally barred by the statute of limitations, the summons may be enforced and the Government need not make a showing of probable cause to suspect fraud which would lift the bar of the statute of limitations. *United States* v. *Powell*, 379 U.S. 48.

All requests for the enforcement of administrative summonses issued by the *Intelligence Division* of the District Director's office, Internal Revenue Service, will be referred to the Tax Division through the Regional Counsel offices, and the Chief Counsel's office in Washington, D.C. Authorization to initiate applications for enforcement of summonses arising out of the Intelligence Division will be forwarded to the United States Attorneys by the Tax Division and the Division should be kept advised of the progress of the proceedings to final disposition.

All requests for enforcement of administrative summonses issued by the *Audit Division* or the *Collection Division* of the District Direc-

tor's office, Internal Revenue Service (except those involving or relating to matters under the jurisdiction of the Organized Crime Section of the Criminal Division), will be referred directly to the United States Attorneys through the Regional Counsel offices. With respect to such summonses it will not be necessary to obtain authorization from the Tax Division prior to instituting court proceedings except in those instances where individual taxpayers or others have refused to produce records and have invoked the privilege against self-incrimination under the Fifth Amendment with respect to these records. Nonetheless, the Tax Division should be notified when such enforcement proceedings are commenced and copies of any pleadings filed should be furnished.

All requests for enforcement of Audit Division or Collection Division summonses relating to matters under the jurisdiction of the Organized Crime Section of the Criminal Division will be referred to the United States Attorneys through the Tax Division in the same manner as Intelligence Division summonses.

The Tax Division should be kept advised of the progress of enforcement proceedings to final disposition, but it is not necessary to furnish copies of letters sent to persons summoned in an effort to obtain compliance prior to an enforcement proceeding.

In *Reisman* v. *Caplin*, 375 U.S. 440, the Supreme Court noted (p. 448) that the enforcement procedure under Section 7604(b), I.R.C. 1954, whereby application is made for an attachment against the person who has failed to comply with a summons "was intended only to cover persons who were summoned and wholly made default or contumaciously refused to comply". The Court also indicated disapproval of the use of the attachment procedure where there was a refusal based upon a claim of privilege. See also *United States* v. *Powell*, 379 U.S. 46. For this reason enforcement applications should take the form of orders to *show cause* why the summons should not be complied with, and the attachment procedure should not be utilized without prior approval of the Tax Division.

Prosecution under Section 7210, I.R.C. 1954, for failure to obey a summons issued by the Internal Revenue Service should not be initiated without first securing specific authorization of the Tax Division. These cases should be processed by the Service and referred to the Tax Division as any other proposed tax prosecution.

4. Actions or Motions to Quash or Enjoin Internal Revenue Summonses.

In *Reisman* v. *Caplin*, 375 U.S. 440, the Supreme Court held that no action may be brought to quash a revenue summons, or to enjoin

the Revenue Service from seeking to enforce such a summons by appropriate court action. Any objections to the validity of the summons can be raised if the Government does institute enforcement action. Anyone who fears he may be injured, if the witnesses summoned comply voluntarily, may seek to have the witness restrained from complying until ordered to do so by a federal court as a result of an enforcement action.

Whenever an action to quash or enjoin the enforcement of an Internal Revenue summons is filed, the United States Attorney should notify the Tax Division immediately and furnish copies of the pleadings. If such a suit is brought in a federal court and the United States or an Internal Revenue official is named, the United States Attorney should move immediately to dismiss on the authority of *Reisman* v. *Caplin*, *supra*. If such a suit is brought in a state court and the United States or an Internal Revenue official is named, the United States Attorney should remove the action to the federal court immediately and then move to dismiss on the authority of *Reisman* v. *Caplin*, *supra*. If such a suit is filed in any court and neither the United States nor any Internal Revenue official is named, the United States Attorney should not become involved in any manner in the action.

Whenever an action is filed, either to enjoin the Internal Revenue Service or a summoned witness, or to quash a summons, the Internal Revenue official who issued the summons should be advised immediately so that a determination can be made whether judicially to enforce the summons. If the Internal Revenue Service decides to seek enforcement, its recommendation should be processed promptly through regular channels so as to insure an early determination on the enforcement of the summons.

V. Suits Against the United States Involving Tax Liens

A. Actions Under 28 U.S.C., Section 2410.

1. *Nature of the Suit.*

Under 28 U.S.C., Section 2410, as enacted and previously amended, the United States has consented to be named a party defendant in any suit instituted in a federal or state court having jurisdiction of the subject matter for the purpose of quieting title to or foreclosing a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. As amended by Section 201 of the Federal Tax Lien Act of 1966, the Government's consent to be sued under Section 2410 has been broadened to include "partition" actions, "condemnation" actions, "interpleader" actions and actions "in the nature of interpleader". By this statute, the United

States has waived its sovereign immunity to suit, subject to certain specified conditions. *United States* v. *Brosnan*, 363 U.S. 237, 244–246. These conditions must be strictly complied with as a jurisdictional prerequisite for maintenance of the suit. See *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 273; *Rock Island &c. R.R.* v. *United States*, 254 U.S. 141, 143. The District Director of Internal Revenue is not a proper party-defendant in any suit under this statute, because he has no proprietary interest in the tax lien. *Czieslik* v. *Burnet*, 57 F. 2d 715 (E.D. N.Y.). If he is named, steps should be taken to have him dismissed. Similarly, if the suit is against the United States, *but is not a permitted suit under 28 U.S.C., Section 2410*, the United States should be dismissed for lack of jurisdiction. *United States* v. *Sherwood*, 312 U.S. 584; *United States* v. *Shaw*, 309 U.S. 495; *Minnesota* v. *United States*, 305 U.S. 382.

The manner of service upon the United States is provided for in the statute and must be strictly complied with. Service is made by serving the process of the court together with the complaint on the United States Attorney and by sending copies of the process and complaint by either registered or certified mail to the Attorney General.

Any pleading (whether or not designated as a complaint) which attempts to join the United States as a party in the types of actions named, where the action involves liens arising under the Internal Revenue Code, must set forth with particularity the nature of the interest or lien of the United States, i.e., (1) the name and address of the delinquent taxpayer, (2) and, if a notice of tax lien has been filed, (a) the identity of the internal revenue office which filed the notice, and (b) the date and place such notice of lien was filed.

A judgment or decree in any such action shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, in a mortgage or lien foreclosure action, the property involved will be discharged from a junior federal mortgage or lien only if a judicial sale of the property is sought; in such situations, except where federal law precludes redemption, the United States may redeem real property sold within 120 days from the date of sale, or such longer period as may be allowed under local law. A revolving fund has been authorized for such purpose. The amount which the United States must pay in the exercise of its right of redemption, whether it relates to a sale under Section 2410(c) or a sale in foreclosure other than plenary judicial proceedings (Section 7425(d)(1)), is set forth in a formula contained in Section 2410(d), as amended.

Where the United States asks, by way of affirmative relief, for foreclosure of its own lien and property is sold to satisfy a *first* lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the Internal Revenue Service. (See III-B-2 (a) and (e), above.)

2. *Procedures.*

Partition and condemnation actions, formerly handled as dismissal and intervention type proceedings, will be processed in the same manner that quiet title and foreclosure actions have been handled in the past. Thus, in all such actions, it is not necessary to advise the local Regional Counsel of the Internal Revenue Service of the pendency of the action or to send him a copy of the complaint at the time the United States Attorney is served. The Tax Division will notify the United States Attorney when service has been made upon the Attorney General and the jurisdictional requirements of the statute have been met. Upon receipt of the form referral letter from the Tax Division, the United States Attorney should then request the District Director for the information necessary to prepare an answer. A copy of the Government's answer should be forwarded to the Tax Division. It is unnecessary for the United States Attorney to correspond further with the Tax Division with regard to these cases unless an offer in compromise is submitted or an appellate issue arises.

If an offer in compromise is made, promptly submit to the Tax Division, General Litigation Section, the matter with your recommendation and sufficient data in support thereof. A copy of any compromise offer, together with a copy of the complaint, should at the same time be forwarded to the local Regional Counsel of the Internal Revenue Service. This procedure is not applicable to those applications for release of the Government's right of redemption with respect to which authority has been delegated to United States Attorneys' offices.

If an appeal is taken by another party to the proceeding, please promptly advise this Division and inform us of the time limitation involved. If a decision is rendered *adverse* to the Government on an issue *contested* by your office, please submit your recommendation with sufficient data to evaluate the question of appeal.

Please note that the Federal Tax Lien Act of 1966 will govern the determination of the priority of the federal tax lien in these cases. This act effects a number of changes in federal tax lien priorities. See particularly Section 6323(e)(3) (attorney fees) and Section 6323(b)(6) (real property tax liens).

If any questions arise in the handling of these cases in respect to

interpretation of the provisions of the Federal Tax Lien Act, please contact the General Litigation Section Office. Certain of the provisions are wholly new to the priority field and we are therefore particularly concerned with the development of the law with respect to these sections. Therefore, if any claimant in the proceeding claims priority over the tax lien under Section 6323(b)(3), (5), (8) or Section 6323 (c) and (d), please advise this office immediately.

In all other respects, the case becomes the responsibility of the United States Attorney's office, which should continue reporting the status of these cases on the machine listing and notifying the District Director of Internal Revenue when the cases are closed.

Interpleader actions, as well as those in the nature of interpleader, will be handled by the Tax Division. The necessary pleadings will be prepared by a Section attorney and forwarded to the United States Attorney together with a letter of instruction.

With respect to the Government's *right of redemption* referred to above, please note that authority to release this right of redemption, insofar as it relates to real property on which is located only one single-family residence and to all other real property having a fair market value not exceeding $10,000, has been redelegated to the United States Attorneys. Instructions respecting the application and the processing thereof are outlined in Memorandum No. 390, dated November 24, 1964, and on the application form itself, reprinted as part of the Appendix to the United States Attorneys Guide. This redelegation is limited to real property meeting the specified conditions, and all other applications for release of the right of redemption should be processed as an offer in compromise under the normal Tax Division procedures.

