IV. Collecting the Judgment

A. An Overview

Collection of a judgment should be pursued promptly, vigorously, uniformly, and fairly. The trial attorney should make every effort to collect as much of the judgment as is feasible within nine months after its entry.

The trial attorney's work can be summarized:

1. Ask the judgment debtor for payment and work with the debtor, if requested, to ascertain the viability of a payment plan or compromise on the basis of collectibility;

2. If payment is not made or arranged for, attempt to locate the judgment debtor's assets and sources of income;

3. Evaluate the priority and value of the Government's claim to those assets that are located and the feasibility of collecting future income;

4. Where worthwhile, liquidate assets and collect income and apply the proceeds to the judgment;

5. If the above steps are insufficient to satisfy the judgment and it is apparent that further collection is not feasible, transfer the judgment to the IRS or United States Attorneys as appropriate for collection and close the Tax Division file. [19]

Once a trial attorney determines that enforced collection will be necessary, the trial attorney should look to the IRS for assistance in locating assets and income and seizing them and

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[19] Tax Division procedures for transferring the judgment and closing the file are described on pp. 60-62, infra.

liquidating them. At your request, IRS Special Procedures [20] will assign a revenue officer to the collection matter (if one

This person is your nuts and bolts contact and can do much leg work, such as conducting an assets investigation, checking land records, preparing and serving IRS levies, and advising you of other local developments which bear on your collection efforts.

Similarly, you may be able to obtain substantial assistance from the United States Attorney's office. Indeed, after a judgment is entered, you should keep the United States Attorney's office advised of what is being done. [21] Most United States Attorneys' offices have Assistant United States Attorneys and paralegals who specialize in judgment collection. These people are a valuable source of information on matters of local law and custom.

Before assuming that enforced collection will be necessary, however, let us explore some means of obtaining a voluntary payment of the judgment.

B. Demand for Payment and Instituting Rule 69 Discovery

The first step in the collection process is simply to ask

[20] Special Procedures is a part of the IRS Collection Division located in major cities throughout the country. It is staffed by Collection Division revenue officers who are very knowledgeable about IRS collection procedures.

[21] In some districts, the United States Attorney's office may routinely open a file on a judgment obtained in that district by the Tax Division and may also initiate collection efforts even though the matter has not been referred to that office. When this occurs a letter in the form attached as Exhibit 11 should be sent to the United States Attorney to advise that the Tax Division will undertake collection activity.

the debtor to pay.[22] The first demand for payment of a judgment should be made by letter ten days after judgment has been entered in favor of the Government in the district court.[23] This is so regardless of whether the taxpayer intends to appeal, unless the taxpayer has successfully invoked the supersedeas bonding procedures and obtained a stay of collection.[24] A sample of a first demand letter is attached as Exhibit 13.[25]

If payment is not received within the 21-day period specified in the first demand letter, try to reach the attorney for the taxpayer by telephone. The second demand letter should be sent 30 days after the date of the first letter. See Exhibit 14.

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[22] If a taxpayer cannot be located and is believed to have left the United States, the trial attorney can request the Immigration and Naturalization Service to notify the Tax Division should the taxpayer return. A sample letter requesting a border check is attached as Exhibit 12.

[23] For ten days, the automatic stay on execution of a judgment is in effect. Fed. R. Civ. P. 62(a). See p. 16, supra.

[24] Likewise, if a taxpayer takes a case to the Tax Court, assessment (other than jeopardy assessment) is prohibited only until the Tax Court enters its decision. Once the Tax Court decision is entered, the IRS makes its assessment and will proceed to collect the deficiency unless the taxpayer files a bond pending appeal.

[25] Frequently in the course of obtaining the judgment you may ascertain that the taxpayer has no intention of paying anything towards any judgment that may be entered. If so, early service of Rule 69 interrogatories (seeking information as to financial condition, see discussion of Rule 69 discovery, pp. 22-27, infra) will eliminate wasted time and start the running of the taxpayer's 30-day period for answering much sooner. Thus, although not required at this point, you should consider sending Rule 69 interrogatories with the first demand letter or shortly after it is sent. Of course, if the debtor satisfies the judgment within the 21-day period as requested in the demand letter the interrogatories need not be answered.

The second demand letter should again ask for payment and should also, if it has not already been done, either request that the judgment debtor fill out a Tax Division, Department of Justice Form DJ-TD 433 (1996) (Statement of Financial Condition and Other Information) within 21 days or be accompanied by Rule 69 interrogatories and a document request seeking information as to financial condition. See Exhibit 15 for a copy of Tax Division Form DJ-TD 433 (1996) [26] and Exhibits 16 and 17 for sample Rule 69 interrogatories and a document request.

Rule 69 interrogatories can seek the same financial information as is sought by a Form DJ-TD 433 (1996). The only significant difference between a Form DJ-TD 433 (1996) and Rule 69 interrogatories, then, is that a debtor cannot be compelled to submit a Form DJ-TD 433 (1996) and has no enforceable deadline for completing the form. In contrast, answers to Rule 69 interrogatories (and document requests) are due 30 days after the interrogatories (and document requests) are served and can be compelled pursuant to Fed. R. Civ. P. 37 in the same manner that prejudgment discovery can be compelled. (See Exhibit 18 for a sample motion to compel responses to Rule 69 interrogatories and a document request.) On balance, then, Rule 69 interrogatories are preferable unless there is good reason to believe that a completed Form DJ-TD 433 (1996) will be promptly submitted.

Obviously, a necessary starting point both for evaluating collection potential and instituting collection activity is knowledge of the taxpayer's financial situation. A complete Form DJ-TD 433 (1996) or Rule 69 interrogatory answers may be the starting point for negotiating a compromise of the judgment on the basis of collectibility.

If the trial attorney has not previously obtained copies of the taxpayer's income tax returns, beginning with the year to which the liability relates and going forward to the present or for some shorter period, a request to the IRS for such returns should be made to the appropriate IRS Service Center no later

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[26] The Tax Division Form DJ-TD 433 (1996) should always be used, rather than IRS Form 433A or Form 433B. These are abbreviated versions of the former IRS Form 433, generally used by the IRS to evaluate a taxpayer's ability to pay immediately, or through installment payments. These abbreviated forms do not have sufficient detail, e.g., information concerning transfer of assets, to be useful for our purposes. Department of Justice Form OBD-500 should not be used because it is not as complete as a Tax Division form.

than the time the second demand letter is sent. At a minimum, the trial attorney should obtain copies of the taxpayer's five most recently filed returns.

The attached sample demand letters are most appropriate where the person writing the letter has had no previous discussion or contact with the taxpayer's representative or the taxpayer concerning collectibility. To the extent feasible, demand letters (and Rule 69 interrogatories) should be adapted and personalized to suit the particular case, in light of what the trial attorney knows about the case's collection potential.

Accordingly, if administrative collection is possible, remind the taxpayer of that in the letter. If the taxpayer owns a home which normally would be exempt from creditors' process, remind the taxpayer (although not in the first letter) that state exemption statutes do not bind the United States.[27] If there is a potential for recovering the 28 U.S.C. § 3011 ten-percent surcharge (discussed on pp. 50-51, infra), say so. The less your demand letters look like standard boilerplate, which may be safely ignored, the more effective your request for payment will be.

A fundamental aspect of judgment collection work is that you will destroy any credibility your requests for payment and financial information have unless they are immediately followed by action.

If the taxpayer does not respond to the second demand letter, and administrative collection is an option, request the IRS to commence collection efforts, including a financial investigation, and give them what pertinent information you can.

As soon as you get financial information, whether in the form of Rule 69 interrogatory answers, recent income tax returns, or a Form DJ-TD 433 (1996), promptly evaluate the information and take appropriate action to initiate collection of assets and/or income that is disclosed. If the amount of the judgment exceeds $50,000, you should request the IRS to verify the Rule 69 interrogatory answers or Form DJ-TD 433 (1996) unless you have determined from sources independent of the mere say-so of the taxpayer or the taxpayer's attorney that the financial information provided is substantially correct. If you have determined that IRS verification is unnecessary, you should prepare a memorandum to

[27] The IRS would not, of course, wish to foreclose the tax lien on a home unless there were no other assets available; however, that might, indeed, be the situation.

the file indicating how and why you came to this conclusion. In all other cases the attorney should request verification of the financial information by the IRS and should consider additional informal and formal discovery.