In any other type of action allegedly brought under Section 2410 in which the United States or the District Director is named a party, the United States Attorney should advise the Regional Counsel as well as the Tax Division when he is served. In several instances, *taxpayers* against whom federal tax liens have been filed have instituted actions to quiet title to their property and to have such liens removed as a cloud on title, thereby attempting to contest the *merits* of the tax assessments made against them which were secured by the liens. Jurisdiction of such suits is usually alleged under 28 U.S.C. 2410 and 28 U.S.C. 1340, granting jurisdiction to district courts in Internal Revenue matters. It is the Government's position that 28 U.S.C. 2410 is not a jurisdictional statute but only a waiver of sovereign immunity to certain specified types of suit which have an independent jurisdictional basis; that 28 U.S.C. 1340 is only a general grant of jurisdiction which must be buttressed by some other statute specifically waiving the sovereign

immunity of the United States in a particular type of action; and that the waiver of immunity found in 28 U.S.C. 2410 does not extend to a suit by the taxpayer to inquire into the merits of a tax assessment. Three appellate courts have sustained the Government's position in these respects. *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2d); *Quinn* v. *Hook*, 341 F. 2d 920 (C.A. 3d); *Broadwell* v. *United States*, 343 F. 2d 470 (C.A. 4th), aff'g *per curiam* 234 F. Supp. 17 (E.D. N.C.); *Cooper Agency, Inc.* v. *McLeod*, 348 F. 2d 919 (C.A. 4th), aff'g *per curiam* 235 F. Supp. 276 (E.D. S.C.); *Floyd* v. *United States*, 361 F. 2d 312 (C.A. 4th).

3. *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 (30 days) in which to take steps for removal (28 U.S.C., Section 1446(b), as amended), 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, but removal should not be effected without prior approval of the Department. The procedure for removal is set forth in detail in 28 U.S.C. 1441–1450.

Where the United States is made a party-defendant in a state court action or intervenes, such as in the case of a petition to sell real estate of a decedent, removal can be accomplished where it appears to be desirable, with the prior approval of the Department. See Section 7424, as amended by Section 103, Federal Tax Lien Act of 1966. However, if a motion to dismiss as to the United States or District Director is filed, and it is determined that the United States should intervene, there must be an independent basis for jurisdiction in the federal court, because, once the dismissal is effected, unless there is an independent jurisdictional basis, the case is subject to remand to the state court. *S. & E. Building Materials Co., Inc.* v. *Joseph P. Day, Inc.*, 188 F. Supp. 742 (E.D. N.Y.).

B. Discharge of Federal Tax Liens in Plenary and Other Foreclosure Actions

Section 7425 of the 1954 Code, as added by Section 109 of the Federal Tax Lien Act of 1966, requires that the United States be made a party in a plenary judicial proceeding to discharge a tax lien; it also

makes provision for a timely notice to the Government where it has the status of a junior lienor and there is no plenary proceeding. In a plenary judicial proceeding where the Government has properly filed notice of a tax lien before the proceeding, but is not joined as a party in an action under 28 U.S.C., Section 2410(a), a judgment rendered in such action, or a judicial sale pursuant to such judgment, does not disturb the lien of the United States. If no notice of lien has been filed, or if the law makes no provision for such filing, the judgment has the same effect with respect to the discharge or divestment of the federal lien as may be provided with respect to such matters by the local law of the place where the property is situated. An exception to this rule is that where the Government is not joined as a party and the sale discharges the tax lien, the Government may still assert its claim against the proceeds of the sale at any time before the distribution is ordered with the same force as the lien had against the property sold. This claim may be made by intervening in the action pursuant to Section 7424, as amended.

In the case of all other foreclosure proceedings, Section 7425(b), as added, specifies the effect that a sale pursuant to (1) an instrument creating a lien on the property sold, (2) a confession of judgment on the obligation secured by such an instrument, or (3) a nonjudicial sale under a statutory lien on the property has with respect to a federal tax lien or title derived from the enforcement of such lien, on the property sold. Where timely notice of the proceeding is given to the Government, its claim to property under a tax lien is discharged in the manner provided by local law. Where proper notice of such foreclosures is not given to the Government, its tax lien is not disturbed, but follows the property into the hands of a third party. However, where notice of the Government's lien is not filed (even where filing is not required), or where the Government is notified of the proceeding, a sale has the same effect on the lien as local law provides with respect to similar claims. Under this subsection, a sale is not effective to divest the Government's lien or title unless notice thereof is given to the District Director by registered or certified mail, or by personal service, at least 25 days prior to the sale, or unless the United States consents to the sale free of its lien or title. As in the case of a sale under plenary judicial proceedings, the United States has a right to redeem the property sold in proceedings described in Section 7425(b).

Note: The above discussion which pertains to the discharge of federal tax liens in *foreclosure actions* is to be distinguished from procedures for the release or discharge of property from a federal tax lien by *administrative* process, provided for by Section 6325 of the 1954 Code, as amended by Section 103(a) of the Federal Tax Lien Act of

1966. This amendment (1) provides new rules for the discharge of property when the sale proceeds of such property are substituted for the property discharged; (2) authorizes the subordination of tax liens in certain cases; (3) authorizes the issuance of certificates of non-attachment of the tax lien; and (4) provides new rules relating to the legal effect of certificates issued pursuant to Section 6325.

United States Attorneys' offices are urged to acquaint members of the bar and other interested parties with the administrative discharge provisions of Section 6325, as amended. It should be made clear that such administrative procedure will eliminate problems inherent in plenary and other foreclosure actions under Section 7425, as amended, including the right of redemption accorded to the Government. In a large percentage of these suits, the lien of the United States is of no value and the work involved in processing the litigation is unproductive. Increased use of this procedure will relieve the heavy burden of work imposed on the offices of the United States Attorneys and the Tax Division by the steady flow of foreclosure actions.

C. Injunction Actions.

Section 7421(a) of the 1954 Code, as amended by Section 110(c) of the Federal Tax Lien Act of 1966, provides, generally, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court, whether or not such person is the person against whom such tax was assessed. The addition of the latter clause serves to prevent a person against whom an assessment has been made from seeking to escape the bar of the statute on the ground that he does not owe the tax and hence stands in the shoes of a third party rather than a taxpayer. See *Ford* v. *United States*, 361 F. 2d 312 (C.A. 4th). Also, this amendment precludes any injunctive relief to third persons unless a District Director has in fact levied upon his property and the federal district court determines that his rights in the property are superior to those of the United States and that enforcement of the levy or a sale of the property pursuant to the levy would irreparably injure his rights in such property. (See Wrongful Levy Actions under Section 7426, below.)

Otherwise, the general rule is that injunctive relief may be had only upon satisfaction of the twofold test laid down in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1.

Since injunction cases are often set for hearing on very short notice, the Department, in some instances, will consent to a *status quo* arrangement whereby the District Director will agree to take no collection activity for a specified period of time in order to afford the Internal Revenue Service an opportunity to conduct an investigation and pre-

pare a defense letter. In some instances, however, it may be necessary to consent to a Temporary Restraining Order to accomplish the same purpose. Rule 65(b), F.R.C.P. In either case, prior authorization should be obtained from the Chief, General Litigation Section. Of course, any suit attempting to restrain the collection of taxes must be served upon the Attorney General. The United States Attorney's Office, however, should immediately notify the General Litigation Section when served with such a suit; if a temporary restraining order or early hearing on a preliminary injunction is set, please telephone the office of the Chief of the General Litigation Section. The appropriate pleading will be prepared by the Tax Division and forwarded to the United States Attorney.

D. Wrongful Levy Actions.

Section 7426 of the 1954 Code, as added by Section 110 of the Federal Tax lien Act of 1966, permits nontaxpayers to sue the United States in federal district courts for wrongful levy actions and actions for surplus proceeds.* It also allows anyone, including taxpayers, to bring an action for the distribution of substituted sale proceeds. It is not necessary to file an administrative claim for refund before bringing such an action. In such actions, the taxpayer's tax liability is not open to question and the person bringing the action is limited to one of four types of relief as may be appropriate in the circumstances of each individual case, e.g., (1) an injunction; (2) recovery of the specific property wrongfully levied upon, or a money judgment for the amount of money wrongfully levied upon or for an amount not exceeding the amount received by the United States from the sale of the property; (3) judgment for all or part of the surplus proceeds remaining after the levy sale where the court determines that the claim of the third person was transferred from the property to the surplus proceeds; (4) judgment in an amount equal to all or part of a fund held pursuant to a valid agreement providing for sale of the levied property and substitution of the proceeds.

Where an action which could be brought against the United States under this section is improperly brought against a District Director, the United States may be substituted as a party upon order of the court and proper service of process on the United States.

E. 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

*Jurisdiction of federal district courts in such actions is conferred by 28 U.S.C., Section 1346, as amended by Section 202 of the Federal Tax Lien Act of 1966.

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, 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.

Title 31 U.S.C. 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. 9th); *Olson* v. *Mellon*, 4 F. Supp. 947, affirmed 71 F. 2d 1021 (C.A. 3rd). 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.

VI. Miscellaneous Matters

A. Subpoenas Served on Employees of Internal Revenue Service.

Frequently, subpoenas are served upon revenue agents and other employees of the Internal Revenue Service, in cases not involving federal taxes, and in which the United States or District 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.

Section 301.9000–1, Treasury Regulations on Procedure and Administration (1954 Code), which supersedes Article 80, Treasury Regulations 1[illegible] (1920 ed.), 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 to establish a uniform policy regarding procedure to be followed where subpoenas

are served upon them. In most cases, if there is sufficient time, the Commissioner will issue specific instructions to the employee and request that these be exhibited to the United States Attorney.

The validity of the superseded Treasury Regulations 12, *supra*, has been upheld and approved by the Supreme Court. *Boske* v. *Comingore*, 177 U.S. 459. Cf. *Touhy* v. *Ragen*, 340 U.S. 462, involving a subpoena served upon an employee of the Department of Justice.

In the event the 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 above 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.