Be sure that any Rule 69 interrogatory answers or Form DJ-TD 433 (1996) that you obtain are made part of the Department of Justice (DJ) file. Often in the past, collection efforts have been hampered because Form DJ-TD 433 (1996), Rule 69 interrogatory answers, and other financial information have been lost or mislaid, particularly in situations where one or more trial attorneys have left the Department before collection efforts have been completed. The original should always go directly to the DJ file, with copies going to the trial attorney's personal file and to the IRS for verification.

If you request the IRS to verify Rule 69 interrogatory answers or a Form DJ-TD 433 (1996), follow up to make sure that the IRS is acting on the request and that the case has been assigned to a revenue officer and, if so, discuss the case with the revenue officer.

Even if the taxpayer has submitted Rule 69 interrogatory answers or a Form DJ-TD 433 (1996), you should proceed with informal or formal discovery to supplement and verify the information provided.

At any stage when assets and/or income are located, immediate efforts should be made to collect them by administrative or judicial action unless negotiations are being diligently pursued by the taxpayer or the taxpayer's counsel to arrange for payment of the judgment from particular assets or over time. Thus, if Rule 69 interrogatory answers reveal substantial assets, and you have forwarded the answers to the IRS for verification, you need not and should not await the verification before proceeding against those assets that have been disclosed. Similarly, you may proceed immediately with additional Rule 69 discovery, such as depositions and document requests.

C. More on Finding Taxpayers' Assets

Ingenuity and diligence are the trial attorney's and paralegal's chief tools in locating a judgment debtor's assets. Judgment debtors range from those who are able and will immediately pay the judgment to those who have designed their financial affairs so that if ever a Tax Division trial attorney sought to collect the

taxes owed, it would be impossible because all assets would be hidden. Needless to say, the latter type of judgment debtor (and many others) will not submit complete and accurate Rule 69 interrogatory answers or Form DJ-TD 433 (1996) and voluntarily disclose assets. Fortunately, there are sources of information about a debtor's assets which do not depend on the cooperation or honesty of the judgment debtor.

1. Tax Returns

Tax returns provide a good source of information concerning the taxpayer's financial situation. Income tax returns of the debtor should routinely be obtained from the IRS in any case where the liability is substantial (more than $25,000). For example, dividend income reported on a return indicates the ownership of stock; interest income indicates the ownership of bank accounts, bonds, or other debt obligations; and deductions for real estate taxes or mortgage interest indicate ownership of real estate. Returns filed over a period of time may also indicate the disappearance of assets and possible fraudulent transfers. For this reason, if copies of tax returns were not obtained at the pre-judgment stage (see pp. 7-10, supra), the paralegal should request the IRS to furnish copies of all federal income tax returns (or copies of tax returns) that were filed for the last five years. In some cases, it may be advisable to obtain copies of the income tax returns for all years beginning with the year to which the liability relates in order to look for a possible fraudulent conveyance. This request should be renewed annually, so that you will have the most current information. A sample letter to an IRS Service Center confirming an oral request for copies of returns is attached as Exhibit 1, and a list of Service Center contacts is attached as Exhibit 2.

Request copies of returns from the IRS as soon as possible. Individual income tax returns are destroyed periodically, and older corporate income tax returns are sometimes difficult to obtain. To speed the process, if the taxpayer seeks to discuss settlement ask the taxpayer for copies of any returns that are needed.

2. Additional Rule 69 Discovery

Rule 69, Fed. R. Civ. P., provides that a judgment creditor may obtain discovery from any person, including the judgment debtor, "in the manner provided in these rules" in aid of

collection of a judgment.[28] This means that a judgment creditor may use the full panoply of discovery as provided in Fed. R. Civ. P. 26 through 36 and may enforce a failure to comply with discovery in the manner provided in Rule 37. Moreover, nonparty witnesses may be subpoenaed to attend a deposition (and produce documents) pursuant to Rule 45.

The ability to conduct (and, if necessary, compel) discovery in aid of collection pursuant to Rule 69 is a key collection tool that is not available to the IRS when it is pursuing administrative collection efforts.[29] Accordingly, as soon as it is apparent that a judgment debtor does not intend to satisfy a judgment voluntarily, a trial attorney should begin to plan how to use the available discovery tools to locate income and assets. In most cases, interrogatories to the judgment debtor are the recommended first step. These can generally be prepared by a collection paralegal with relatively little assistance from the trial attorney.[30] Nevertheless, if the trial attorney knows or suspects that the debtor has certain assets or income, the Rule 69 interrogatories should be tailored to fit the circumstances of the case.

Frequently, Rule 69 interrogatories are not answered within the 30 days allowed by Rule 33 or are not answered at all. Accordingly, if the interrogatories are not answered within the allowed 30 days, the trial attorney, with the assistance of a collection paralegal, should promptly request answers and, if necessary, follow up with a motion to compel answers. It is very important to follow up promptly if the interrogatories are not timely answered, since ignoring a failure to answer sends a message to the debtor that the Government is not serious about collecting the debt. Again, a motion to compel answers can be prepared by a paralegal with relatively little assistance from the trial attorney. (See Exhibit 18 for a sample motion to compel responses to Rule 69 interrogatories and document request.)

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[28] See also 28 U.S.C. § 3015(a), which specifically authorizes postjudgment discovery as to the debtor's financial condition.

[29] The IRS can issue collection summonses pursuant to I.R.C. § 7602, but, as a practical matter, summonses are generally considerably less effective than discovery depositions.

[30] See Exhibits 16 and 17 for a suggested sample set of Rule 69 interrogatories and document request.

Most important, once the interrogatory answers are received, the paralegal and trial attorney should promptly review them and determine whether any income or assets are identified that might be a possible source of collection. In most cases, the answers should be forwarded to the IRS for verification, but there is no need to wait for the IRS's response before taking action based on information reported in the answers. Indeed, it is essential to act promptly when income or assets are discovered. The paralegal and trial attorney should also review the interrogatory answers with a view towards pursuing additional discovery, such as depositions and document requests.

As in pretrial discovery, depositions are one of the most effective postjudgment discovery tools. A Rule 69 deposition of the debtor (and possibly third parties) is advisable if:

(1) the amount of the judgment exceeds $50,000; or

(2) the trial attorney suspects that the debtor has the ability to satisfy the judgment; or

(3) the attorney suspects that assets or income have been or are being concealed or fraudulently transferred.

A document request should accompany the deposition notice. Among the documents you will usually want to seek are the debtor's bank statements, loan applications, documents evidencing consideration allegedly furnished for property transferred by the debtor, and documents indicating amounts held in IRAs, pension plans, mutual funds, and the like. In many cases depositions of (or document subpoenas issued to) the debtor's employer, bank(s), and possible transferees of assets are also advisable. [31]

3. Fraudulent Conveyances

The paralegal and trial attorney should be alert to look for assets which may have been fraudulently conveyed by the taxpayer or

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[31] When subpoenaing documents from a bank pertaining to the account of a person other than the judgment debtor, you must comply with the notice provisions of the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3412. The Act applies only to financial information about a customer who is an individual or a partnership of five or fewer individuals.

which are held in the name of a nominee. When the IRS requests institution of a suit to reduce an assessment to judgment, it will generally authorize whatever other litigation is then known to be necessary, such as a foreclosure of a lien on realty, or a suit to satisfy a fraudulent conveyance, or a nominee suit. Sometimes, however, even when the IRS has been vigorously pursuing collection, the IRS may overlook a fraudulent conveyance, or property held in the name of a nominee. In cases involving counterclaims, the IRS may never have investigated the possibility of a fraudulent conveyance, and it is the trial attorney's responsibility (assisted, of course, by the IRS) to determine whether any occurred.

For purposes of determining whether a debtor's transfer of an asset rendered him insolvent, [32] a liability accrues when it is incurred. For example, a liability for the trust fund recovery penalty with respect to employment taxes for the last quarter of 1996 accrues in the last quarter of 1996, rather than in some subsequent period or periods when the underlying employment tax assessment or the trust fund recovery assessment is made, or when the assessment is reduced to judgment. United States v. Edwards, 572 F. Supp. 1527 (D. Conn. 1983).