If Executive Privilege is to be invoked, steps should be taken to see that the proper head of the agency involved issues the necessary instructions. With respect to requests for Department of Justice records, see Department Order No. 381–67, dated June 29, 1967. See also *Stiftung* v. *Zeiss, Jena*, 40 F.R.D. 318 (D.C. D.C., 1966), aff'd. May 8, 1967 (C.A.D.C.).

B. Suits Involving Governmental Immunity From State and Local Taxes.

The Tax Division is charged with the responsibility of representing the interests of Government agencies and officers in contesting the improper imposition of state or local taxes. Requests for assistance frequently come directly from Government contractors, and members of the Armed Forces, as well as from Government agencies. Because of their sensitive nature and the need for their close coordination, all such matters are handled directly by the Tax Division. All requests, whether to institute litigation or merely for advice or to persuade taxing authorities not to impose a tax, should be promptly referred to the General Litigation Section.

C. Foreclosure of Veterans Administration Mortgages Where Tax Liens Are Involved.

Where a request to foreclose a Veterans Administration mortgage is referred to the United States Attorney and there is a federal tax

lien outstanding which encumbers the same property, neither the United States nor the Internal Revenue Service should be named as defendants. If a release of the federal tax lien cannot be obtained, the tax lien should be included in the complaint with a prayer that the Government liens be allowed and paid in the order of their priority. However, prior approval of the Tax Division is necessary before including federal tax liens in the complaint.

D. Litigation Under the Freedom of Information Act.

On July 4, 1967, the so-called Freedom of Information Act (Public Law 90–23) became effective. This Act amends the Public Information Section of the Administrative Procedures Act (5 U.S.C. 552) and provides for making records available to members of the public unless it comes within specific categories of matters which are exempt from public disclosure. Refusal by the agency of requests for certain identifiable records may be reviewed by the federal district courts. Primary responsibility for handling litigation arising under the Act has been assigned to the Civil Division; however, the responsibility for litigation involving records of the Internal Revenue Service has been assigned to the General Litigation Section of the Tax Division.

VII. Appeals in General Litigation Cases

Appeals in General Litigation Section cases including those cases handled for trial by the United States Attorneys' offices are the responsibility of the Appellate Section of the Tax Division.

In order to protect adequately the Government's interest in state court cases, it is essential that at the time the Tax Division is notified of the adverse decision, the United States Attorneys' offices advise the Tax Division as to the specific time limits for taking each step in perfecting the appeal, with citation of the statute, or rules of court, or decisions which set out the procedure for taking appeal. Each United States Attorney's office should see to it that each step is timely taken and so advise the Tax Division. As soon as possible, each office should forward all relevant papers, including docket entries, together with a short summary of the evidence, if no transcript is available, to enable the Tax Division to process the question of appeal to the Solicitor General. See Memo No. 330, November 8, 1962, and related Bulletin items, reprinted in the Appendix to the United States Attorney's Guide (1967 rev.).

For authority to incur state or local litigation fees, see United States Attorneys Manual, Title 8, Section 144–2.

VIII. Claims of United States in Bankruptcy, Receiverships, Probate, and Insolvency Proceedings

General

The Internal Revenue Service files a proof of claim in bankruptcy proceedings, state court receivership and insolvency proceedings, and in certain probate proceedings where there are unpaid federal taxes. The United States Attorney may or may not be advised of the filing of a proof of claim. Where a controversy arises and the United States Attorney is requested to take any action or make a court appearance, the General Litigation Section should be notified immediately so that a file may be opened in the Tax Division.

If an objection to the proof of claim is filed, no action should be taken without prior approval of the Tax Division. The necessity for prompt action will frequently require a telephone call to the office of the Chief of the General Litigation Section.

Section 6036, I.R.C. 1954, places a duty upon every trustee in bankruptcy, receiver, assignee for the benefit of creditors, executor, and other like fiduciary to give notice of his qualification as such to the Secretary of the Treasury, or his delegate, in such manner and at such time as provided by the Regulations. The purpose of this provision is to enable the Internal Revenue Service to make an immediate determination as to whether all taxes have been properly reported and paid.

A. Bankruptcy Proceedings.

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 District Director promptly to determine and assess against the bankrupt all taxes which may be due and owing. Section 6871(a), I.R.C. 1954.

1. *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. The tax assessment is *prima facie* evidence of the validity of the proof of claim. *Paschal* v. *Blieden*, 127 F. 2d 398 (C.A. 8th); *Fiori* v. *Rothensies*, 99 F. 2d 922 (C.A. 3rd).

The United States Attorney may be furnished with a copy of the proof of claim. 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.

2. *Contested cases.*—In some bankruptcy cases questions as to the merits or priorities 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.

Where other creditors file a petition for a *turnover order* or obtain a *show cause order* in an attempt to obtain property of the bankrupt, the pleadings relating to the question, together with pertinent information, should be referred promptly to the Tax Division and to the Regional Counsel's office. In many of these cases, the United States Attorney should consider obtaining an extension of time for filing responsive pleadings so that the Division will have an adequate opportunity to consider the matter prior to the filings of such pleadings.

Section 2A of the Bankruptcy Act, as amended, as added by Section 1 of P.L. 89–496 (80 Stat. 270), invests the Bankruptcy Courts with jurisdiction to hear and determine the merits of tax liabilities not previously adjudicated by a judicial or administrative agency. No petition for redetermination may be filed in the Tax Court after adjudication of bankruptcy. Section 6871(b), 1954 Code.

3. *Discharge of tax debts and priority of tax claims.*—On July 5, 1966, two bills amending certain sections of the Bankruptcy Act became law, e.g. P.L. 89–495 (89th Cong., 2d Sess.), 80 Stat. 268 and P.L. 89–496 (89th Cong., 2d Sess.), 80 Stat. 270. Both laws are discussed in Tax Division Memo No. 490, dated October 18, 1966, reprinted as part of the Appendix to the United States Attorneys Guide (Rev. 1967). We note, in general, these important changes.

P.L. 89–496 completely alters the historical concept of the nondischargeability of tax debts and establishes a new priority of liens in bankruptcy. The law now provides that a bankrupt may be relieved of liability for all or some of the tax debts outstanding at the time of discharge. The general rule is that taxes which become "legally due and owing" more than three years preceding bankruptcy are discharged. For the purpose of this provision, federal taxes become "legally due and owing" as follows: personal income taxes (calendar year), April 15 of the succeeding year; corporate income taxes (calen-

dar year), March 15 of the succeeding year; withholding and Social Security taxes, April 15 of the succeeding year (see Sec. 6501(b)(2), 1954 Code); federal employment taxes, January 31 of the succeeding year.

There are five (5) exceptions to the general rule; thus, the following taxes will not be discharged: (1) taxes *not assessed* prior to bankruptcy because a bankrupt failed to "make a return required by law"; (2) taxes *assessed* within *one* year preceding bankruptcy, even though the bankrupt failed to make a return required by law with respect to taxes legally due and owing more than three years preceding bankruptcy; (3) taxes which were not reported on a return made by the bankrupt and which were *not assessed prior to bankruptcy by reason of a prohibition on assessment* pending the exhaustion of administrative or judicial remedies available to the bankrupt; (4) taxes with respect to which the *bankrupt made a* false or fraudulent return, or willfully attempted in any manner to evade or defeat collection; (5) taxes which the bankrupt has collected or withheld from others as required by law, but not paid over to the Government.

It should be noted, however, that a discharge in bankruptcy does not affect or release a tax lien, notice of which was filed prior to bankruptcy. Also, even though a bankrupt is discharged, his exempt property under state law remains subject to collection procedures for satisfaction of the tax.

As amended by Section 3 of P.L. 89-496, Section 64(a)(4) of the Bankruptcy Act (11 U.S.C., Section 104) accords fourth priority to taxes which are not released by a discharge in bankruptcy. As to taxes which are released by such discharge, the Government will now be a general unsecured creditor and will share *pro rata* with other unsecured creditors. Federal taxes now fall into these three creditor categories: (a) Lien creditor—taxes for which a notice of lien was filed prior to the petition in bankruptcy; (b) Priority creditor—taxes which are not discharged and for which no notice of lien was filed prior to the petition in bankruptcy; (c) Unsecured creditor—taxes dischargeable in bankruptcy.

P.L. 89-495 (89th Cong., 2d Sess.), 80 Stat. 268, establishes and defines the priority of liens in bankruptcy; provides a solution to the circuity of lien problems; codifies the decision of the Supreme Court in *United States* v. *Speers*, 382 U.S. 266 (1965); and defines certain rights and powers of a trustee in bankruptcy. As amended thereby, Section 67(c) of the Bankruptcy Act (11 U.S.C., Section 107(c)) is limited to statutory, as opposed to consensual, liens and is designed to assure that consensual liens are not subjected to any of the tests of validity prescribed for statutory liens. As now amended, Section

67c eliminates lack of possession of personal property as the standard for upsetting liens and instead invalidates as against the trustee every lien which falls within any of the following categories: (a) statutory liens which first became effective (1) upon the insolvency of the debtor, (2) upon distribution or liquidation of his property, (3) upon execution against his property levied at the instance of one other than the lienor; (b) statutory liens not perfected at the date of bankruptcy as against a subsequent bona fide purchaser from the debtor on that date; (c) statutory liens for rent and every lien of distress for rent, whether statutory or not.

Where the District Director has levied upon personal property of the bankrupt prior to bankruptcy, the tax lien is thereby perfected against that property and it does not become part of the bankrupt estate. *United States* v. *Eiland*, 223 F. 2d 118 (C.A. 4th); *Rosenblum* v. *United States*, 300 F. 2d 843 (C.A. 1st); *Division of Labor Law Enforcement* v. *United States*, 301 F. 2d 82 (C.A. 9th).

4. *Petitions for review.*—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 to the district court and serve copies on all adverse parties. See Section 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 concurrently with reference of the matter to the Department. The United States Attorney should promptly advise the Department and the Regional Counsel of adverse decisions and take the necessary steps, including the filing of a petition for review, to protect the Government's interest. The decision on petitioning for review is made by the Tax Division, and the United States Attorney's recommendation should be submitted as soon as possible, together with a transcript of the proceedings or a summary of the evidence and all pleadings. As to the time limit (30 days) and procedure for appeals from orders of the district court, see Title 6, Appeals.