The federal fraudulent conveyance statute is based upon the Uniform Fraudulent Transfer Act, but it contains relatively short statutes of limitations, 28 U.S.C. § 3304, generally six years after the transfer (plus, for intent to defraud, two years after the transfer reasonably should have been discovered). These statutes of limitation will be troublesome in a tax context because the legislation does not include any suspension during periods in which a criminal investigation or litigation in the Tax Court is pending. Accordingly, a fraudulent conveyance case brought by the Tax Division will normally be based on state law, instead of the federal statute. While the federal legislation is the exclusive remedy for most Government claims, state remedies are still available in aid of collection of taxes, 28 U.S.C. § 3003(b)(1), and state statutes of limitation do not bind the United States. [33] A state law statute of limitations extinguishing a claim after a

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[32] Under most fraudulent conveyance statutes, the party seeking to establish the existence of a fraudulent conveyance must establish that the debtor was insolvent at the time of the conveyance or that the transfer in question rendered the debtor insolvent.

[33] See United States v. Bacon, 82 F.3d 822 (9th Cir. 1996); United States v. Fernon, 640 F.2d 609 (5th Cir. 1981).

certain period of time likewise is not binding on the United States. [34]

4. Use of Computerized Database Services to Locate Debtors' Assets

In recent years there has been tremendous growth in the availability of computerized databases containing public records information. These databases, which can search through millions of records in seconds, are powerful tools in locating judgment debtors and their income and assets. No judgment should be considered uncollectible until these tools have been used to try to uncover assets. Many computerized databases are currently available to the Tax Division. The library staff has an expert on these databases who can assist you both in ascertaining which services are best for your needs and in doing searches on the various databases.

The Treasury Department's Financial Crimes Enforcement Network (FinCen) in Northern Virginia, 703-905-3520, will, for no charge, do a computer search of numerous public records databases for information on a debtor's whereabouts and finances. A key advantage of FinCen is that the search includes currency transaction reports filed by banks (and others) on cash transactions exceeding $l0,000. The only disadvantage of using FinCen is that the search usually takes several weeks.

In addition, many United States Attorneys' offices have Financial Litigation Units (FLUs) that may have access to additional databases. It is a good idea to check with the local United States Attorney's office to see if it has tools that are not otherwise available to you. For example, many of the FLUs have access to the major credit reporting agencies, such as TRW, Trans Union, and Equifax. These can give you current addresses, employment information, and credit scoring, and can often help to locate banks with which a debtor does business.

Listed below are some of the sources of computerized information currently available in the Tax Division, either directly for use by attorneys and paralegals or through the library staff.

* The CD-Rom telephone number database in the Tax Division library has addresses and phone numbers

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[34] See United States v. Bantau, 907 F. Supp. 988 (N.D. Tex. 1995); Stoecklin v. United States, 858 F. Supp. 167 (M.D. Fla. 1994).

of millions of individuals and businesses, searchable by city, state, or region. The database is updated several times a year. Use of this system is free.

* LEXIS AND WESTLAW each have extensive databases of public records information that can be searched separately or in combination.

* The Dialog service provides access to Dun & Bradstreet reports, various databases with biographical information, and databases with information on corporate offices.

* The World Wide Web (WWW) offered through the Internet can provide a vast amount of information free of charge. For example the Securities and Exchange Commission's EDGAR (http://www.sec.gov) has SEC corporate filings such as 10K, 10Q, 13G, 13D, and other reports which offer valuable insight on publicly held corporations. Many other databases on the WWW which can locate people and corporations can be identified using Yahoo (http://akebono.stanford.edu/yahoo). Yahoo lists more than 25,000 WWW locations worldwide, and can be searched by keyword. The Tax Division library staff and the Division's administrative office can assist with searches on the WWW.

* The Antitrust Division Library and the Main Justice library have access to additional specialized business databases, including many on CD-ROM that can be used at no charge. Tax Division library staff can assist you in determining whether one of these services would be helpful to you.

D. Evaluating Collection Potential

Once the trial attorney finds assets, the next step is to ascertain whether they are available for collection. Some assets or income may be exempt from collection or subject to the prior claims of other creditors.

In evaluating collection potential you must take into account, among other things:

(1) the priority of the Government's underlying federal tax lien, and whether a notice of federal tax lien has been timely filed and remains perfected;

(2) the protection afforded by the judgment lien;

(3) the effect, if any, of state exemption statutes; and

(4) the extent to which the tax claims covered by the judgment will survive bankruptcy.

1. Priority: The Federal Tax Lien

In collecting a judgment for taxes, the trial attorney can rely upon either the judgment lien or the federal tax lien, or both.[35] Since the federal tax lien will usually pre-date the judgment lien, normally the United States will rely upon the federal tax lien.[36] Thus, the trial attorney must be familiar with when a federal tax lien arises and the filing requirements relative to federal tax liens.

The first step in the creation of a federal tax lien involves the making of an assessment. An assessment of a federal tax is made by recording the liability of the taxpayer in the office of the Secretary of the Treasury. I.R.C. § 6203. Pursuant to the Treasury Regulations, an assessment is made by an assessment officer signing the summary record of assessment. Treas. Reg. § 301.6203-1. Section 6303 of the I.R.C. provides that as soon as practicable, and within 60 days after the making of an assessment, notice of the assessment and demand for payment of the assessment must be given to the taxpayer.[37]

If the taxpayer neglects or refuses to pay the tax after demand, then, pursuant to I.R.C. §§ 6321 and 6322, a federal tax lien comes into existence and attaches to all property and rights

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[35] The federal tax lien and the judgment lien the Government obtains when a tax assessment is reduced to judgment are separate, independent liens. See note 18, supra.

[36] No federal tax lien is involved when the judgment is for an unassessed liability (e.g., for failure to honor a levy, for an erroneous refund, or for liability under I.R.C. § 3505). In such cases only the judgment lien can be relied on to establish lien priority.

[37] Failure to give notice and demand does not invalidate the assessment. See United States v. Berman 825 F.2d 1053 (6th Cir. 1987), on remand, 88-2 U.S. Tax Cas. (CCH) ¶ 9550 (S.D. Ohio 1988), judgment aff'd, 884 F. 2d 916 (6th Cir. 1989).

to property belonging to the taxpayer. The tax lien dates from the date of assessment, and continues until the tax liability has been satisfied or becomes unenforceable by reason of lapse of time. The federal tax lien attaches not only to all property or rights to property belonging to the taxpayer on the date the tax lien arose, but also attaches to all after-acquired property or rights to property. Glass City Bank v. United States, 326 U.S. 265 (1945).

State law determines the nature of the interest the taxpayer has in property, but once it has been determined that the taxpayer has an interest in property under state law, federal law determines the priority of competing liens asserted against the taxpayer's property. Aquilino v. United States, 363 U.S. 509 (1960).

Except as provided under I.R.C. § 6323, in order for a state-created lien to compete against a federal tax lien, the state-created lien must be "choate." A state-created lien is choate when the identity of the lienor, the property subject to the lien and the amount of the lien have all been established. United States v. New Britain, 347 U.S. 81 (1954). Once a state-created lien has become choate, then the priority between the state-created lien and the federal tax lien is determined by the principle that the first in time is the first in right. New Britain, 347 U.S. at 85.

With respect to certain interests listed in I.R.C. § 6323(a), the federal tax lien imposed by § 6321 is not valid until such time as a notice of federal tax lien has been filed. The interests are those of a purchaser, holder of a security interest, mechanic's lienor, and judgment lien creditor. Once a notice of federal tax lien has been filed, the priority of the listed interest with respect to the federal tax lien is determined by the same principle of "first in time is first in right." In deciding whether the federal tax lien is first in time, however, you look to the date the notice of federal tax lien was filed, not the date the federal tax lien arose under § 6322. [38]

The notice of federal tax lien is filed in the one office within the state (or the county or other governmental

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[38] I.R.C. § 6323(b) provides protection (known as super-priority) for certain interests even though a notice of federal tax lien was filed before those interests came into existence. Also, § 6323(c) sets forth special rules with respect to a commercial transaction financing agreement, a real property construction or improvement financing agreement, and an obligatory disbursement agreement.

subdivision) designated by the laws of that state where the property is situated. [39] I.R.C. § 6323(f)(1)(A). Real property is deemed to be situated at the place of its physical location. [40] I.R.C. § 6323(f)(2)(A). Personal property is deemed to be situated at the residence of the taxpayer at the time the notice of federal tax lien is filed. I.R.C. § 6323(f)(2)(B). The residence of a corporation or partnership is deemed to be the place at which their principal executive office is located. id. The residence of a taxpayer whose residence is outside of the United States is deemed to be the District of Columbia. id. If the state in which the property is situated fails to designate the one office required by § 6323(f)(1)(A), then the notice of federal tax lien must be filed in the office of the clerk for the United States District Court for the judicial district in which the property is located. I.R.C. § 6323(f)(1)(B).