5. *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. This authority has been delegated to the Chief Counsel of the Internal Revenue Service. Where such a plan has been accepted, the Department will give appropriate instructions to the United States Attorney with respect to filing notice of acceptance.

B. Receivership Proceedings.

Where receivers for the taxpayer are appointed in a state or federal court, it is the practice of the Internal Revenue Service to make deter-

minations 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).

Whenever a contest develops as to the merits or priority of the claim, the United States Attorney should notify the Department and the Regional Counsel prior to taking any action and furnish all relevant pleadings and information. In such proceedings in state courts the United States is generally required to abide by the procedural rules and time limits of the court, and, in referring such matters 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.

C. Probate Proceedings.

Where assessments have been made against the decedent in his lifetime, or are made under Section 6871(a), 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. The United States Attorney may be furnished with a copy of the proof of claim. 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 Chief Counsel 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.

Whenever a contest develops, or whenever it becomes necessary to compel the personal representative to act on a claim of the United

States, the United States Attorney should notify the Department and the Regional Counsel and furnish any papers or information which may be germane to the question raised. 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.

D. Insolvency Proceedings.

There are various forms of insolvency proceedings in state courts, the most frequent of which is an assignment for the benefit of creditors. Where proofs of claim are filed in such proceedings 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. Where a contest develops, as in the other proceedings, the United States Attorney should notify the Department and the Regional Counsel prior to taking any action and furnish all relevant pleadings and information.

E. Appeals in Bankruptcy, Receiverships, Probate and Insolvency Proceedings.

A petition for review of a decision of a referee in bankruptcy is to the district court as discussed above. The time limit on appeal to the Circuit Court of Appeals from an order of the district court in bankruptcy cases is 30 days rather than the usual 60 days where the United States is involved in a suit. The United States Attorney must assume responsibility for filing a timely notice of appeal and taking all steps necessary to perfect the right to appeal in such cases and in other receivership, probate and insolvency proceedings, pending authorization of appeal by the Solicitor General. If the adverse decision is rendered in a state court, the United States Attorney should advise the Department of the necessary steps to perfect an appeal and of the applicable time limits, and he should also advise the Department when he completes each step to perfect an appeal. For a further discussion, see the section on Appeals in General Litigation Section Cases, page 4:40, infra, and see Title 6, Appeals.

SUITS FOR REFUND OF TAXES PAID

THE REFUND TRIAL SECTIONS

The Refund Trial Sections of the Tax Division are responsible for defending all suits brought against the United States or one of its officers for refund of taxes alleged to have been improperly assessed and collected. Because of the technical nature of the issues involved and the nationwide distribution of the suits which are filed, however, the performance of this mission requires a close coordination between the Refund Trial Sections, the Internal Revenue Service and the United States Attorneys' offices. The duties performed by each and the procedures which have been adopted to implement these duties must, therefore, be stated and understood.

ORGANIZATION OF THE REFUND TRIAL SECTIONS

There are four separate Refund Trial Sections in the Tax Division as follows:

1. Refund Trial Section No. 1 (North). The states included in this section are:

Delaware	Minnesota	Massachusetts
Kentucky	New York	Connecticut
Illinois	Indiana	Virgin Islands
Maryland	Vermont	New Hampshire
Michigan	Maine	Rhode Island
Wisconsin	Ohio	Pennsylvania
Puerto Rico	Iowa	New Jersey

2. Refund Trial Section No. 2 (South). The states included in this section are:

Alabama	Florida	Mississippi
Arkansas	Georgia	New Mexico
Canal Zone	Oklahoma	North Carolina
Louisiana	Texas	South Carolina
Tennessee	Virginia	West Virginia
	District of Columbia	

3. Refund Trial Section No. 3 (West). The states included in this section are:

Alaska	Utah	California
Arizona	Guam	Washington
Colorado	Idaho	Wyoming
Missouri	Hawaii	Montana
Nebraska	Kansas	North Dakota
Oregon	Nevada	South Dakota

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4. Court of Claims Section.

The Court of Claims Section handles tax refund suits only in the Court of Claims. The United States Attorneys will have no direct responsibility over any of these cases. At times, however, United States Attorneys may be requested to provide assistance on some aspect of a Court of Claims case such as locating and/or interviewing some local witness.

A Chief and Assistant Chief are appointed to supervise the work of each of these four sections. An Assistant for Civil Trials and two special assistants are appointed to establish and coordinate litigating policies for all four sections. The Assistant for Civil Trials reports directly to the Assistant Attorney General for the Tax Division.

FORUMS AND REMEDIES AVAILABLE TO TAXPAYERS

Taxpayers have three alternative forums to invoke for a judicial determination of the amount of taxes which they may owe. They may challenge the validity of any tax assessment (1) by filing a timely petition in the Tax Court, or they may pay the amount of the tax in dispute and file a suit for refund against the United States (2) in the Court of Claims or (3) in a United States District Court.

COORDINATION BY THE TAX DIVISION WITH THE INTERNAL REVENUE SERVICE AND THE UNITED STATES ATTORNEYS

Before Trial

Immediately after a new case is received in the Tax Division, a copy of the complaint is sent to the Chief Counsel of the Internal Revenue Service requesting him to furnish the Department with the Service files and a statement of the litigating position of the Service. After receiving this notice and request, the Chief Counsel's office requisitions and assembles all relevant Service files, analyzes these files for a determination and application of current Service policies, and sends these files to the Tax Division with a letter setting forth a summary of the jurisdictional and operative facts, a statement of relevant Service policies, and a recommendation concerning the factual or legal defenses which might be raised.

After a copy of the complaint is sent to Chief Counsel and receipt of the complaint has been acknowleged, the Assistant for Civil Trials refers the case to the Chief of the cognizant Refund Trial Section. After examining the complaint to ascertain the nature of the issues involved and the geographical location, the Chief of the Refund Trial Section will assign the case to a Section Trial Attorney for preparation and trial. The first duty of the Trial Attorney upon assignment of a

new case is to prepare a timely answer or other responsive pleading for the United States Attorney to serve and file.

The Refund Trial Section is usually able to prepare and mail an answer or other responsive pleading to the United States Attorney no later than four days before the answer is due. Sometimes, however, the Service may not be able to furnish the Tax Division with the files on a given case within this time limit. When the available files are not complete enough to permit preparation of the responsive pleading, the Refund Trial Section is then responsible for communicating with the United States Attorney no later than four days before the answer is due, advising him why the responsive pleading has not been mailed, and asking him to request from the Court an extension of time. The United States Attorney should under no circumstances allow the time for filing of the answer to expire without an answer having been filed or an extension of time obtained from the court.

After a case is at issue, the Refund Trial Sections continue a close liaison with the Service. It is often necessary to arrange for supplemental field investigation; conduct valuation engineering or other necessary technical studies; make special actuarial, accounting, or tax computations; request recommendation on offers to settle pending cases; review current policy decisions and/or litigating positions of the Service as these new developments may apply to pending cases; and various other inter-departmental activities which may need to be initiated and coordinated in order to prepare many complicated tax cases for trial.

After Favorable Decisions

When a case is decided in favor of the Government, the Refund Trial Section holds the case in suspense until the time for taxpayer's appeal has expired or the United States Attorney advises that a notice of appeal has been filed. If taxpayer files a notice of appeal, the Refund Trial Section is responsible for reviewing the record of the case, reviewing taxpayer's designation of the record on appeal, and advising the United States Attorney what, if any, additional or counterdesignation of the record should be made. The case is then transferred from the Refund Trial Section to the Appellate Section of the Tax Division. The case is returned to the Refund Trial Section after the appeal has been decided and becomes final. If the decision of the trial court in favor of the Government is affirmed, the Refund Trial Section closes the Department files and returns the Service files to Chief Counsel. If the decision of the trial court is modified or the case is remanded, the Refund Trial Section will immediately communicate with the United States Attorney's Office and make appropriate arrangements for prompt compliance with the Court's order.

After Adverse or Partially Adverse Decisions

When the decision of the District Court is adverse or only partially favorable, the Refund Trial Section will have several additional duties. First, it will communicate with Chief Counsel's Office and arrange for a computation of the amount of judgment due under the Court's decision. Second, it will furnish Chief Counsel with a summary of the evidence presented at trial (or a copy of the transcript when ordered), copies of all exhibits (when practical and/or available), stipulations, pleadings, pretrial orders, briefs, etc., and request the recommendation of the Service as to whether an appeal should be taken. The Refund Trial Section then prepares its own recommendation on whether to appeal. The recommendation and files are then sent to the Appellate Section for further review and recommendation to the Solicitor General.

Until the Solicitor General decides whether an appeal should be prosecuted, the United States Attorney is responsible for protecting the Government's interest in the case by filing a timely notice of appeal and for obtaining any needed extensions for docketing the appeal.

If the Solicitor General decides that appeal will be authorized, the Refund Trial Section is responsible for advising the United States Attorney what portions of the record should be designated for appeal and such other specifications and/or assistance as may be necessary to file and docket a timely appeal under the rules of the particular Court of Appeals. If the Solicitor General decides that an appeal will not be prosecuted, the Division advises the United States Attorney immediately of this decision. The case is then transferred to the Litigation Control Unit of the Tax Division for processing and prompt payment of the judgment, as set forth in pages 4:77 *et seq.* of this Title.

Responsibilities of the United States Attorneys

General.—The relationship between the Refund Trial Sections and the United States Attorney's office is a very close and cooperative one. The United States Attorney's office furnishes the Refund Trial Section with copies of all pleadings and correspondence received; notifies it of all scheduled court appearances; and advises it of any other information formally or informally received which may have a bearing on a just disposition of the case. The Refund Trial Section, on the other hand, prepares all pleadings, motions, briefs, findings, etc. for the United States Attorney to serve and file; keeps the United States Attorneys advised of all material developments in the preparation and/or settlement of the case; and communicates with the United States Attorney for such special assistance as may be reasonable and necessary as particular problems may arise.