In order for the notice of federal tax lien to remain effective, it must be refiled during the refiling period specified in I.R.C. § 6323(g)(3). [41] The first refiling period is the one-year period ending 30 days after the expiration of ten years after the date of the assessment of the tax. The second refiling period, as well as all other subsequent refiling periods, is the one-year period ending with the expiration of ten years after the close of the preceding required refiling period.

Thus, if a federal tax assessment is made on March 1, 1989, the first refiling period for any filed notice of federal tax lien with respect to that tax would be April 1, 1998 through March 31, 1999. The second refiling period would be from April 1, 2008, through March 31, 2009. A timely refiled notice of federal tax lien is effective as of the date the original notice of federal tax lien to which the refiled notice relates was effective. Treas. Reg. § 301.6323(g)-1(a)(2). If the notice of federal tax lien is filed after the required refiling period, then the notice

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[39] With respect to property situated in the District of Columbia, the notice of federal tax lien is to be filed with the Recorder of Deeds of the District of Columbia. § 6323(f)(1)(C).

[40] With respect to real property in certain states, not only must a notice of federal tax lien be filed to compete against the interests set forth in § 6323(a), but the fact of filing must be entered and recorded in an index. § 6323(f)(4).

[41] The place where the notice of federal tax lien must be refiled is set forth in § 6323(g)(2).

of federal tax lien will only be effective from the date of the subsequent refiling.

2. Priority: The Judgment Lien

As previously noted, with most tax judgments the underlying federal tax lien will give the Government a better priority position than will the judgment lien. Nevertheless, the trial attorney should ensure that the United States obtains a judgment lien on the taxpayer's real property by filing an abstract of judgment. (See p. 18, supra.) Creation of a judgment lien is especially important in those cases in which the underlying liability of the judgment debtor to the United States is not secured by a federal tax lien, e.g., liability under §§ 3505 and 6332(c) of the I.R.C. and erroneous refunds.

3. Effect, if any, of State Exemption Statutes

At the election of a debtor under 28 U.S.C. § 3014 Government claims generally will be subject to the various exemptions from creditor's process enacted in each state or to the federal exemptions specified in § 522(d) of the Bankruptcy Code.[42] However, with respect to federal taxes, the only exemptions generally available (outside of bankruptcy) are those provided under § 6334 of the I.R.C. This is particularly significant in jurisdictions which have a generous homestead provision. While property listed in § 6334 is exempt from levy, it is the Government's position that it is not exempt from the federal tax lien which is created at the time of assessment.

Some of our collection cases do not involve an assessed tax so that a tax lien does not exist and the IRS does not have the power to levy. Examples are suits to enforce levies, actions under I.R.C. § 3505 (relating to derivative liability for withholding taxes), actions to recover erroneous refunds, and tortious conversion of lien suits. In attempting to effect collection of judgments in such cases, the state exemption rules may apply pursuant to 28 U.S.C. § 3014. The state exemption provisions likewise will apply to the use of judgment enforcement procedures to collect costs, sanctions, and attorney's fees. An alternative course of action for avoiding the state exemption rules when collecting costs, sanctions, and attorney's fees is to request their assessment and collection by the IRS under I.R.C. § 6673(b).

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[42] References in this Manual to "state exemptions" should be understood as covering as well the § 522(d) exemptions when elected by the debtor.

Collection of these amounts by levy is not subject to state exemptions, but only to the I.R.C. § 6334 exemptions.

4. Extent of Survival of Tax Claims After Bankruptcy

Another important consideration is the possibility that the taxpayer may file a bankruptcy petition and the degree to which the tax claims will survive bankruptcy. A mere threat of bankruptcy should not cause the Tax Division to waive collection of amounts that would be discharged in bankruptcy. Counsel for taxpayers frequently threaten to file bankruptcy when attempting to negotiate a settlement of a tax debt. Nonetheless, the degree to which a tax claim would be satisfied or discharged in bankruptcy is a relevant consideration in evaluating a settlement proposal.

Whether certain taxes of an individual are dischargeable in a bankruptcy proceeding sometimes depends upon whether the proceeding is one under Chapter 7, 11, 12 or 13. Section 523(a) of the Bankruptcy Code provides exceptions to the normal discharge provisions with respect to an individual in a case under Chapter 7, 11 or 12. [43] Pursuant to § 523(a), a tax claim which is entitled to priority under § 507(a)(8) of the Bankruptcy Code will not be discharged in a proceeding under Chapter 7, 11 or 12. [44] Further, tax claims will not be discharged in an individual's case under Chapter 7, 11 or 12 if the claims relate to a tax debt with respect to which a return, if required, was not filed or was filed late and two years or less before the date of the filing of the bankruptcy petition. Section 523(a) also provides for the nondischarge of certain tax penalties.

A discharge granted under § 1328(a) of the Bankruptcy Code is different. A debtor who receives a discharge under § 1328(a) is discharged, with certain exceptions not applicable to this discussion, from all debts provided for by the plan or disallowed under § 502. Thus, 100% penalty liabilities have been held to be discharged in a Chapter 13 proceeding when the plan provided for payment of the liability, but, because the IRS's proof of claim had not been timely filed, the liability did not in fact have to be paid. See In re Tomlan, 102 B.R. 790 (E.D. Wash. 1989), aff'd per curiam, 907 F.2d 114 (9th Cir. 1990).

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[43] § 523(a) also applies to hardship discharges granted pursuant to the provisions of § 1328(b) of the Bankruptcy Code.

[44] If a tax is not dischargeable, then the interest associated with that tax claim is also not dischargeable. In re Larson, 862 F.2d 112 (7th Cir. 1988).

A corporation is not entitled to a discharge in a Chapter 7 proceeding. Bankruptcy Code § 727(a)(1). A corporation will also not be able to discharge its tax liabilities in a Chapter 11 proceeding if the plan provides for the liquidation of all or substantially all of the property of the estate and the corporation does not engage in business after consummation of the plan of reorganization. Bankruptcy Code § 1141(d)(3).[45] If a corporation files a Chapter 12 proceeding, Bankruptcy Code § 1228(a)(2) provides for the nondischarge of any debt of the kind specified in § 523(a).

E. Liquidating Assets

There are a number of different tools which can be used by the United States to liquidate assets. In many Tax Division cases, it will be most advantageous to collect the judgment through the "judicial sale" procedures, 28 U.S.C. § 2001, or by means of an IRS levy. The Federal Debt Collection Procedures Act of 1990, 28 U.S.C. §§ 3001 through 3308, provides other powerful tools for the enforcement of judgments--execution, garnishment, and installment payment orders.[46]

1. The IRS's Ability to Collect Administratively

A suit to reduce an assessment to judgment must be brought, or a counterclaim filed, prior to the expiration of the ten-year period provided under § 6502, I.R.C., or the extension of that period (by agreement or by operation of law).[47] During this period the IRS has the power to seize property by levy[48] and distraint.

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[45] This exception will also apply to individuals provided also that the debtor would have been denied a discharge under § 727(a) if the case were one under Chapter 7.

[46] The court can issue any other writs under 28 U.S.C. § 1651 to support these remedies.

[47] I.R.C. § 6503 suspends the running of the period of limitations on collection by levy and on commencement of suit, where, inter alia, assets of the taxpayer are in custody of a court, the taxpayer is continuously outside the United States for a period of six months, there is a wrongful seizure of property of a third party, a case is pending under the Bankruptcy Code, and other situations.

[48] While a levy must be served within the period prescribed in

(continued...)

I.R.C. §§ 6331-6344. If a collection suit is timely filed, the IRS power to levy is extended for as long as the suit is pending and for as long as any judgment resulting from the suit remains enforceable.

Thus, IRS levy procedures are available for collecting judgments in any case where the underlying liability has been assessed by the IRS. An IRS levy has a number of advantages over judgment execution procedures. First, a levy is a quick, efficient, and effective means of seizing property in order to satisfy a tax liability. Judgment execution procedures are somewhat more cumbersome, requiring more paperwork and the involvement of the court or the marshal. Second, some types of property can be reached with a levy, such as a taxpayer's interest in an IRA or qualified pension or profit-sharing plan, that might not be subject to judgment execution processes because of state exemption provisions. A levy can even be made on Social Security payments, although such levies are made only in abusive situations. Third, the property exempt from an IRS levy is very limited in comparison to property exempt from judgment execution procedures.