While the continued effectiveness of this close relationship must be based upon the mutual respect and courteous cooperation of the people involved, the procedures which have been adopted to coordinate the preparation and trial of tax refund suits may be summarized here as follows:

On receipt of complaint.—The United States Attorney is responsible for sending a copy of all complaints filed against the United States or one of its officers immediately to (1) the Tax Division and (2) the local District Director of Internal Revenue.

The letter accompanying the copy of the complaint sent to the Department should state the date when the complaint was served and include any suggestions the United States Attorney may have regarding any defense of the case which may be apparent from an examination of the complaint and/or any information the United States Attorney may have concerning the case, the taxpayer, the Court, state law, etc., which he believes would be helpful to the Department in preparing the case for trial or exploring possible settlement.

A copy of the complaint is sent to the District Director (with a preceding telephone call when necessary and/or convenient) so the Service may immediately begin to assemble all files which will be needed to prepare responsive pleadings and prepare the case for trial.

When extra copies of the complaint are available, or being made, three copies of the complaint should be sent to the Department. One copy of the complaint is needed for the Department file; a second for Chief Counsel; and the third for the Refund Trial Attorney.

Filing of answer.—As in other cases filed against the United States or one of its officers, answers in refund cases must be filed "within 60 days after the service upon the United States Attorney". (Rule 12(a) Federal Rules of Civil Procedure.)

The United States Attorney is responsible for (1) keeping a record of the dates for filing answers in all refund suits; (2) in the absence of advice, telephoning the Refund Trial Section if reponsive pleadings are not received when due; (3) seeing that all answers and/or responsive pleadings received from the Trial Section conform with local court rules; (4) advising the Refund Trial Section of any suggested changes; (5) filing with the court and serving opposing counsel with answers and/or responsive pleadings received from the Refund Trial Section and (6) securing extensions for filing answers whenever necessary to assure that the interest of the Government will be protected.

While it is the responsibility of the Refund Trial Sections to prepare and mail proper pleadings to the United States Attorneys no later than four days before such pleadings are due to be filed—or

advise the United States Attorney at that time why this cannot be done in a given case—it is the responsibility of the United States Attorney to secure extensions of time for filing answers and other required pleadings whenever necessary to protect the Government's interest, or, when this is not possible, to advise the Refund Trial Section immediately.

Trial preparation.—The Refund Trial Sections are responsible for preparing all refund suits for trial and/or negotiating all settlements. However, the United States Attorney is counsel of record for all refund suits filed in the Federal District Courts, and all pleadings, notices, motions, etc., filed will be served on the United States Attorney rather than the Refund Trial Section. For this reason it is very important that the United States Attorney immediately send copies of any pleadings, motions, notices, correspondence, etc., which may be received.

Soon after the issue is joined, the Refund Trial Section will begin to prepare the case for trial. Much of this work, necessarily, will be done by the trial attorney during various trips he must make to the field. Close cooperation of the United States Attorney's Office and the Refund Trial Attorneys before, during, and after these field trips is essential. The problems may be varied. Witnesses may have to be located and interviewed. Facilities and a court reporter for evidentiary or discovery depositions may be needed. Conferences with opposing counsel may have to be arranged. Occasional stenographic assistance may be needed.

The primary responsibility for making all arrangements necessary for preparing refund cases for trial, of course, must rest with the Refund Trial Attorney himself. But he will obviously be unable to make these arrangements or prepare his case effectively for trial without the close cooperation of the United States Attorney. The United States Attorney, on the other hand, has many pressing problems of his own to resolve. Burdensome or tardy requests for assistance, accordingly, will be held to a minmum.

Trial.—The Refund Trial Sections are responsible for the trial of all refund suits. Since the United States Attorney (or one of his assistants) has an intimate knowledge of the community, the court, the opposing counsel and the jury panels, however, material assistance may very often be given, particularly in jury cases or in court cases involving disputed issues of fact.

Depending upon the assistance which may be needed and the time the United States Attorney may have available for such assistance in a particular case, the help of the United States Attorney or one of his assistants may be requested. As with other problems and arrange-

ments which may arise in tax refund suits, however, it is recognized that such assistance may be arranged (or declined) not as a general rule but only as needed in particular cases, and then only as the United States Attorney or his assistant may have the time. At a minimum, however, the United States Attorney or one of his assistants should introduce all new Refund Trial attorneys to the court and, in all jury cases, assist in selection of the jury panel and sit with the Refund Trial attorney at the counsel table during trial.

From trial to decision.—The Refund Trial Sections are responsible for the timely preparation and mailing of all post trial motions, briefs, findings of fact and conclusion of law, judgments orders and such other legal research or order as the court may request. The Refund Trial Sections are also responsible for assigning a Refund Trial attorney to attend any scheduled post trial argument or conference.

When a transcript of the trial is necessary for preparing a post trial argument, the Refund Trial attorney may order such transcript. If a transcript is ordered, however, the trial attorney is instructed (1) to advise the court reporter to deliver the transcript along with his invoice to the United States Attorney's office, and (2) advise the United States Attorney that a transcript has been ordered which will be delivered to his office and (3) to request the United States Attorney to forward the transcript to the Tax Division and arrange to pay the court reporter.

Between trial and decision, the responsibilities of the United States Attorneys are to furnish the Refund Trial Sections with copies of all correspondence, motions, briefs, notices, etc., which may be received, and to file and serve such motions and briefs as may be prepared and mailed to him by the Refund Trial Sections.

Also, on occasion, illness or a conflict of court appearances, will require the Refund Trial Section to request an extension of time for the filing of a brief. As soon as this is known, it is the responsibility of the Refund Trial Section to communicate with the United States Attorney immediately, advising him of the nature of the problem which has arisen and asking the United States Attorney to request the court for additional time.

After decision.—The responsibility of the Refund Trial Sections during the period after decision and before appeal have been generally discussed on page 4:65 et seq., above. Reference should also be made to page 4:80, *infra*, which describes the steps to be taken by the United States Attorneys to insure proper entry of judgment in refund cases decided adversely, in whole or in part, to the Government.

If the decision is favorable, the Refund Trial Section holds the case in suspense until the United States Attorney either (1) advises the

Refund Trial Section that the time for appeal has expired without notice of appeal being filed or (2) advises the Refund Trial Section that a notice of appeal has been filed and furnishes it with a copy. After taxpayer files a notice of appeal, the United States Attorney is responsible for sending copies of all documents subsequently filed to the Refund Trial Sections and the Refund Trial Sections are responsible for advising the United States Attorney of any modification, counter-designation, or any other steps to be taken to preserve the Government's interest on appeal.

If the decision is adverse or only partially favorable, the Refund Trial Section is responsible for (1) securing a computation of the amount of judgment to be entered, (2) preparing opposition to proposed Findings of Fact, proposed Judgment Order, etc., (3) starting inter-agency and inter-departmental procedures necessary for the Solicitor General's review and decision as to whether an appeal should be taken, and (4) keeping the United States Attorney advised of the status of the case pending the Solicitor General's decision.

Other than furnishing the Department with all correspondence, notices, etc. which may be received or served after decision, the United States Attorney has three responsibilities respecting appeal: (1) to file a timely notice of appeal as directed or as may be necessary to protect the Government's interest in the case until the Solicitor General decides whether to prosecute the appeal; (2) to file a timely designation of record when and as advised by the Refund Trial Section; and (3) to see that the record is docketed with the Appellate Court by the due date.

Miscellaneous Problems and Arrangements

Newspaper reporters and publicity.—The United States Attorney is requested to furnish the Refund Trial Section with copies of all newspaper publicity and/or comment which, in his judgment, may merit the Department's attention.

Incurring expenses for expert witnesses, transcripts, and other costs of litigation.—The Refund Trial Attorneys are responsible for securing advance authorization for the incurrence of any expense and advising the United States Attorney immediately of any expense which has been authorized, or which has been incurred.

Pre-Trials and Special Tax Calendars

In litigation where the Government is defendant, it does not ordinarily take the initiative to press the case. In tax refund suits, however, the Government is concerned with keeping to a minimum both

its potential liability for interest, which runs at six percent on any recovery, as well as with the court congestion which arises from delay. The Tax Division has found it to be extremely wise, in refund suits, to initiate stipulations or exploration of the possibilities of settlement, to discourage continuances, to arrange special tax calendars and especially to resort to pre-trial proceedings under Civil Rule 16. By these procedures, refund suits can be greatly expedited to the overall benefit of both Government and taxpayers.

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.

Trial briefs.—In all cases triable either by court or jury, where trial briefs are required in advance under the rules of 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.

Telephoning the refund trial sections.—The United States Attorneys are encouraged to telephone the Refund Trial Sections concerning any questions or suggestions they may have.

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 signed by the taxpayer or his counsel of record, is definite and unambiguous, sets forth clearly the proposed basis of compromise, and is submitted to the Department in duplicate. A letter from the United States Attorney setting forth the terms of taxpayer's offer will not suffice. 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 District Directors of Internal Revenue.

OFFERS SUBMITTED TO THE UNITED STATES ATTORNEY

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 shall be by certified treasurer's or cashier's check or money order, made payable to "Internal Revenue Service". The United States Attorney should hold the check or money order pending action on the offer. If the offer is accepted the check or money order should be sent to the appropriate District Director of Internal Revenue. If the offer is rejected the check or money order should be returned to the offerer.

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 most 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 some 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 many 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.

SETTLEMENT NEGOTIATIONS

In those cases where, after thorough study, the United States Attorney considers it appropriate to become involved in settlement negotiations, either alone or in conjunction with the trial attorney of the Tax Division, the United States Attorney should impress upon taxpayer's counsel (and also upon the court) that offers in compromise in tax cases are subject to final action by the Attorney General or certain officials of the Department in Washington to whom the Attorney General has specifically delegated such authority, and that the United States Attorney and the Tax Division trial attorney can do no more than make a recommendation.

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 CIVIL LIABILITY WHEN CRIMINAL CASE PENDING

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. No

consideration will be given to settlement of the civil liability until after sentence has been imposed in the criminal case, except where the court chooses to defer sentence in order to permit the defendant an opportunity to settle the civil liability.

DEPARTMENT'S APPROVAL REQUIRED

United States Attorneys should not enter into any agreement to compromise, or to make any other administrative disposition of, any case under the cognizance of the Tax Division without the specific approval of the Division.

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, or administrative settlement, 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 a refund in the appropriate amount. At this time the case is transferred within the Tax Division to the Litigation Control Unit for supervision of the issuance of the refund check or notice of credit and the dismissal of the suit upon the records of the Court. See pages 4:78 et seq., *infra*.

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 advised by the Department that the refund check or notice of credit will not be delivered until a stipulation of dismissal of the suit with prejudice has been delivered to the United States Attorney. The refund check, and/or notice of credit, is sent by the Service to the United States Attorney for delivery to the taxpayer or his counsel of record, *after* receipt by the United States Attorney of the stipulation of dismissal. Such stipulations in refund suits usually take the following form:

> It is hereby stipulated and agreed that the above-entitled case may be and is hereby dismissed with prejudice, the parties to bear their respective costs.

In general it is not the policy of the Department to permit the terms of a compromise to be set forth in the stipulation. When the dismissal order has been entered by the Court, the United States Attorney should advise the Department so that the case may be marked closed.

Upon acceptance of an offer in compromise of a suit by the Government to collect taxes, the United States Attorney should secure full payment of the amount offered and forward it to the appropriate District Director of Internal Revenue. The suit should not be dismissed until specific authority has been given by the Tax Division.

STIPULATED JUDGMENTS

It is contrary to the policy of the Department to stipulate for judgment in favor of the taxpayer 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 the taxpayer's costs in tax cases that are compromised or administratively settled. The United States Attorney should so advise taxpayer's counsel in the initial stages of settlement negotiations.

RELEASE OF RIGHTS OF REDEMPTION

Occasionally the Department is requested to release rights of redemption arising in favor of the United States under Section 2410, Title 28, U.S.C. Under terms specified therein authority to execute

such releases has been redelegated to the United States Attorneys as to real property, on which is located only one single-family residence, and all other real property having a fair market value not exceeding $10,000. Reference should be made to Departmental Memo No. 391, October 7, 1964, 29 Fed. Reg. 15,756 (28 C.F.R. Part O, Subpart W, App.). There is a prescribed form of "Application For Release Of Right Of Redemption In Respect Of Federal Tax Liens", copies of which can be requisitioned in the usual manner. On the back of the application form is detailed information as to the procedure to be followed.

In all instances not covered by the redelegation order, applications for release of rights of redemption should be handled in a manner similar to compromises and administrative settlements, *supra*. The amount offered should be equal to the estimated value of the right of redemption of the United States, but in no event should the consideration offered be less than $50 except in the case of applications by agencies of the United States Government.

POST-LITIGATION ACTIONS

DUTIES OF LITIGATION CONTROL UNIT

The Litigation Control Unit was established within the Division in 1957 as an additional aid to the solution of problems posed by the Division's steadily increasing work load and as a further effort to execute the Department's program for relief of court congestion and delay. The Unit assists the Section Chiefs in reviewing continuously the status of work in all Sections of the Division in an attempt to insure that the cases are expeditiously brought to issue, trial and conclusion and are properly closed in the shortest feasible time.

While cases are in their litigating stages, the Litigation Control Unit does not deal directly with the United States Attorneys' Offices. However, when the litigating phases are concluded, whether by compromise or final judgment in favor of or against the United States, the Litigation Control Unit generally assumes supervision of further processing of the case to insure payment of the amount due under the compromise or judgment and prompt closing of the case upon the records of the Courts and the Department.

SUITS FOR REFUND

Compromises and Administrative Refunds

When a letter is sent to taxpayer's counsel notifying him that the Department has approved a compromise or administrative settlement,

the case is transferred from the litigating section which formerly exercised supervision to the Litigation Control Unit. This Unit then performs all follow-up activity to see that the check or credit is issued and resolves any disputes which may arise as to the proper disposition of the case. In most instances, these disputes involve the computation of the amount refundable. Prior to the issuance of the refund check, or credit, it is the general practice of the Internal Revenue Service to send the Department a formal computation of the amount proposed to be refunded or credited. This computation is then forwarded by LCU to the United States Attorney for transmittal to taxpayer's counsel in accordance with the instructions contained in United States Attorneys' Bulletin Item, Vol. 15, No. 2. The taxpayer's counsel should be requested to review the accuracy of the computation. If the computation is not agreeable to the taxpayer, he should be instructed to bring this matter to the attention of the District Director, who can generally solve those problems which are purely a matter of mathematical computation. This refund procedure should be followed even if the computation was prepared in the National Office of the Internal Revenue Service. If the nature of the dispute indicates there is a substantive difference of opinion as to the terms of the compromise, the District Director will notify the National Office and the United States Attorney should promptly notify the Tax Division. In any event, the earlier such potential conflicts are spotted, the greater the chance of resolving them before the issuance of a refund check or credit. Refund checks in District Court cases are made payable to the taxpayer and forwarded to the United States Attorney for delivery to taxpayer's counsel of record. A Notice of Adjustment, Form 1331–B, will accompany the check and should be delivered to taxpayer's counsel with the check. If the refund is credited to other liabilities of the taxpayer, of course, there will be no check, but the Notice of Adjustment effecting the credit will be sent to the United States Attorney for delivery to taxpayer's counsel.

The letter notifying the United States Attorney of the acceptance of the offer or of the authorization of an administrative settlement, will request the United States Attorney to obtain from taxpayer's counsel a stipulation for dismissal, to be held by the United States Attorney until delivery of the refund check or Notice of Credit whereupon the stipulation can be filed with the court. In some cases the United States Attorney will receive a refund check or notice of credit and the taxpayer's counsel will not have furnished him with a stipulation for dismissal. The United States Attorney should notify the taxpayer's counsel of the receipt of the check or notice of credit, and again request that he be furnished with a stipulation of dismissal. If taxpayer's

counsel raises the objection that the amount of the check is insufficient, the United States Attorney should make an unconditional tender of the refund check by registered mail, receipt requested, in those cases where it is clear that the objection of the taxpayer's counsel is mathematical only. The covering letter should specify, with particularity, that (1) the check is being tendered unconditionally and (2) acceptance of the refund check will not prejudice the taxpayer's right to a further refund, if such be determined to be due the taxpayer. Section 6611(b) I.R.C. 1954. If taxpayer's counsel persists in his refusal to furnish the appropriate documents, please advise the Tax Division immediately and we will instruct you as to the filing of an appropriate motion to dismiss or motion to enter satisfaction of judgment. The District Director usually sends a notice of adjustment with the check, but the check should be tendered whether or not the notice of adjustment (Form 1331–B) has been received.

If, however, in settlement cases, the objections raised indicate that there may not have been a meeting of the minds between the Government and the taxpayer as to the terms of the settlement, or, in judgment cases, the objections appear to be well-founded, then the United States Attorney should promptly notify the Tax Division and should hold the check pending further instructions. If the United States Attorney is in doubt as to whether the dispute signifies a lack of mutual agreement, he should resolve this doubt in favor of requesting advice of the Tax Division.

Where a dispute has arisen with respect to the statutory interest computation, the check again should be unconditionally tendered in the manner above indicated and counsel advised to take this matter up directly with the District Director. For your information, the computation of the refundable amount made by the National Office of the Internal Revenue Service covers only the principal amount of the overpayment. All statutory interest computations are made by the District Director concerned. See United States Attorneys' Bulletin Item, Vol. 14, No. 20.

Judgments Against the United States

It is the Department's policy to expedite payment of adverse judgments. This is based not only on the idea of keeping the Government's liability for interest to a minimum, but also to insure expeditious receipt by taxpayers of their refund checks or credits.

To implement this policy, it is the responsibility of the Litigation Control Unit to obtain all papers necessary to support the issuance of the refund check and furnish them to the Internal Revenue Service.

The United States Attorney should supervise the entry of judg-

ments, both as to form and amount. Amendments of judgments which contain errors is time consuming and a source of embarrassment to the Government. The amount of the judgment should be supported by a recomputation of the Internal Revenue Service, which the Division trial attorney should obtain and forward to the United States Attorney. The form of judgment should follow the example given in the United States Attorneys' Bulletin, Vol. 6, No. 10, p. 285.

Once a proper judgment is entered, the United States Attorney must furnish the Division immediately the following papers, so that processing of the payment will not be delayed:

(1) Three copies of the judgment (one certified).

(2) When the suit is against the District Director, three copies of the certificate of probable cause (if it is not included in the judgment) (one certified). The certificate of probable cause need be no more elaborate than "the court hereby certifies that, in performing his official duties involved herein, the defendant had probable cause". This statement can be included in the judgment, or may be filed as a separate pleading with appropriate captions and signatures.

(3) Three copies of the mandate of the Court of Appeals where judgment reverses the court below (one certified). This document is only required if reference to the mandate is not included in the judgment.

(4) Three copies of the cost bill itemizing the costs allowed by the court, Form A.O. 133 (one certified).

By arrangement with the Administrative Office of the United States Courts, the Clerk should furnish the papers without charge.

When the check or credit is issued, the check and/or a notice of adjustment will be mailed to taxpayers in care of the appropriate United States Attorney for delivery to the taxpayers or their counsel of record. In exchange for the refund check and/or notice of adjustment, a satisfaction of judgment should be obtained and filed with the court. The case should then be closed on the records of the United States Attorney's office and the Tax Division advised immediately in order that the case may be closed on its records.

If taxpayer's counsel will not agree to furnish a satisfaction of judgment the United States Attorney should make unconditional tender of the check in all cases where objections raised indicate that the taxpayer is entitled to at least the amount of the check. If the taxpayer is entitled to more than this amount, then Section 6611(b) I.R.C. 1954, will protect the taxpayer's interests, while allowing him to negotiate the check. In those rare cases where the objection is that

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.