When property of the taxpayer is located and the trial attorney determines that an IRS levy is the best method of collection, the trial attorney should call either the District Counsel attorney, the revenue officer assigned to the case, or the local Special Procedures office to explain the situation and request a levy, and should follow up with a letter requesting the levy. If the request is made directly to a revenue officer or Special Procedures, District Counsel should always be kept informed and provided with copies of all correspondence.

2. Judicial Sales and Execution Sales

The purpose of an execution or judicial sale is to sell property to obtain money to satisfy a judgment. An execution sale pursuant to 28 U.S.C. § 3203 is available in all cases in which the United States obtains a money judgment. Judicial sales pursuant to 28 U.S.C. §§ 2001, 2002, and 2004 are available in those cases where the United States has a lien which may be foreclosed on the property or rights to property of the debtor.

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[48] (...continued)
I.R.C. § 6502, it "freezes" the corpus levied upon until a levy enforcement action is commenced. Such an action may be brought at any later date. See, e.g., United States v. Eiland, 223 F.2d 118, 121-22 (4th Cir. 1955); United States v. Weintraub, 613 F.2d 612 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980).

Typically, when the Government has a federal tax lien on property, a suit to foreclose the lien is brought pursuant to I.R.C. § 7403 and, once a judgment is entered in favor of the Government foreclosing the lien, a judicial sale of the property proceeds in accordance with 28 U.S.C. § 2001. The applicable notice procedures for a sale under § 2001 are specified in 28 U.S.C. § 2002.

In situations where we can choose between selling property at a judicial sale and at an execution sale, the preferred method is usually to use the judicial sale procedures because a better sales price is generally obtained for property sold at a judicial sale than at an execution sale. For either type of judicial sale it is often advisable to ask the IRS Collection Division to publicize the sale among known bidders so as to get as many bidders as possible to attend the sale.

a. Distinction Between Judicial Sales (28 U.S.C. §§ 2001, 2002, and 2004) and Execution Sales (28 U.S.C. § 3203)

A judicial sale is conducted under supervision of the court from entry of judgment until confirmation of sale. The judicial writ employed is called an Order of Sale. (A sample judgment and order of judicial sale is attached as Exhibit 19.) The degree of judicial supervision is the most significant difference between the judicial sale and execution sale procedures.

In a judicial sale, the judge enters an "Order of Sale" directing the sale of a specific piece of property with notice, at a specific time and place, under specified terms and conditions, such as the minimum permissible deposit. The trial attorney should also consider requesting the court to establish a minimum bid price with respect to the property being sold. The provisions of the order of sale generally mirror the provisions of the judgment providing for sale of the property. The terms and conditions of sale are discretionary with the court. The judge can authorize either a public or a private sale. The trial attorney should notify the IRS as soon as possible of the date of sale so that the IRS can arrange to be present if it wishes to bid at the sale. If the tax liens are superior, the IRS may want to make a bid for the property. This requires special authorization, which may take some time to obtain. Thus, it is essential to plan ahead. Judicial confirmation of the sale is required.

In contrast, the initial procedural step to sell property at an execution sale is for the clerk of court to issue a writ of execution to the marshal. The writ authorizes the marshal to

seize and sell the judgment debtor's property. The writ is not limited to a specific piece of property but covers all of the debtor's property. Without any involvement of the court, the marshal conducts an execution sale by following the procedures of 28 U.S.C. § 3203(g). An execution sale is by definition a public sale. The levy and sale by the marshal are ministerial acts, and do not come under judicial supervision except on motion of a party.

A district court has broad powers under I.R.C. § 7402(a) to issue orders to ensure the orderly sale of property. For example, a number of Division attorneys have obtained provisions in courts' orders of sale requiring the judgment debtor to:

* refrain from damaging the property or otherwise interfering with the sale,

* refrain from filing deeds, liens or other documents that might tend to interfere with the sale, and

* vacate the property either shortly before or after the sale.

It is a good idea to request such restrictions in all orders of sale. They are particularly useful in cases involving tax protestors, who frequently attempt to hinder judicial sales. Attached as Exhibit 39 are sample property sale documents.

b. More on Judicial Sales Under 28 U.S.C. §§ 2001 and 2004

Section 2001(a), 28 U.S.C., provides the procedures for a public sale of real property, while § 2001(b) specifies the procedures for a private sale. Each method (public or private) has its own advantages or disadvantages, depending upon the circumstances. Section 2001(a) provides that a public sale is conducted at the courthouse of the county in which the greater part of the property is located or upon the premises of the property itself.

A private sale may be appropriate if a specific purchaser has been found who is willing and able to pay a good price for the property. Section 2001(b) provides notice, publication, and appraisal requirements, however, which must be satisfied before a private sale can be confirmed by the court. The expense and administrative burden of these procedures should be considered when deciding whether to proceed with a private sale. To avoid the burden and expense of these procedures, however, the parties can stipulate to a private sale waiving the notice, publication,

and appraisal requirements of § 2001(b). While not specifically authorized by statute, such a procedure is in essence a settlement of the action which is agreed to by all parties.

Section 2004 deals with the sale of personal property, providing that it shall be sold in the same manner as real property is sold under § 2001.

c. More on Execution Sales Under 28 U.S.C. § 3203

Section 3203, 28 U.S.C., sets forth procedures for judgment execution. The first step is filing an application with the court seeking a writ of execution.[49] Information specific to the case must be included in the writ, including the last known address of the debtor, the amount due as of the date the writ is issued, and the interest rate. In addition, the writ directs the United States marshal to satisfy the judgment by levying on and selling property in which the debtor has a substantial nonexempt interest, but not to exceed property reasonably equivalent in value to the aggregate amount of the judgment, interest, and costs.

The rules for levy and return of levy applicable to prejudgment attachments under 28 U.S.C. § 3102(c) also apply to levy of execution. A levy is made on real property by posting the writ and notice and on personal property by taking possession of the property or by attaching to it a copy of the writ and notice of levy. The marshal cannot enter a residence or other building unless authorized by the writ or other order of the court.

An execution lien is created at the time a levy is made on property levied under a writ of execution. For real estate, the execution lien relates back to the date of the judgment lien.

Until the execution sale, the debtor can obtain return of the property by satisfying the judgment, including interest and costs, or providing a bond.

Detailed procedures for conducting execution sales are specified in 28 U.S.C. § 3203(g). The usual form of sale is by

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[49] § 3202, 28 U.S.C., imposes several preconditions and restrictions on the judgment enforcement remedies available under the Act. At the time that an application is made for a writ of execution, the United States must prepare a form of notice to the taxpayer and submit the notice to the Clerk of Court for issuance. This precondition applies to garnishment and installment payment orders and is discussed on pp. 42-46, infra.

public auction. Notice of the sale must be given by publication for real estate and posting notice for personal property, as well as service of the sale notice. Detailed procedures for the sale and for postponement of the sale are also provided, and should carefully be followed.

Proceeds are distributed first to satisfy the debtor's exemption claim, and then to the costs of sale and the judgment.

3. The Federal Debt Collection Procedures Act

The Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3001 through 3308, is the Federal Government's primary tool for the collection of civil judgments. An understanding of the Act and its relationship to tax liens and levies, judicial sales, and state judgment execution procedures is essential to the effective collection of tax judgments.

Until the enactment of the Federal Debt Collection Procedures Act, all civil judgments in federal court, including judgments in favor of the United States, were collected pursuant to state judgment execution laws. Variations in these laws and in state exemption laws resulted in great disparities from jurisdiction to jurisdiction in the ability of the United States to collect debts.

The Act eliminated many of the procedural disparities by providing uniform prejudgment remedies, judgment execution procedures, and fraudulent transfer rules, for judgments entered in favor of the United States.[50] However, state limitations on collection from jointly owned property, such as tenancies by the entirety, and state exemption laws have not been preempted and will continue to apply to such judgments.

While the Act is generally the exclusive remedy for the collection of judgments in favor of the United States, it provides special treatment for collecting taxes. Pursuant to 28 U.S.C. § 3003(b), the remedies contained in the I.R.C. and state judgment collection remedies are still available for the collection of taxes, in addition to the procedures contained in the Act. Moreover, the Act does not affect either federal tax liens or the procedures relating to "judicial sales" although it does provide new federal provisions for "judgment execution sales." See discussion, pp. 36-39, supra.

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[50] The Act comprises Subtitle A (28 U.S.C. §§ 3001-3015), Definitions and General Provisions; Subtitle B (28 U.S.C. §§ 3101-3105), Prejudgment Remedies; Subtitle C (28 U.S.C. §§ 3201-3206), Postjudgment Remedies; and Subtitle D (28 U.S.C. §§ 3301-3308), Fraudulent Transfers.

Some of our suits do not involve assessed tax and, accordingly, the tax lien and levy procedures are not available to collect the judgments in those cases. Examples of such suits are failure to honor levy cases, actions to enforce § 3505 liability (relating to derivative liability for withholding taxes), erroneous refund suits, and tortious conversion of lien cases. In the absence of an I.R.C. remedy, such judgments must be collected under the procedures contained in the Federal Debt Collection Procedures Act (or under procedures provided by state law).

The policy of the Tax Division is that even when a notice of federal tax lien has been filed, the trial attorney should record the judgment in order to perfect a judgment lien as well. A judgment is recorded by filing a certified copy of the abstract of the judgment in the same manner as a tax lien. 28 U.S.C. § 3201. See Exhibit 10. The lien attaches only to real estate and the abstract should be recorded as a matter of routine in the jurisdiction where the taxpayer resides and must also be recorded in any jurisdiction where the taxpayer is known to own realty.

A judgment lien is valid for 20 years, and may be refiled with leave of court to make it effective for an additional 20 years. 28 U.S.C. § 3201(c).

The provisions of the Federal Debt Collection Procedures Act dealing with judgment enforcement, including execution, installment payment orders, and garnishment are discussed, infra.

4. Federal Debt Collection Procedures Act Remedies: Garnishment, Court-Ordered Installment Payments, and Notice Procedures

The Federal Debt Collection Procedures Act provides three remedies for the enforcement of judgments: execution, garnishment, and installment payment orders. The court can issue any other writs under 28 U.S.C. § 1651 to support these remedies.

a. Notice and Other Preconditions

Section 3202(b), 28 U.S.C., imposes several preconditions and restrictions on the judgment enforcement remedies available under the Act. At the time that an application is made for a writ of execution, a writ of garnishment, or an installment payment order, the United States is required to prepare a form of notice to the taxpayer and submit the notice to the clerk of court for issuance. A sample notice for a writ of execution or garnishment is attached as Exhibit 20. A sample notice and

motion for court-ordered installment payments is attached as Exhibit 21.

The notice advises the judgment debtor that property has been seized, identifies the debt owing to the United States, describes potentially applicable exemptions, explains the procedure and time for requesting a hearing, and gives notice of the intent to sell the property. Since state law exemptions differ from jurisdiction to jurisdiction, the trial attorney should obtain from the appropriate United States Attorney's office a copy of the notice used by that office. The rule for determining which state's exemption law is applicable is set forth in 28 U.S.C. § 3014(a)(2)(A), which provides that the applicable law is the law of the state in which the debtor's domicile was located for the 180 days immediately preceding the date on which the application is filed (or the state in which the domicile was located for a longer portion of such 180-day period than in any other state).

The notice, along with a copy of the motion, must be served on the judgment debtor and on anyone believed, after diligent inquiry, to have an interest in the property to which the writ or application relates.

The judgment debtor must request a hearing within 20 days of receiving the notice, and the property in question cannot be sold before the hearing. The hearing is supposed to be held within five days of the debtor's request. The debtor is only permitted to raise issues concerning: (1) exemption claims; (2) procedural defects relating to issuance of the enforcement remedy; and (3) for default judgments, the validity of the claim and good cause for setting the judgment aside.

b. Garnishment

Garnishment is a procedure for levying upon property of a debtor that is in the possession, custody, or control of a third party. To obtain a writ of garnishment, the United States must file an application that includes information about the amount due under the judgment and indicates a belief that the garnishee possesses property in which the debtor possesses a substantial nonexempt interest. A wage garnishment is limited to 25% of disposable income. In other words, 75% of disposable income is exempt. A garnishment writ has continuing effect.

Notice of the writ is given to both the garnishee and the debtor. The writ directs the garnishee to withhold the property and file an answer with the court. In addition, instructions are given to the garnishee about filing an answer and to the debtor

about filing objections to the garnishee's answer and for requesting a hearing.

The garnishee has ten days in which to answer. The answer must list the property of the debtor being held, its value, prior garnishments, and information about future indebtedness of the garnishee to the debtor. The debtor and the United States have 20 days in which to object to the garnishee's answer and to request a hearing. The court is suppose to hold the hearing within ten days.

If a timely request for a hearing is not made, the court will enter an order directing the garnishee as to the disposition of the debtor's nonexempt interest in the property. The United States must give both the debtor and the garnishee an annual accounting of the proceedings. Upon termination of the writ, the United States must give a cumulative written accounting to both the debtor and the garnishee.

In contrast to these procedures, an IRS levy requires a 30-day notice of intent to levy, but neither the taxpayer nor the person upon whom the levy is served have a right to a hearing. Nor does the I.R.C. contain formal requirements about accounting for proceeds. Another difference is that the formula for exempt wages under the I.R.C. is based on the standard deduction and exemption [51] rather than fixed at 25% of disposable income. Also, the remaining property exempt from levy under I.R.C. § 6334 is less generous than the exemption provisions under most state laws.

c. Court-Ordered Installment Payments

Court-ordered installment payments can be a very effective collection tool with a judgment debtor who has income but refuses to make payments towards a tax debt. Court-ordered installment payments are particularly effective against self-employed taxpayers such as lawyers, doctors, and accountants who, because they are self-employed, are not subject to wage levies or garnishment. In recent years the Tax Division has handled a

[51] The weekly exempt amount under the I.R.C. is the sum of the standard deduction and of the total amount of deductions for exemptions to which the taxpayer is entitled, divided by 52. Unless the taxpayer submits verification to the contrary, the IRS can assume that the taxpayer is married filing a separate return and has one exemption. Based on 1997 rates ($3,450 standard deduction for a married person filing separately and $2,650 deduction for an exemption), the amount exempt can be as little as $117 per week.

number of sizeable collection cases involving self-employed professionals who were able to avoid paying their income taxes as the taxes accrued because the professionals were self-employed, and thus not subject to wage withholding or wage levies. Administrative collection efforts against such taxpayers are often ineffectual. Thus, court-ordered installment payments are an effective tool that should not be overlooked.

Authority for court-ordered installment payments is provided by 28 U.S.C. § 3204, which states:

> Installment payment order
>
> (a) Authority to issue order.-- Subject to subsection (c), if it is shown that the judgment debtor--
>
> (1) is receiving or will receive substantial non-exempt disposable earnings from self employment that are not subject to garnishment; or
>
> (2) is diverting or concealing substantial earnings from any source, or property received in lieu of earnings;
>
> then upon motion of the United States and notice to the judgment debtor, the court may, if appropriate, order that the judgment debtor make specified installment payments to the United States. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration after a hearing, the income, resources, and reasonable requirements of the judgment debtor and the judgment debtor's dependents, any other payments to be made in satisfaction of judgments against the judgment debtor, and the amount due on the judgment in favor of the United States.
>
> (b) Modification of order.--On motion of the United States or the judgment debtor, and upon a showing that the judgment debtor's financial circumstances have changed or that assets not previously disclosed by the judgment debtor have been discovered, the court may modify the amount of payments, alter their frequency, or require full payment.

> (c) Limitation.--(1) An order may not be issued under subsection (a), and if so issued shall have no force or effect, against a judgment debtor with respect to whom there is in effect a writ of garnishment of earnings issued under this chapter and based on the same debt.
>
> (2) An order may not be issued under subsection (a) with respect to any earnings of the debtor except nonexempt disposable earnings.

To obtain an installment payment order under § 3204 the trial attorney should file a motion with the court demonstrating that the judgment debtor has regular income but has failed to satisfy the judgment or make arrangements for a voluntary payoff schedule. The motion should request payments of a specified amount periodically (generally weekly or monthly). The declaration(s) and memorandum in support of the motion should establish the amount of the debtor's income and should explain why the amount of the periodic payment you are requesting is appropriate, both in relation to the size of the debtor's income and the size of the debt to be collected. In many cases you will need to conduct Rule 69 discovery (interrogatories, document requests, and depositions) in order to gather sufficient information about the debtor's income to obtain the installment payment order.