APPENDIX C

FORM OF JUDGMENT IN REFUND SUITS

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

RICHARD ROE, Plaintiff
v.
UNITED STATES OF AMERICA [or, JOHN DOE, DIRECTOR] Defendant

CIVIL ACTION No. 123
JUDGMENT

The Court having considered the evidence and the arguments of counsel, and having entered its findings of fact and conclusions of law herein, it is in conformity therewith:

ORDERED, that plaintiff have judgment against defendant for the principal amount of $_____,[1] with interest thereon at six percent according to law.[2]

[FURTHER, the Court hereby certifies that, in performing his official duties involved herein, the defendant had probable cause.][3]

DONE IN OPEN COURT at _____, _____, this ____ day of _____, 19__.[4]

_____
(United States District Judge)

Presented and approved by:

_____
(Attorney for Plaintiff)

Approved as to form by:

_____
(United States Attorney)

[1] The principal amount consists of tax *and* interest overpaid, as verified by the Internal Revenue Service. No amount should be agreed upon without its approval, unless admittedly due under the pleadings or a stipulation.

[2] Ordinarily, interest runs from the date of *overpayment* to a date within 30 days of the refund. 28 U.S.C. 2411(a) and 26 U.S.C. 6611(b)(2). Occasionally, other limitations apply.

[3] This certification is necessary in all refund suits where the named defendant is a Collector or Director of Internal Revenue, or a former Collector or Director. 28 U.S.C. 2006. Where the United States alone is defendant, this paragraph should be omitted.

[4] Costs against the Government should be provided only if the Court has expressly allowed them in its decision. They may not be awarded simply by taxation by the Clerk. Rule 54(d), Federal Rules of Civil Procedure, and 28 U.S.C. 2412(b).

the check is drawn in too large an amount, the United States Attorney should advise the Tax Division and the check should be retained pending instructions from the Division.

Interest

There are various types of interest and various interest restrictions peculiar to tax cases. Therefore, it is best that the judgment award only a principal amount (which will include any interest paid by the taxpayer on the taxes determined to have been overpaid) and provide for any additional interest thereon in general terms, as follows: "with interest thereon according to law".

Costs

On July 18, 1966, Public Law 89–507, 80 Stat. 306, was enacted. This law, which amends Section 2412 of Title 28 of the United States Code, was proposed by the Department of Justice and was intended to correct the disparity of treatment with respect to court costs in litigation involving the government and private parties. The following discussion is offered as an aid in resolving general questions relating to costs. Problems concerning the improper taxation of costs and not answerable thereunder should immediately be communicated to the Tax Division by telephone in order that timely objections, if warranted, can be made.

It should be initially pointed out that the new law applies only to actions *filed subsequent to July 18, 1966*. Hence, in all tax refund suits filed prior thereto, the former rules regarding costs which may be assessed against the United States still apply, i.e., costs allowed by the trial court and limited to those actually incurred for witnesses and fees paid to the clerk after joinder of issue.

Section 2412 of Title 28 of the United States Code, as amended, provides:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section

2414 and section 2517 of this title for the payment of judgments against the United States."

SEC. 2. Section 2520(d) of Title 28 of the United States Code is hereby repealed.

SEC. 3. These amendments shall apply only to judgments entered in actions filed subsequent to the date of enactment of this Act. These amendments shall not authorize the reopening or modification of judgments entered prior to the enactment of this Act.

The guiding principle, therefore, within the limits set out in the law will be that whoever is the prevailing party in litigation involving the government is entitled to the same treatment in awarding court costs.

If a plaintiff is successful in the cause of action asserted against the defendant, he is the prevailing party even though he was awarded less than his demand or even if the defendant was successful in his counterclaim (if the counterclaim was less than plaintiff's award) 20 Am. Jur. 2d, p. 15.

The awarding of such costs is authorized only in actions filed subsequent to July 18, 1966.

The costs to be awarded are for expenses incurred in litigation involving the Government in any court—State or Federal. The Act has no effect upon expenses or costs in administrative proceedings. Nor does it cover court costs of Government corporations which are treated as private parties. *RFC* v. *Menihan Corp.*, 312 U.S. 8.

Since the law has always been that the United States was subject to the assessment of costs only to the extent authorized by statute, no change in principle is effected by this new statute. There has merely been a substantial extension of the situations in which the United States may be subject to costs. Thus, Rule 54(d), FRCP, needs no change. We do, however, expect some change in the practice of the courts. A number of courts, particularly appellate courts, do not allow costs to the United States when it prevails. This exercise of discretion has been reported to us as stemming from the unfairness involved in the existing law which so seldom allows a prevailing party to get costs from the Government. We anticipate that, where this attitude now prevails, it will be changed by this new statute; where it is embodied in court rules, these rules will be changed. The Department has objected to the proposed Rule 39(b) of the Uniform Rules for Federal Appellate Procedure which prohibits costs in favor of the United States.

The kinds of costs that may be assessed under the statute are those enumerated in 28 U.S.C. 1920 with the exception of attorneys' fees. With this specific exception, whether particular costs involving these items may be allowed will be governed by existing law and the court

decisions. No change in this arrangement is made by this new statute. For example, expenses for transporting witnesses from outside the district or for more than 100 miles are apparently a matter within the discretion of the court. *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227. For discussions of particular costs and their allowance, see Moore's *Federal Practice*, Vol. 6, Para. 70 *et seq.;* Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, Para. 1195 *et seq.;* 20 *Am. Jur.* 2d 1; 20 *C.J.S.* 245; *Federal Tort Claims Practice Manual*, Para. 326.

The House Subcommittee deleted a specific exemption of expert witness fees from the bill on the ground that the exemption was unnecessary in view of the general rule that any compensation to an expert witness in excess of the statutory witness fee may not be taxed as costs. *Henkel* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 284 U.S. 444. This is the rule in Federal courts and in most of the States. In those States where this is *not* the rule, assessments for costs for expert witnesses should be scrutinized carefully for necessity for the witness and the reasonableness of the fee charged.

The costs that may be assessed against the Government are to include only actual expenses incurred by the prevailing party, and are intended only to reimburse that party for such expenses. Thus, the Government shall not pay what are described as constructive fees of the type forbidden in 28 U.S.C. 1824, nor shall it be subject to any penalties, for example, for frivoluous appeals under 28 U.S.C. 1912 or the penalties provided for in Rule 37(e), FRCP. The test whether even actual costs may be assessed is the standard one of whether or not the prevailing party's costs were necessary for resolution of the issues in the trial or proceeding and whether the expenses incurred, if necessary, were either reasonable in amount or as fixed by some schedule. It is not believed, for example, that the Government can insist that it should be assessed only for multilithing briefs and not for printing such documents. The appellate court rules usually permit alternative methods of reproduction and, until the rule is changed, it is not likely that we can insist that the cheapest method must be used or that the Government shall be liable for no more than the cost of the cheapest method of reproduction.

Absent a final judgment, the United States is not liable for any fees required as a pre-condition for the Government doing something in a Federal court, for example, filing fees, 28 U.S.C. 1914, or marshal fees for serving process, 28 U.S.C. 1921. It may be responsible for such costs, if at all, only after litigation in which it is *not* the prevailing party and then, of course, only for such fees as were actually paid by the prevailing party. The Act places discretion in the judge; only the judge *may* award costs; nobody is required to pay or collect costs fees

without such a judicial award. For actions in a state or local court, the United States Attorneys have been given general authority to pay necessary fees and expenses. U.S. Attorney's Manual, Title VIII, p. 144.2.

Special Problems

Some of the special problems that may arise under this statute are as follows:

Depositions.—A deposition necessarily obtained for use at trial (as opposed to one obtained merely as an aid in preparing for trial) comes within the phrase "stenographic transcript" as used in Section 1920 (2) of Title 28, *U.S.* v. *Kolesar* (CA Fla.) 313 F. 2d 835 (1963), *Cooke* v. *Universal Picture Co.*, 135 F. Supp. 480 (D.C. N.Y., 1955), *Hartig* v. *Schnoecknecht*, 11 FRD 166.

As a general rule in the Federal courts, when depositions are not introduced in evidence, the cost thereof is not taxable. *Cahn* v. *Monroe*, 29 Fed. 675. This rule is premised on the supposition that since it was not introduced at trial, it was not obtained necessarily for use at trial. However, the exception appears to be that when it can be shown that the deposition was in fact necessarily taken for use at trial but not used because the case was dismissed for lack of jurisdiction, or deponents appeared and testified—costs for such may be assessed. *Mashak* v. *Hackee*, 303 F. 2d 526; *Firemen's Fund Inc. Co.* v. *Standard Oil of California*, 339 F. 2d 148; *Modick* v. *Carvel Stores of New York, Inc.*, 209 F. Supp. 361; *Perlman* v. *Feldmann*, 116 F. Supp. 102; *Prashkerr* v. *Beech Aircraft Corp.*, 24 F.R.D. 305; *Wagner* v. *Aetna Insurance Co.*, 16, F.R.D. 528.

Thus whether a deposition will be an item of cost, will depend on whether it was obtained by counsel for purpose of discovery, i.e., to prepare for trial, or whether in fact it was necessarily obtained by him for use at trial. The element of necessity is essential and hence, where the deposition is not introduced at trial, it would seem that the burden is on the proponent to show that it was "necessarily obtained for use at trial."

Costs Under 28 U.S.C., Section 2410.—Under the Federal Tax Lien Act of 1966 (P.L. 89-719) Section 2410 cases have been expanded to include not only foreclosure and quiet title actions but also condemnation, partition and interpleader suits. Since 2410 cases involve more than two parties, the proper division of costs among these parties may, at times, cause concern. Accordingly, the following principles are offered in an attempt to obviate such concern. Although the following examples only consider foreclosure, the principles embodied therein apply equally to all action under 2410 with the exception of condemna-

tion actions which will be considered separately under *Condemnation; infra.*

Example 1.—In an action to foreclose a mortgage or other lien in which the United States has been named pursuant to 28 U.S.C. 2410, all other parties claiming and establishing a lien apart from the foreclosing plaintiff, are also prevailing parties and are entitled to reimbursment for their court costs. See Mortgages, 59 C.J.S., page 1583.