A sample motion for installment payment order (with sample declaration, memorandum of law, proposed order, and 28 U.S.C. § 3202(b) notice) is attached as Exhibit 21. The motion should be filed with the court that entered the judgment. If the debtor has moved to another judicial district the debtor may seek to have proceedings on the motion transferred to that district pursuant to 28 U.S.C. § 3004(b)(2).

Note that § 3204(a)(2) provides for the issuance of an installment order when the judgment debtor "is diverting or concealing substantial earnings from any source, or property received in lieu of earnings." This can be useful in cases where the judgment debtor is not self-employed, but controls and manipulates corporate or family business assets to pay his or her expenses while nominally earning little or no salary.

If an installment payment order is sought pursuant to § 3204, be sure to request the ten percent surcharge authorized by 28 U.S.C. § 3011. See discussion of § 3011, infra, pp. 49-50.

If a judgment debtor fails to comply with a court-ordered installment payment order, the judgment creditor's remedy is to obtain contempt sanctions from the court. Generally, a court can

impose a fine or imprisonment against a judgment debtor for civil contempt. These sanctions are not punitive, but are designed to encourage the contemnor to comply with the court's order. Fines will generally be of little use against debtors who already owe the Government substantial tax liabilities.

Some states (e.g., Michigan and New York) have their own statutes authorizing court-ordered installment payments. In most situations you will want to rely on 28 U.S.C. § 3204, because of its uniform applicability in all states. You should, however, check the law of the state where you are seeking the order to see if you might be able to obtain better results using the state's installment payment order statute.

5. Collecting Specific Assets

a. IRAs And Other Retirement Funds

Retirement accounts and funds such as Individual Retirement Accounts and § 401(k) plan funds are frequently the largest asset and the only liquid asset in the hands of a judgment debtor. Such funds may not be subject to judicial garnishment or execution, yet the IRS can use its broad levy power under I.R.C. § 6331 to attach the funds. Pursuant to I.R.C. § 6334(c), notwithstanding any other law of the United States, no property or rights to property is exempt from an IRS levy other than the property specifically made exempt by § 6334(a). See 2 Administration, CCH Internal Revenue Manual, Part V, Collection Activity, ¶¶ 536(14).22, 536(14).5, which set forth internal IRS guidelines as to when and how the IRS should levy on retirement funds. Internal Revenue Manual ¶ 536(14).5(1) states:

> Qualified pension, profitsharing, stock bonus, IRA plans and retirement plans benefiting selfemployed individuals, or interest earned on these plans, are not exempt from levy. However, because the plans are established for the taxpayer's future welfare, they will be levied upon judiciously.

While the IRS Manual does not define the term "judiciously" it does state, in paragraph 536(14).22:

> Retirement plan benefits (income) receivable from a qualified pension fund or account, generally will not be levied upon if the annual benefits are $6000 or less ($500 or less per month).

Accordingly, if your investigation discloses substantial assets

or income in a retirement or pension fund, you should consider asking the IRS to levy on the funds (or the income from the funds) in accordance with the pertinent provisions of the IRS Manual.

In Brunwasser v. Davis, 63 A.F.T.R.2d (P-H) 675 (W.D. Pa. 1989), the district court denied a request for an injunction against IRS levies "against an individual retirement account, retirement plan and any other qualified pension, profit sharing and stock bonus plan." Similarly, in First Fed. Savs. and Loan Ass'n v. Goldman, 644 F. Supp. 101 (W.D. Pa. 1986), the court held that an IRS levy attached to an IRA account because no property or rights to property are exempt from levy other than property specifically exempted by I.R.C. § 6334(a).

I.R.C. § 6334(a)(6) specifically exempts from levy certain enumerated annuity and pension payments. The only such amounts enumerated in § 6334(a)(6), however, are benefits under the Railroad Retirement Act, the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll, and annuities based on retired or retainer pay under chapter 73 of 10 U.S.C.

In Melechinsky v. Secretary of the Air Force, 51 A.F.T.R.2d (P-H) 1276 (D. Conn. 1983), the district court held that military retirement benefits are not exempt from an IRS levy because only items specifically enumerated in I.R.C. § 6334 are exempt from levy and § 6334 does not exempt such benefits. Cf. United States v. Metropolitan Life Ins. Co., 691 F. Supp. 1339 (S.D. Ala. 1988) (IRS levy attaches to cash surrender value of taxpayer's life insurance policy. IRS steps into shoes of delinquent taxpayer and can itself exercise taxpayer's right to compel life insurance company to pay cash surrender value of annuity contract).

b. Securities and Notes

Service of a notice of levy or a writ of execution on the maker of a note is sufficient to obtain possession of the debt owing on the note. In order to sell an installment note or securities, however, there must be actual physical possession of the stock certificates or paper representing the promise to pay for seizure to be accomplished. See Rev. Rul. 75-355, 1975-2 C.B. 478. Cf. In re Frank, 55-2 U.S. Tax Cas. (CCH) ¶ 9772 (S.D. Cal. 1955).

The need to seize physically securities and notes is dictated by the ease with which securities, notes, and similar documents pass, like money, in the channels of business activity.

Congress recognized the needs of the marketplace when it accorded the purchasers of securities and holders of security interests in securities a "superpriority" status under certain circumstances. I.R.C. § 6323(b)(1) provides that even though a notice of lien has been filed, the lien is not valid with respect to a security (as defined in § 6323(h)(4)) either as against a purchaser of the security or as against a holder of a security interest (as defined in § 6323(h)(1)) in a security who, at the time of the purchase or at the time the security interest came into existence, did not have actual notice or knowledge of the existence of the lien. If the trial attorney learns of a planned stock transfer or grant of a security interest, the trial attorney should notify the potential purchaser or holder of the security interest of the existence of the tax liens. This notification should be performed by certified mail, return receipt requested, so as to provide solid proof of actual notice.

When the trial attorney cannot determine who is in possession of stock certificates or installment notes so that they may be levied upon, or when ownership of stock or the existence of loans is unclear, I.R.C. §§ 7402(a) and 7403 may provide a means of collection. A court may order the taxpayer to turn over stock certificates and notes to a receiver so that they may subsequently be sold. United States v. Ross, 196 F. Supp. 243 (S.D.N.Y. 1961), aff'd, 302 F.2d 831 (2d Cir. 1962); Cf. Florida v. United States, 285 F.2d 596 (8th Cir. 1960); Goldfine v. United States, 300 F.2d 260, 264 (1st Cir. 1962). It should be kept in mind, however, that where the taxpayer owns a controlling interest in the corporation, it may be more advantageous for the receiver to vote the stock to liquidate the corporation so that the assets may be sold to satisfy the judgment. United States v. Lias, 103 F. Supp. 341, 344 (N.D. W. Va.), aff'd, 196 F.2d 90 (4th Cir. 1952).

c. Wages

If a taxpayer has employment income, an IRS levy on wages is a very effective way to collect a judgment. Unlike most other IRS levies, the effect of an IRS wage and salary levy is continuous, meaning that the employer must continue to pay the appropriate amount to the IRS each payday without the need for the IRS to continue to serve additional levies each pay period. I.R.C. § 6331(e).

An IRS levy (including a wage levy) requires, except in a situation where collection is in jeopardy, a 30-day notice of intent to levy. I.R.C. § 6331(d). Section 6334(d) provides for certain exemptions from a wage levy. The formula for determining the amount that is exempt from an IRS wage levy is

based on the standard deduction and the aggregate amount of the deductions for personal exemptions allowed the taxpayer under § 151 in the year in which the levy occurs. The weekly exempt amount under the I.R.C. is the sum of the standard deduction and of the total amount of deductions for exemptions to which the taxpayer is entitled, divided by 52. Section 6334(d)(2) provides that, unless the taxpayer submits verification to the contrary, the IRS can assume that the taxpayer is married filing a separate return and has one exemption. Based on 1997 rates ($3,450 standard deduction for a married person filing separately and $2,650 deduction for an exemption), the amount exempt can be as little as $117 per week.