If upon judicial sale sufficient proceeds are realized to satisfy all claimants, including the court costs of all "prevailing" parties, no problem of costs arises.

However, if insuffcient proceeds are realized upon judicial sale and a deficiency exists as to any or all claimants, costs may be included in the deficiency judgment awarded to them. In order of priority each claimant would be entitled to recover his costs, principal, and interest before the next priority claimant receives any money.

Example 2.—In a 2410 proceeding in which the United States places in issue the priority of another claimant's lien and loses, the other party whose priority was unsuccessfully contested may be awarded costs against the United States necessarily incurred in connection with this separate issue. However, the United States is considered a "prevailing" party in the foreclosure action to the extent it establishes a valid lien (albeit asserting the incorrect priority). 59 C.J.S., page 1541.

Condemnation Actions.—No costs should be assessed in condemnation actions in favor of either side. Rule 71A(1), FRCP, states the correct position on this issue.

Even though the United States is the prevailing party in almost every such proceeding, costs cannot be assessed against the landowner because the payment of such costs would reduce the just compensation being paid for the taking.

In the rare situation, such as in *Maiatico* v. *United States*, 302 F. 2d 880 (C.A.D.C.), when the Government's right to take is successfully disputed by the landowner, no costs should be assessed against the Government because of the equality of treatment contemplated by the new enactment.

Your attention is directed to the requirement in Rule 54(d) of the Federal Rules of Civil Procedure that exception to the improper taxation of costs by the clerk against the United States must be taken by your filing a motion for review by the court within five days of the date the costs are taxed by the clerk. In some instances, cost bills are being forwarded to the Division by the United States Attorneys' offices for processing and payment without the United States Attorney's office having taken exception to the improper costs taxed therein. Usually by the time cost bills are received in the Division and reviewed,

it is too late to request your offices to move for review by the court, the time for filing such a motion having expired. It is requested, therefore, that this matter be given your special attention so that in the future the payment of improper costs may be avoided.

COLLECTION MATTERS

General

Primary responsibility for collection of a judgment in favor of the government in a tax case, as in any other case, rests with the office of the United States Attorney.

However, certain aspects of the collection procedure for judgments in tax cases may differ from the procedures for collecting judgments in cases referred to the United States Attorneys from agencies other than the Internal Revenue Service. These differences should be kept in mind during the course of collection procedures in tax judgments to insure maximum efficiency and results.

Cooperation With the District Directors' Offices

A major factor which should be kept in mind is the unique resources for assisting in the collection of tax indebtedness possessed by the Internal Revenue Service—resources not generally available to other government agencies. For example, the local office of the District Director of Internal Revenue has personnel trained in the collection of tax indebtednesses, and also has continuing access to financial data contained in subsequent tax returns of judgment debtors.

The collection resources possessed by the District Directors' offices also accounts for some differences in the types of tax cases which will be referred to the United States Attorney in the first place. Generally, tax cases are not referred to the United States Attorney until after extensive efforts have been made to collect the indebtedness administratively. For example, the Internal Revenue Service has the authority to proceed by administrative levy against specific property owned by a delinquent taxpayer. For these same reasons, tax collection suits will not generally be brought for minor sums. Therefore, when a judgment is obtained in a tax case, and an execution is returned unsatisfied, an F.B.I. asset check is usually in order because less expensive efforts at locating assets will usually have been attempted without success before the suit is brought.

Once the United States Attorney's office has completed the initial collection efforts described below, the existence of the unique collection resources of the District Directors' office have also dictated a different

policy with respect to further collection procedures in many such cases. In 1957 the Internal Revenue Service and the Tax Division agreed that further follow-up in most routine cases where initial collection efforts of the United States Attorneys' office have been exhausted could best be performed by the local District Director's office. Therefore, instructions were issued by the Internal Revenue Service to local District Directors advising them to make periodic investigations to attempt to locate assets in cases which are returned to the Internal Revenue Service under circumstances set out below.

Initial Steps to Collect Judgments

When money judgments are entered in favor of the Government, either in counterclaims in refund suits or in suits under the supervision of the General Litigation Section, such cases may be transferred to the Litigation Control Unit of the Tax Division for supervision of collection activity. In some cases where money judgments are entered in favor of the Government, the Section Chief may decide that it is more appropriate to have the Section Attorney supervise collection activity. In any event the United States Attorney will be advised by the Division whenever responsibility for supervision of a case is transferred to the Litigation Control Unit.

The United States Attorneys' Offices should take the initiative in order to insure prompt collection of judgments entered in favor of the United States in tax cases. In Title III of this manual (Civil Division) pages 3:16–21, there is contained an extensive discussion of steps which can be taken to collect judgments and many helpful suggestions are given as to how to proceed when problems are encountered. In tax cases, the preliminary steps in the collection of judgments will be much the same. Demand for payments should be promptly made, the Government's judgment should be perfected as a lien by registering, recording, docketing or indexing it as required by state law (28 U.S.C. 1962), the debtor should be personally interviewed, and, where appropriate, interrogated orally or by written interrogatories (Rules 69(a). 26–37, and 45(d) F.R.C.P.).

Execution and Supplementary Proceedings After Judgment

Under Rule 69, F.R.C.P. 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 per-

mits 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, F.R.C.P.; Section 3800. See also *Schram* v. *Carlucci*, 41 F. Supp. 36 (E.D. Mich.).

If a writ of execution is returned unsatisfied, in whole or in part, an F.B.I. asset investigation should ordinarily be requested.

Execution Outside of State

A final judgment for the recovery of money or property entered in a district court may be registered in any other district by filing therein a certified copy of the judgment, and, when so registered, it has the same effect as a judgment in the district where registered and it may be enforced in the same manner. 28 U.S.C. 1963. In addition to this remedy, a writ of execution on a judgment obtained for the use of the United States in a district court may run to and be executed in any other state or in any territory or in the District of Columbia, but all such writs must be issued from and made returnable to the district court in which the judgment was obtained. 28 U.S.C. 2413. See *Toland* v. *Sprague*, 12 Pet. 300, 328; *Pierce* v. *United States*, 255 U.S. 398; 14 Op. A.G. 384.

Payments and Records

All payments on judgments should be forwarded to the District Director. See Sections 7406 and 6311, I.R.C. 1954. However, the Department must be kept advised of all payments so made and appropriate entries should be made on the records of the court and the Debtor Index and Payment Record, Form U.S.A. 117, maintained by the United States Attorney.

The United States Attorney should maintain his records on tax judgments in the same manner as he maintains records on other judgments in favor of the United States. That is, he will maintain such tax judgments in either an "active", "inactive", or "closed" status.

Transfer Of Cases To "Inactive" Or "Closed" Status

Judgments in tax cases which have not been fully collected must not be transferred on the records of the United States Attorneys' offices from an "active" status to any other status without the prior approval of the Tax Division.

The initial collection steps described above should be completed in all cases, except where the facts and circumstances clearly indicate that

they are not advisable. If assets are discovered, the United States Attorney should, of course, take the steps necessary to have these assets applied against the judgment. If further judicial proceedings, such as garnishment suits, suits against transferees, or proceedings against newly discovered property appear appropriate, these actions should not be undertaken without the prior approval of the Tax Division.

If the initial collection steps described above are completed without discovering assets which can be presently applied against the judgment, but assets are located which may become available in the future (such as in some of the situations described in Title III of this Manual (Civil Division), at pages 24.10, 24.11.), then the United States Attorney should request the Tax Division's permission to transfer the case to an "inactive" status. At this time the United States Attorney should outline to the Tax Division a proposed follow-up procedure appropriate to the particular situation. If the Tax Division gives permission to transfer the case to an inactive status, the District Director must be notified so that his office can also initiate periodic follow-up actions under established Internal Revenue Service procedures.

If, after completion of the initial collection steps described above, no assets are discovered which can presently be applied against the judgment and no definite prospects for future payments are disclosed, the United States Attorney should request Tax Division permission to close his file and return the case to the Internal Revenue Service, which will then make the periodic investigatons prescribed by their established procedures. Any unusual aspects of such cases which would indicate that the Department should retain primary responsibility for further collection efforts should be called to the attention of the Tax Division at this point.

It should be emphasized that returning such cases to the Internal Revenue Service does not involve a determination that they are uncollectible. This procedure was originally established in recognition of the superior follow-up capabilities possessed by the Internal Revenue Service, and contemplates that they will make the final decision as to when the further expense of follow-up action is not justified by the prospects of further collection. The United States Attorney should stand ready to provide the District Director with all reasonable assistance, including reactivation of the case in the event further proceedings by the United States Attorney's office appear warranted.

Requests to transfer cases to an inactive or closed status should be accompanied by a memorandum setting forth the results of the collection activity which has been completed and, if any of the routine initial collection steps have been omitted, the reasons therefor. The infor-

mation in this memorandum should be sufficiently detailed to provide an adequate basis for the Tax Division to determine the appropriate disposition of the case.

To assist the District Director's office in his further periodic investigations, he should be notified at the time the case is transferred to an inactive status or returned to the Internal Revenue Service of the steps which have been taken to collect the judgment, and of the results of any asset investigations which have been conducted.

Compromises

In compromising tax judgments, the United States Attorney must follow the procedure set out for the compromise of any tax case.* Settlements after judgment can only be approved on the basis of doubt as to collectibility and the offer should be accompanied by either a financial statement of the taxpayer (T.D. Form 433, available at the local office of I.R.S.) or an investigation report prepared by the I.R.S. A deferred payment arrangement under which the United States is to receive the full amount of the judgment is not considered a compromise so as to require the United States Attorney to initiate the procedures set out above with respect to compromises.

*An exception to the rule that all settlements must be approved by the Division are settlements which involve the release of the Government's rights of redemption in certain cases brought under 28 U.S.C. Section 2410. See Tax Division Memorandum No. 391.