An alternative to an IRS wage levy is a garnishment of wages pursuant to 28 U.S.C. § 3205. (See discussion of garnishment, pp. 42-43, supra.) Because a court must issue a writ of garnishment and because a garnishment is subject to state exemptions, however, an IRS wage levy will almost always be easier and more effective than a garnishment.

See the discussion of installment payment orders, pp. 43-45, supra, for an explanation of how to deal with a debtor who keeps wages or salary artificially low in order to hinder collection of a judgment.

d. Co-owned Property

Frequently a delinquent taxpayer/judgment debtor co-owns property [52] with one or more other persons (most commonly a spouse or other relative) who are not indebted to the Government. In other situations the delinquent taxpayer may own only a life estate or a remainder interest in the property. Also, in most states the spouse of a judgment debtor has dower, or curtesy, or homestead rights in some or all property of the debtor. The federal tax lien, of course, attaches only to the taxpayer's interest in the property, and not to any interest held by a non-debtor.

While co-ownership of property between a taxpayer/debtor and a non-debtor complicates the Government's efforts to sell the property in order to collect the delinquent tax, the Government may be able to sell the entire property in a judicial sale, and then allocate the sale proceeds between the taxpayer's interest (which goes to the Government) and the interest of the non-debtors who have an interest in the property. (Almost always, a sale of the entire property with an allocation of the sale proceeds

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[52] For example, as tenants-in-common, as joint tenants, or as tenants by the entirety.

commensurate with the co-owners' interests will yield the Government a greater amount than could be obtained by a sale of only the taxpayer's interest in the property.)

I.R.C. § 7403(a) authorizes the United States to bring an action in Federal District Court to enforce a federal tax lien "or to subject any property, of whatever nature, of the delinquent [taxpayer], or in which he has any right, title, or interest, to the payment of such tax or liability." (Emphasis added.) The Supreme Court, in United States v. Rodgers, 461 U.S. 677, 692-94 (1983), held that § 7403, as a general rule, allows the Government to sell the entire property in which the delinquent taxpayer has "an interest."[53] The Court noted, however, that § 7403 "does not require a district court to authorize a forced sale under absolutely all circumstances, and ... some limited room is left ... for the exercise of reasoned discretion." Id. at 706. The Court provided examples of factors a district court should consider in exercising its limited discretion not to order a sale of the entire property. Id. at 709-11. See United States v. Bierbrauer, 936 F.2d 373 (8th Cir. 1991), for an analysis of the application of these factors in a particular case.

Before bringing a § 7403 lien foreclosure suit in a situation where non-liable third parties have ownership interests in the property along with the taxpayer, a Tax Division trial attorney should consider the factors listed in Rodgers.

6. Ten-Percent Surcharge for Costs of Collection

Section 3011, 28 U.S.C., authorizes the United States to recover a surcharge of "ten percent of the debt" in order "to cover the cost of processing and handling the litigation and enforcement under this chapter of the claim for such debt". The surcharge can be a very effective collection tool, especially against potential judgment debtors who have the means to satisfy a judgment in full. In some cases, simply mentioning the existence of the surcharge in a pre-suit letter may be enough to cause a prospective defendant to

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[53] The Rodgers Court noted that, in an administrative seizure and sale of property by the IRS pursuant to its I.R.C. § 6331 levy power (as opposed to a judicial sale under I.R.C. § 7403), the Government can sell only the interest in the property belonging to the taxpayer. Rodgers, 461 U.S. at 696. See also Mansfield v. Excelsior Ref. Co., 135 U.S. 326, 339-41 (1890); National Bank & Trust Co. of South Bend v. United States, 589 F.2d 1298, 1303 (7th Cir. 1978); Herndon v. United States, 501 F.2d 1219, 1223 (8th Cir. 1974).

pay the underlying debt in full. Of course, if the debtor is unable to pay the underlying debt in full, the surcharge may be of little or no practical benefit. The surcharge is not recoverable if the United States recovers an attorney's fee in connection with enforcement of its claim or if the law governing the claim provides for the recovery of similar costs. 28 U.S.C. § 3011(b). The Tax Division takes the position that the 50-percent penalty that is available to the government in some failure-to-honor-levy suits (under IRC § 6332(d)(2)) is not a provision that precludes the government from also obtaining the ten-percent surcharge under § 3011(b), because the 50-percent penalty is intended to penalize the defendant, rather than reimburse the government for its costs of enforcement.

The Department of Justice takes the position that the § 3011 surcharge is recoverable in any affirmative collection suit brought by the United States, including all tax collection suits, counterclaims, erroneous refund suits, failure-to-honor-levy suits, and IRC § 3505 suits that result in a money judgment. A number of district courts, however, have held that the surcharge is not applicable unless and until the Government has availed itself of one of the pre- or postjudgment collection tools provided under subchapters B or C of the Federal Debt Collection Procedures Act (28 U.S.C. §§ 3101-3206).[54] See, e.g., Rendleman v. Shalala, 864 F. Supp. 1007, 1012-13 (D. Ore. 1994); United States v. Smith, 862 F. Supp. 257, 263-64 (D. Hawaii 1994); United States v. Maldonado, 867 F. Supp. 1184, 1199 (S.D.N.Y. 1994); United States v. Mauldin, 805 F. Supp. 35 (N.D. Ala. 1992). As the Rendleman court pointed out, however, as soon as the Government files its abstract of judgment under 28 U.S.C. § 3201 to obtain a judgment lien, the Government is entitled to the surcharge because the § 3201 judgment lien is a judgment collection tool available under subchapter C of the Federal Debt Collection Procedures Act. Because the Tax Division will promptly file an abstract of judgment in all or virtually all cases where it has obtained a judgment, the holdings of cases such as Rendleman and Mauldin may in fact pose only a minor obstacle in the Division's path to obtaining the § 3011 surcharge.

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[54] The collection procedures authorized by §§ 3101-3206 are: (1) Prejudgment Attachment (§ 3102); (2) Prejudgment Receivership (§ 3103); (3) Prejudgment Garnishment (§ 3104); (4) Prejudgment Sequestration (§ 3105); (5) Enforcement of Judgment Lien (§ 3201); (6) Postjudgment Execution (§ 3203); (7) Postjudgment Installment Payment Order (§ 3204); and (8) Postjudgment Garnishment (§ 3205).

Consistent with the Department's interpretation of § 3011, all complaints and counterclaims brought by the Division seeking money judgments should specify that the United States seeks the § 3011 surcharge as part of its judgment. Similarly, the surcharge should be sought in all summary judgment motions in such affirmative collection cases and should be requested in all other judgments to be entered in favor of the Government in such cases. Trial attorneys should request that the final judgment in favor of the Government in all affirmative collection cases include a provision for the ten-percent surcharge. In most instances it is probably best not to provide a specific dollar amount for the surcharge, because the dollar amount of surcharge that we are entitled to collect ultimately depends on the amount of interest on the underlying debt that we recover. Thus, a typical judgment might provide for "judgment in favor of the United States in the amount of $100,000 in tax and assessed interest, plus interest thereon pursuant to law accruing after the date of assessment, plus the ten-percent surcharge provided by 28 U.S.C. § 3011(a)." If a court declines to include the surcharge in the initial judgment, following the reasoning of Mauldin, Rendleman, and similar cases, then the surcharge should be sought again after an abstract of judgment has been filed. This can (and should) be done promptly in a post-judgment motion that establishes that the abstract of judgment has been filed in accordance with 28 U.S.C. § 3201.

When the § 3011 surcharge has been obtained, and after the full amount of the underlying judgment (including all accrued interest and penalties) has first been collected, the extra ten percent, to the extent it is collected, should not be paid to the IRS and applied to the delinquent taxpayer's account. Rather, amounts collected towards the ten-percent surcharge should be paid to the Department of Justice in the same manner as is done with attorneys' fees, sanctions, and other such amounts collected by the Department.

The § 3011 surcharge can be a very useful collection tool in many of the Division's cases. Trial attorneys and paralegals need to be aware of how the surcharge provision works and should be mindful of how the surcharge can best be used to assist in collecting delinquent taxes. [55]

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[55] Ironically, the Government cannot use the collection remedies provided under the Act to collect the § 3011(a) ten-percent surcharge because the surcharge is specifically excluded from the definition of a "debt" in 28 U.S.C. § 3002(3)(B), and § 3001(a) provides that the FDCPA remedies can be used only to collect a "debt" as defined in § 3002. The Department hopes to obtain a

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